Neutral Citation Number: [2009] EWCA Civ 755
Case No: 2008/2613

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION (COMMERCIAL COURT)
The Honourable Mr. Justice Aikens
[2008] EWHC 1901 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL
20 July 2009

B e f o r e :

LORD JUSTICE WARD
LORD JUSTICE RIX
and
LORD JUSTICE MOORE-BICK

Between:

DALLAH ESTATE and TOURISM HOLDING COMPANY
Appellant/
Claimant

- and -

THE MINISTRY of RELIGIOUS AFFAIRS, GOVERNMENT of PAKISTAN
Respondent/Defendant

Miss Hilary Heilbron Q.C. and Mr. Klaus Reichert (instructed by Kearns & Co) for the appellant
Mr. Toby Landau Q.C. and Mr. Patrick Angénieux (solicitor) (instructed by Watson Farley & Williams) for the respondent
Hearing dates : 5th-7th May 2009

HTML VERSION OF JUDGMENT

Lord Justice Moore-Bick :

1. This is an appeal against an order of Aikens J. setting aside an order made without notice by Christopher Clarke J. giving leave to the appellant, Dallah Real Estate and Tourism Holding Company ("Dallah"), to enforce an arbitration award made under the auspices of the International Chamber of Commerce in Paris against the Ministry of Religious Affairs of the Government of Pakistan. It raises an important question relating to the recognition and enforcement of international arbitration awards under sections 100-103 of the Arbitration Act 1996 which give effect to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards usually known as the New York Convention ("the Convention").

Background

2. The background to these proceedings can be described quite shortly. Dallah is a member of a substantial group of Saudi companies which has interests in many fields, including the provision of accommodation, transport and other services to Muslims who wish to undertake the Hajj. The Ministry of Religious Affairs is part of the Government of Pakistan which has responsibility for, among other things, the welfare and safety of pilgrims from Pakistan who wish to perform the Hajj. In February 1995 Mr. Shezi Nackvi of Samaha Holdings Ltd, another company in the group which includes Dallah, approached the Ministry with a proposal that Dallah should make available to pilgrims from Pakistan a substantial amount of accommodation which it proposed to build on a site it was able to acquire for development situated about a mile from the centre of Mecca. Following negotiations Dallah and the Government of Pakistan signed a Memorandum of Understanding on 24th July 1995 under which Dallah agreed to acquire the land, build accommodation suitable for pilgrims and lease it to the Government for 99 years. The arrangements for financing the project, the terms of the lease and the details of the accommodation were among the many matters that still had to be settled. On 18th November 1995 Dallah acquired some 43,000 square metres of land in Mecca with a view to implementing the agreement.

3. Some time before, in December 1994, the Government of Pakistan had approved in principle a proposal to establish a body to be known as the Awami Hajj Trust for the purpose of accepting deposits from prospective pilgrims and investing them in Shariah-compliant schemes in order to help them meet the costs of the Hajj. It appears that as negotiations with Dallah proceeded the Government decided that the Trust would provide a convenient vehicle for the project. At all events, on 31st January 1996 the President of Pakistan promulgated Ordinance No. VII of 1996 providing for the establishment of the Trust as a body corporate with legal personality, whose objects included mobilising the savings of members, investing them, using the proceeds to defray the costs of travel and subsistence and generally facilitating their performance of the Hajj.

4. The Trust came into existence on 14th February 1996 when the Ordinance was published in the Official Gazette. Its Constitution provided for various officers, including a Secretary of the Board of Trustees who was to be the Secretary of the Ministry of Religious Affairs for the time being. Under the constitution of Pakistan the Ordinance automatically lapsed after a period of four months and therefore the continued existence of the Trust depended on its re-publication at regular intervals. It was re-published for the second time as Ordinance No. LXXXI of 1996 on 12th August 1996, but it was subsequently allowed to lapse (whether intentionally or by oversight is unclear) and as a result the Trust ceased to exist on 12th December 1996.

5. Negotiations between Dallah and the Government continued well into 1996 culminating in

an agreement dated 10th September 1996 which was expressed to be made between Dallah and the Trust. The Government was not expressed to be a party to the Agreement, nor did it sign it in any capacity. It is unnecessary for the purposes of this judgment to set out the terms of the Agreement apart from clause 23 which provided as follows :

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

6. On 6th November 1996 there was a change of government in Pakistan and before long the relationship between the Government, the Trust and Dallah had broken down. On 19th January 1997 in a letter written on the headed paper of the Ministry of Religious Affairs Mr. Lutfullah Mufti, who signed as "Secretary", accused Dallah of having repudiated the Agreement which he therefore purported to treat as discharged. The next day proceedings were issued by Mr. Lutfullah Mufti in the name of the Trust in the Court of the Senior Civil Judge, Islamabad seeking a declaration that Dallah had repudiated the Agreement and an injunction restraining it from asserting otherwise or claiming any rights against the Trust under it. Over the next two years further proceedings followed, to which it will be necessary to refer in more detail at a later stage, in which the Government attempted to establish that it was under no liability to Dallah either. For present purposes, however, it is necessary to add only that on 19th May 1998 Dallah purported to commence arbitration against the Ministry of Religious Affairs under the rules of the ICC claiming damages for breach of the Agreement. The ICC appointed a distinguished tribunal consisting of Lord Mustill, Mr. Justice Dr. Nassim Hasan Shah and Dr. Ghaleb Mahmassani.

7. The Government of Pakistan rejected any suggestion that it was a party to the Agreement and therefore challenged the jurisdiction of the tribunal. The tribunal decided to determine the question of jurisdiction first. The Government provided some written submissions under protest, but otherwise declined to take part in the proceedings. On 26th June 2001 the tribunal published its First Partial Award in Paris in which it held that the Government was bound by the agreement to arbitrate contained in clause 23 of the Agreement and that it therefore had jurisdiction to determine Dallah's claim. In a Second Partial Award published on 19th January 2004 the tribunal held that the Government had repudiated the Agreement and directed that damages should be assessed, and issues relating to interest and costs determined, at a later hearing. By a Final Award dated 23rd June 2006 the tribunal awarded Dallah damages in the sum of US$18,907,603 and costs of US$1,680,437.

The present proceedings

8. The present proceedings were started by an arbitration claim form seeking leave under section 101(2) of the Arbitration Act 1996 to enforce the tribunal's Final Award in the same manner as a judgment of the High Court. On 9th October 2006 Christopher Clarke J. made an order without notice giving Dallah permission to enforce the award, which led in turn to an application by the Government to set aside the order on the grounds that the arbitration agreement on which the award was based was not valid within the meaning of section 103(2)(b) of the Act.

9. Section 103 provides, so far as is material to this appeal, as follows:

103 Refusal of recognition or enforcement

(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;

10. Aikens J. held that, since the parties had not agreed the law by which clause 23 of the Agreement should be governed, it was subject to French law as the law of the country where the award was made. He heard expert evidence of French law, on the basis of which he made certain findings which he applied in determining whether the Government was a party to clause 23 of the Agreement. He held that it was not, that there was therefore no valid arbitration agreement between it and Dallah and that the award should therefore not be enforced.

11. Miss Heilbron Q.C. for Dallah made her submissions under the following four broad headings:

(i) that the judge adopted the wrong approach to deciding whether the Government of Pakistan had proved that the arbitration agreement on which Dallah relied was not valid;

(ii) that although the judge's findings of the relevant principles of French law were open to him on the evidence, he failed to apply them correctly to the material before him;

(iii) that the Government of Pakistan was estopped from denying that the arbitration agreement was valid; and

(iv) that, even if the award was not valid, the judge erred in not exercising his discretion in favour of enforcing it.

12. Miss Heilbron did not follow that order when making her oral submissions, choosing to deal first with the facts and the judge's application of French law to them, but in my view the order in which I have summarised them (and in which they appeared in her skeleton argument) is the logical order in which to address them and that is the course I propose to take.

(i) The nature of proceedings under section 103(2)

13. The tribunal itself considered and determined the question of its jurisdiction, which it recognised depended on whether the Government had entered into an arbitration agreement with Dallah. In the proceedings before the court the Government sought to prove that the arbitration agreement on which Dallah relied as the basis for the tribunal's Final Award was not valid because it had not entered into any such agreement. The issue before the court, therefore, was the same as that which had been before the tribunal. The question raised by Miss Heilbron's submissions is whether in those circumstances proceedings under section 103(2) should take the form of a full re-hearing or a more limited review.

14. The judge treated this issue as essentially one of statutory interpretation. In paragraphs 81-84 of his judgment he said:

"81. . . . Miss Heilbron submitted that international comity and the general "pro–enforcement" approach of both the Convention and Part III of the Act, suggested that a limited enquiry should be carried out by the English court if a party made an application under section 103(2)(b).

82. I cannot agree with this submission. It seems to me that I am bound by the wording of the Act itself, which reflects faithfully that of the Convention. A party who wishes to persuade a court to refuse recognition or enforcement of a Convention award has to prove one of the matters set out in paragraphs (a) to (f) of section 103(2). Those paragraphs are definitive of what a party can prove in order that a court "may" refuse recognition or enforcement of a Convention award. If a party has to "prove" a matter, that must mean, in the context of English civil proceedings, prove the existence of the relevant matters on a balance of probabilities. Challenges under section 103(2) will be challenges to the recognition and enforcement of awards that have been made in a country other than England and Wales. Therefore, so far as English law is concerned, the matters set out in paragraphs (a) to (f), including issues of foreign law, are all matters of fact.

83. Thus, a party must be entitled to adduce all evidence necessary to satisfy the burden of proof on it to establish the existence of one of the grounds set out in section 103(2). . . . it seems to me that the statutory wording of section 103(2) requires that the party wishing to challenge the recognition and enforcement of a Convention award must be entitled to ask the court to reconsider all relevant evidence on the facts (including foreign law), as well as apply relevant English law.

84. I have already set out the test that the arbitrators stated had to be applied to see if the GoP [Government of Pakistan]was a party to the arbitration clause. The GoP's French law expert, M. Le Bâtonnier Vatier, accepted that, in general, the arbitrators had applied the correct test as would be enunciated by a French court. However, it seems to me, on the correct construction of section 103(2) that despite this concession, I cannot evade going through the exercise of considering all the relevant evidence to see whether the GoP has proved (applying French law principles) that it is not a party to the arbitration clause, which is therefore not valid. The exercise is, to that extent, a rehearing, not a review."

15. The essence of Miss Heilbron's submission was that in so construing the statute the judge failed to have sufficient regard to the policy behind the Convention and that, in order to give proper effect to what she described as its "pro-enforcement" philosophy, the court when considering a challenge under section 103(2) to the enforcement of a foreign arbitration award should not conduct a full trial of the issues of fact and law to which the application gives rise, but should limit itself to an enquiry more in the nature of a review, accepting any relevant findings of fact and decisions of the tribunal unless they can be shown to be clearly wrong. She accepted that the weight to be accorded to the tribunal's conclusions might vary depending on the circumstances of the case, but she submitted that the court should normally pay particular regard to them. That submission was based to a significant extent on the distinction that she submitted is to be drawn between the role of the courts of the seat of the arbitration (the "supervisory" or "primary" court) and the courts of the state in which enforcement is sought (the "enforcing" court). In the present case the French courts were the supervisory courts and the High Court no more than an enforcing court. The tribunal was composed of eminent lawyers and the decision it reached in its First Partial Award was one that was clearly open to it. She submitted that the judge should therefore have given particular weight to its decision and, having done so, should have rejected the Government of Pakistan's application.

16. The language of section 103(2) of the Arbitration Act follows very closely that of Article V.1 of the Convention, although in some respects its structure is slightly different. Article V.1 itself provides as follows:

"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 parties to the agreement referred to in article II were, under the law applicable to

them, under some incapacity, or the said 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; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made."

As is apparent, therefore, it is directed to matters which, if established, undermine the legitimacy of the award as giving rise to a binding obligation created in accordance with the will of the parties as expressed in the arbitration agreement.

17. Article V.1(e) and section 103(2)(f) both recognise that the courts of the country in which, or under the law of which, the award was made have a supervisory role. The scope of the supervisory court's powers and therefore the extent of that role varies in accordance with its own domestic law, but will normally include the power to set aside the award in cases where the arbitral process has failed to conform to the terms of the arbitration agreement or has failed to meet certain basic standards of fairness. In some jurisdictions, notably our own, the court also has the power to entertain a challenge to the award on the grounds of an error of law. The power of the supervising court to annul the award is, therefore, of a substantive nature. It extends beyond the mere refusal to recognise or enforce the award, which is the limit of the powers available to courts of other states that are parties to the Convention.

18. Miss Heilbron submitted that the distinction between the powers of the supervisory court and the powers of enforcing courts naturally points to the conclusion that as a matter of policy the Convention accords primacy to the supervisory court. In one sense that is not controversial because Article V.1(e) itself recognises that the supervisory court has the power to set aside or suspend the award, a step which of itself entitles (but does not require) courts of other jurisdictions to refuse enforcement. However, there is nothing in the Convention to suggest that the supervisory court is intended to have primacy in the sense that enforcing courts are expected, much less required, to treat the award as valid and binding unless and until successfully challenged in the supervisory court. If that had been intended, Article V.1 would have taken a very different form. In particular, it would not have given courts of other jurisdictions an unrestricted power to refuse enforcement in cases where defects in the arbitral process of the kind which it describes could be proved. On the contrary, it is well established, and indeed was common ground, that a person against whom an award has been made is not bound to challenge it before the supervisory court in order to challenge its enforcement in another jurisdiction: see Svenska Petroleum Exploration AB v Government of the Republic of Lithuania (No. 2) [2006] EWCA Civ 1529, [2007] QB 886 at paragraph 104 and the cases there cited. In my view the terms of Article V.1 read as a whole amply bear out the submission of Mr. Landau Q.C. that one of the fundamental principles enshrined in the Convention is that such a person is entitled to

oppose the enforcement of an award on the grounds that it is not based on a valid agreement to arbitrate.

19. Miss Heilbron suggested a number of additional reasons why primacy should be accorded to the supervisory court, but they were all essentially of a pragmatic nature. Thus, she submitted that it would promote certainty, since in many cases the law governing questions relating to the validity of the arbitration agreement will be that of the supervisory court, which is much better placed to decide them than any other. It would also, she submitted, remove the possibility of enforcement being opposed in separate proceedings in many different jurisdictions with potentially different outcomes. Other considerations, however, may point in a different direction. One of the attractions of international arbitration is that it gives the parties the power to insulate the proceedings from local jurisdictions. The effect of requiring foreign courts to defer to the courts of the country where the arbitration has its seat would be to reinstate in all but name the "double exequatur" rule which the Convention displaced and would significantly increase the influence of the courts of that jurisdiction. That would not be universally welcome. It may well be that the particular considerations to which Miss Heilbron referred were present to the minds of those who were responsible for negotiating the Convention, but if they were, they were rejected in favour of the safeguards contained in Article V.1 which are designed to ensure the fundamental integrity of the award.

20. Miss Heilbron submitted that the Convention policy of giving primacy to the supervisory court meant that Article V.1 contemplated a review within a narrow compass and not a wholesale re-hearing of the issues determined by the tribunal, a matter that should be left to the supervisory court. As will be apparent, I am unable to accept that there is any policy of the kind she suggested, but quite apart from that, her argument founders on the language of Article V.1 itself, which requires the party against whom enforcement is sought to "furnish proof" of the matters to which it refers (an expression accurately reflected in the more modern language of section 103(2) of the Act). In a case where the tribunal has determined its own jurisdiction there is an obvious possibility that a party opposing enforcement will wish to challenge some of its findings of fact or conclusions of law and I find it very difficult to interpret the expression "furnish proof" as meaning anything other than requiring proof in the manner and to the standard ordinarily required in proceedings before the enforcing court.

21. Moreover, I have to say that I find it difficult to understand exactly what Miss Heilbron had in mind when submitting that the court should accord deference to the tribunal's conclusions, particularly in view of the fact that she asserted that the principle was flexible in its application. If it meant no more than that the court should have regard to the tribunal's reasoning in reaching its own conclusion, I should have little difficulty with it, since the tribunal's reasons will almost invariably be before the court and will carry as much persuasive weight as their cogency gives them. That is not, however, what I understood her to mean, since it was essential to her argument that the court should at least accord great weight to the tribunal's conclusions unless they are clearly wrong. However, as became clear in the course of argument, it is impossible to formulate any satisfactory principle that falls somewhere between a limited review akin to that which the court undertakes when reviewing the exercise of a judicial discretion and a full re-hearing, not to mention one that is also capable of flexibility in its application. Moreover, for the court to defer to the tribunal's conclusions in the manner suggested by Miss Heilbron when it is required to decide whether a particular state of affairs has been proved would be to give the award a status which the proceedings themselves call into question. It is for similar reasons that our courts have consistently held that proceedings challenging the jurisdiction of an arbitral tribunal under section 67 of the Arbitration Act involve a full rehearing of the issues and not merely a review of the arbitrators' own decision.

22. I agree with Miss Heilbron that a statutory provision which gives effect to an international convention of this kind should be construed with due regard to the purpose of the convention and

with a view to ensuring consistency of interpretation and application, but there is no reason to think that the judge was not alive to that principle. In the absence of any authority, either in this country or abroad, which tends to support the conclusion that the language of Article V.1 is to be given a meaning different from that which it naturally bears and in the light of the close similarity of language between the Convention and the statute, I think the judge was right to treat the question as one of statutory interpretation and that his conclusion on the meaning of section 103(2) was clearly correct.

(ii) The application of French law

23. Before dealing with Miss Heilbron's submissions on French law and its application to the facts of this case it is necessary to say a little more about the First Partial Award, the tribunal's identification of the law applicable to the arbitration agreement, and the application of that law to the facts which it found.

24. Neither the Agreement as a whole nor clause 23 contained any express choice of governing law. Before the tribunal Dallah argued that both were governed by Saudi Arabian law, being the system of law with which the contract had its closest and most real connection. The Government of Pakistan argued on similar grounds that both were governed by the law of Pakistan. As far as clause 23 was concerned, the tribunal did not accept either of those submissions, nor did it hold that by choosing arbitration in Paris the parties had made an implied choice of French law. Instead, it held that all issues relating to the validity and scope of clause 23, including the question whether the Government of Pakistan was a party to it, were to be determined by reference to "those transnational general principles and usages which reflect the fundamental requirements of justice in international trade and the concept of good faith in business". The tribunal then proceeded to examine in some detail the conduct of the Government before, at the time of and after signing the Agreement and reached the conclusion that it had demonstrated that it had always been, and considered itself to be, a party to the Agreement with Dallah. As a result, applying the transnational principles to which it had earlier referred, the tribunal held that the Government of Pakistan was a true party to the Agreement, including the arbitration clause.

25. I am conscious that this brief summary does not do full justice to the tribunal's reasoning, but the two important matters to emphasise are, first, that it did not purport to apply French law in order to determine the issue before it and, second, that its decision was based mainly, if not entirely, on inferences drawn from the documents. The judge, on the other hand, not only had some additional documents before him, but, more importantly, was bound by section 103(2) of the Act to apply French law to the facts as he found them.

26. The judge had the benefit of hearing evidence from two experts in French law, M. Derains and M. Le Bâtonnier Vatier. In paragraph 85 of his judgment he set out the following passages from their Joint Memorandum which encapsulated the principles which they agreed were applicable to the present case:

"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.

When a French court has to determine the existence and effectiveness of an arbitration

agreement over the parties to an arbitration which is founded upon that agreement, and when for these purposes it must decide whether the said agreement extends to a party who was neither a signatory nor a named party thereto, it examines all the factual elements necessary to decide whether that agreement is binding upon that person".

27. The judge then referred to the oral evidence and found that:

"Both experts agreed that 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."

28. It is important to recognise that the judge not only had the benefit of hearing the witnesses give their evidence, but also had the opportunity of clarifying with them through direct questions his understanding of the relevant principles of French law, an opportunity of which he took full advantage. Having seen the evidence before him, I am of the view that it fully supported his finding that French law is concerned to ascertain the "real" or "subjective" intentions of the parties in order to determine whether an agreement existed between them. It is unnecessary to consider that evidence or the basis for the judge's findings in any greater detail because Miss Heilbron accepted that the judge had correctly found that French law required him to ascertain the common intention of the parties by reference to their behaviour during the negotiation, performance and, if applicable, termination of the agreement. She submitted, however, that he had erred in two respects in his understanding and application of the principle. First, he concentrated too much on the subjective intention of the Government of Pakistan and too little on the objective evidence of its intention in the way it had conducted itself throughout the period in question. Second, he misunderstood the relevance and status of transnational law in this context and so failed to take into account the interests of justice and good faith which French law recognises as important.

29. The application of foreign law by an English court depends not merely on the judge's finding of the relevant principles, but on his understanding of their content and the way in which they are applied by the courts of the country in question. In this case, as I have pointed out, the judge had the opportunity of debating with the experts the essential nature of the relevant principles of French law and thereby of gaining a fuller understanding of them which he could bring to bear when applying them to the material before him. In those circumstances I think an appellate court, which has not had the same benefit, should be slow to hold that the judge, having formulated the principles correctly, erred in his application of them.

30. Miss Heilbron's criticism of the judge depended heavily on the contention that he had failed to give sufficient recognition to the fact that, as he himself had found, the parties' subjective intentions are to be ascertained by reference to their objective conduct. To that end she was at pains to emphasise that right from the outset to the point of its eventual collapse the project with Dallah was one in which the Government was directly interested and which it controlled at the highest level. In the period leading up to the signature of the Memorandum of Understanding all negotiations were carried on by the Government and the Memorandum of Understanding itself embodied an agreement between Dallah and the Government. After the establishment of the Trust the Government continued to direct the project and to handle all negotiations with Dallah. Although it existed as an independent legal person, the Trust itself played no separate role. In effect, her submission was that the Trust was little more than a vehicle which the Government directed and used for the purposes of implementing the arrangements it had made with Dallah.

31. In my view that is not an unfair way of describing the respective roles of the Government and the Trust in practical terms, but the judge was clearly well aware of the Government's

involvement in the project, which in any event does not take one very far in deciding whether it was the common intention of the parties that it was to be a party to the Agreement. Given Miss Heilbron's emphasis on the importance of ascertaining the parties' intentions by reference to their conduct, it is worth recording that Mr. Landau accepted two propositions that are reflected in the judge's findings of French law and which seem to me to be important. The first was that although French law seeks to ascertain the parties' real intentions, it does so by examining their conduct and communications and to that extent the exercise necessarily involves an element of objectivity. The second is that we are concerned in this case with the common intention of the parties, not their individual intentions, and that before one can find that two parties were in agreement it is necessary to be satisfied that each was aware that the other was of the same mind; and that in turn requires some communication between them.

32. The judge seems to have had all these matters well in mind. Although the principles of French law determined the question he had to ask himself, the ascertainment of the parties' real intentions and the existence of any common intention was a matter of fact. He examined the material before him (which was to a large extent the same as had been before the tribunal) and considered what inferences could properly be drawn from it. In the course of doing so he took into account the views expressed by the tribunal in the award. Prior to the establishment of the Trust the Government was the only party with whom Dallah could negotiate and its position was made clear in the Memorandum of Understanding, a document which was drafted in formal terms and clearly intended to be legally binding. In my view, however, the establishment of the Trust and, most importantly, the execution of an Agreement between the Trust and Dallah represented a fundamental change in the position and must have been recognised as such by all parties. Indeed, correspondence which preceded the Agreement shows that Dallah was well aware that it would be contracting with the Trust rather than the Government. The Government was not expressed to be a party to the Agreement, nor did it sign the Agreement in any capacity. It is difficult, therefore, to infer that Dallah, the Trust and the Government each intended (and knew that each of the others intended) that the Government was to be a party to it. If that had been their common intention the Government would surely have been named as a party to the Agreement, or would at least have added its signature in a way that reflected that fact. Other aspects of the Agreement, to which the judge referred, tend to bear out that conclusion. The fact that the Agreement contemplated that the Government would guarantee the Trust's obligations in respect of a loan required to enable it to finance the project is certainly evidence of its continued involvement and support, but the fact that the Agreement does not purport to impose any such obligation on the Government directly is telling when it comes to deciding whether it was intended that it should be a party to it.

33. The judge then dealt with events that occurred between the execution of the Agreement and the letter of 19th January 1997, in particular with various letters dealing with the establishment of the bank that was to collect and invest payments made to the Trust. Miss Heilbron submitted that he misunderstood the nature of those letters. I do not think he did, but their significance, if any, lies only in the fact that they were written by officials of the Ministry of Religious Affairs. That is certainly further evidence that the Government was managing the project on behalf of the Trust, but in my view goes no farther than that.

34. The piece of evidence on which Miss Heilbron placed most emphasis was the letter of 19th January 1997 itself, the significance of which was said to lie in the fact that the Government purported to accept Dallah's repudiation of the Agreement as if it were itself a party to it. The letter was written on the headed paper of the Ministry of Religious Affairs. It referred to the Agreement and to Dallah's obligation to obtain the Trust's approval of detailed specifications and drawings within 90 days of its execution. It continued:

"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

[sic] 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."

35. The arbitrators placed a good deal of weight on this letter and Miss Heilbron submitted that to a French court it would have provided strong evidence that the Government regarded itself as bound by the Agreement. However, the judge, she said, had approached the matter as an English lawyer, seeking to analyse what the writer had in his mind. Her submissions echoed the findings of the tribunal who found that the letter confirmed that the Government regarded itself as a party to the Agreement and entitled to exercise rights in relation to it.

36. I think that Miss Heilbron was right in saying that the judge paid close attention to the letter itself and to the circumstances in which it was written in order to ascertain the writer's intention, but that is hardly surprising given the nature of the task that he had to perform under French law and indeed she herself approached the matter in a similar way. In my view, however, too close an analysis is apt to mislead. For example, some play was made on both sides with the fact that when this letter was written the Trust had ceased to exist, with the result that, as a matter of law, Mr. Lutfullah Mufti could not have been writing as secretary to the Board of Trustees. Strictly speaking, that is true, but it does not necessarily follow that he was writing on behalf of the Government or that the Government viewed itself as a party to the Agreement. That is a matter to be judged in the light of the surrounding circumstances as a whole. Indeed, it seems likely that when the letter was written the writer was unaware of the fact that the Trust had ceased to exist, because the very next day proceedings were commenced in the name of the Trust seeking a declaration that it had no liability to Dallah. The fact that the letter was written on the headed stationery of the Ministry of Religious Affairs also loses much of its significance when it is appreciated that the Trust did not possess its own headed stationery. Equally, the fact that the letter was written by a Government official counts for little when one realises that the Ministry of Religious Affairs had routinely dealt with correspondence and carried out similar functions on behalf of the Trust and that the writer was (or had been) its secretary. Such evidence no doubt demonstrates that the Government continued to be closely involved in the project and was behind the scenes pulling the strings, but it is not evidence that the Government, the Trust and Dallah shared a common intention that the Government was to be a party to the Agreement. If, as I think likely, the letter 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. It is interesting to note in this context that although French law directs the court to the common intention of the parties as the foundation of any agreement, little attention appears to have been directed to the question whether Dallah demonstrated any intention to enter into an agreement with the Government of Pakistan. If it did intend to do so, it is surprising, to say the least, that it was content for the Government neither to be named as a party to the Agreement nor to sign it in any capacity and that it did not seek any other formal or informal statement of its intention to be bound.

37. One further submission falls for consideration at this point. Miss Heilbron submitted that it is possible in French law for a person to become a party to an agreement by what in English law would be recognised as a process of adhesion, provided that the existing parties consent to his doing so. Again, therefore, it is necessary to find a common intention of the parties. The principle itself does not appear to have been controversial, but there are obvious potential difficulties in the way of applying it in this case, given that one of the parties to the Agreement had ceased to exist

and with it, perhaps, the Agreement itself. However, unless Miss Heilbron can successfully challenge the judge's finding that the Government did not intend to become a party to the Agreement, this argument must fail. I find it difficult in all the circumstances to accept that the letter can properly be viewed as indicating that the Government intended at that late stage to become a party to an agreement which the writer was purporting to treat as discharged by repudiation.

38. Finally, it is necessary to mention the proceedings in Pakistan on which again Miss Heilbron placed some reliance. The proceedings started in the name of the Trust on 20th January 1997 were the first in a series of actions which were pursued over the following two and a half years in an attempt to obtain a decision from the courts in Pakistan that neither the Trust nor the Government had incurred any liability to Dallah. The claim in the name of the Trust was dismissed on the grounds that the Trust no longer existed and could not therefore maintain an action. However, in the course of his judgment delivered on 21st February 1998 the judge in Islamabad observed that the Ministry of Religious Affairs as the Trust's parent department for whom the Ordinance had been issued could sue and be sued in respect of matters done under it.

39. On 29th May 1998 the ICC wrote to the Government informing it that Dallah had made a request for arbitration under the Agreement. In the light of that development and of the observation made by the judge when dismissing the earlier proceedings, it is not surprising that on 2nd June 1998 the Ministry started its own action in Islamabad seeking a declaration that the Agreement had been repudiated by Dallah and an injunction restraining Dallah from asserting any rights against it. In the opening paragraphs of its statement of claim the Ministry made it clear that it claimed in a derivative capacity following the demise of the Trust and later in the document it referred to the fact that the action started in the name of the Trust had been dismissed because the Trust had ceased to exist.

40. In paragraph 121 of his judgment Aikens J. noted that the tribunal had found that the Government's statement of claim amounted to an admission that it was a party to the Agreement and had accepted Dallah's repudiation in its own right. He also noted, however, that the Government did not allege in terms that it was a party to the Agreement, except in paragraph 16 where the Agreement was said to have been entered into between "the parties" in Islamabad, an allegation which he attributed to a need to found jurisdiction there. He was unable to accept that the pleading contained an admission on the part of the Government that it was or had become a party to the Agreement.

41. Miss Heilbron criticised the judge's conclusion on the grounds that there are many references in the statement of claim to "the plaintiff" in connection with the Agreement or its termination that are consistent with an acceptance by the Government that it was and always had been a party to the Agreement. It is quite true that at various points in the statement of claim the expression "the plaintiff" is used in connection with the Agreement or its termination where a reference to the Trust might have been expected, but that is a flimsy basis on which to read the document as containing an admission by the Government that it was a party to the Agreement. When read as a whole I think that the nature of the Ministry's (and therefore the Government's) case is clear: it was suing in a purely derivative capacity as the department that had sponsored the Ordinance under which the Trust had been established. A more careful pleader would no doubt have avoided many of the references to "the plaintiff" as being inapposite, but I do not think that their use detracts from the obvious meaning of the pleading. Moreover, it is necessary to bear in mind that French law did not require the judge to engage in a technical exercise in which the Government could be impaled on an apparent admission. It required him to ascertain the common intention of the parties on the basis of the evidence as a whole. Taken fairly as a whole this pleading does not provide any support for the conclusion that the Government always intended to be a party to the Agreement. I regard this criticism of the judge as misplaced.

42. I return at this point, therefore, to Dallah's real complaint, namely, that when considering the material before him the judge concentrated too much on the Government's private intentions and too little on its intentions as evidenced by its behaviour. It is true that there are some passages in the judgment which, taken in isolation, might lend some support to that argument, but in reality there is nothing in the point since there was no evidence from Mr. Lutfullah Mufti or anyone else representing the Government of what was actually in its mind. All that the judge could do, therefore, was to deduce from the objective evidence what the Government's real intentions were and that is what he did. To make such findings based on evidence of that kind is exactly what French law, as found by the judge, required of him.

43. Miss Heilbron also criticised the judge for failing to consider the overall justice of the case or the requirements of good faith, despite the fact that the experts agreed that it was an important factor to be taken into account in ascertaining the intentions of the parties. In fact, in paragraph 128 of his judgment the judge specifically referred to the need to take account of the doctrine of good faith, so it was clearly present to his mind, but it is difficult to see how its relevance to the present case could ever have gone beyond providing a context in which the conduct and utterances of the Government were to be judged.

44. The judge expressed his conclusions on this part of the case as follows in paragraph 129 of his judgment:

"On the evidence before me, my conclusion is that it was not the subjective intention of all the parties that the GoP [Government of Pakistan] should be bound by the Agreement or the arbitration clause. In fact, I am clear that the opposite was the case from beginning to end. That is why the GoP distanced itself from the contractual arrangements in the Agreement and that is why it sought to argue from the time of the Termination Letter that the Agreement was void and illegal. As for the doctrine of good faith, I accept that the parties are obliged to act in good faith. But I do not see how the doctrine can carry matters any further. There is no evidence that the GoP acted in bad faith at any stage. Even if it did, that could not make it a party to the arbitration agreement."

45. I agree. Miss Heilbron submitted that the Government had sought to avoid its obligations by setting up an independent body in the form of the Trust to enter into the contract with Dallah and subsequently allowing it to disappear when it became politically convenient to do so. A state which acts in that way may well lay itself open to criticism, but it does not amount to bad faith of a kind that has a bearing on the particular question the judge had to decide. What matters is whether there was a common intention that the Government was to be a party to the Agreement. If its conduct, understood in accordance with the doctrine of good faith, did not indicate any such intention, no complaint can be made. That was clearly recognised in one of the leading cases in French law on this subject, Southern Pacific Properties v Arab Republic of Egypt, in which the Egyptian state enterprise responsible for tourism and hotels had signed an agreement with Southern Pacific for the construction of tourist complexes near the pyramids. Although the Government was not named as a party, the Minister for Tourism had signed the agreement under the words "approved, agreed and ratified". The Cour de Cassation held that the Government of Egypt had not become a party to the agreement by signing it in that way, since its signature was intended merely to confirm its approval of the contract made by the state enterprise. In the end Miss Heilbron did not pursue this part of her submissions.

46. In my view the judge correctly applied the principles of French law to the evidence before him and his conclusion on this issue is not open to criticism.

(iii) Estoppel

47. Miss Heilbron submitted that the Government of Pakistan was estopped by the decision of

the tribunal in its First Partial Award from denying that it was a party to the Agreement and that the judge should therefore have exercised his discretion in favour of allowing the award to be enforced. At first sight that is a surprising proposition because the First Partial Award and the Final Award both depend for their validity on the existence of an arbitration agreement between the Government and Dallah which it was the very purpose of these proceedings to challenge. The submission therefore has an element of unreality about it. Miss Heilbron put her argument on the basis that the Government had waived its right to challenge the award in France and had thereby given it a status that it would not otherwise have enjoyed. She did not seek to argue, however, that its conduct had given rise to any other form of estoppel.

48. Before going any further I think it is desirable to disentangle two strands in the argument, estoppel and the exercise of discretion. The exercise of discretion in a case of this kind raises difficult questions to which I shall return in a moment, but it is in my view quite separate from the question of estoppel. Estoppel by record, which is the kind of estoppel on which Miss Heilbron sought to rely in this case, embodies a well-established rule of public policy favouring finality in litigation, namely, that the same issue should not be litigated between the same parties on more than one occasion. The principle applies to arbitration awards and to decisions of foreign courts. It requires a final decision of a court of competent jurisdiction on the merits in relation to the same issue in proceedings between the same parties: see The 'Sennar' (No. 2) [1985] 1 W.L.R. 490, particularly at 499. If Miss Heilbron is right and the First Partial Award does finally determine as between Dallah and the Government of Pakistan whether the latter is a party to the arbitration agreement, the Government will be estopped from contending otherwise and as a result will be precluded from challenging the validity of the agreement in the present proceedings. It follows that the grounds on which it seeks to challenge the enforcement of the award could not be established and the court would be bound to enforce the award. No question of the exercise of discretion would arise.

49. Miss Heilbron's argument depends on two essential propositions: (i) that the tribunal was for these purposes a court of competent jurisdiction; and (ii) that the failure of the Government of Pakistan to challenge the award before the French courts has rendered the award final and conclusive as between the parties. Each of these propositions calls for closer examination.

50. Before the judge Miss Heilbron placed some emphasis on the decision of this court in Svenska Petroleum v Government of Lithuania (No. 2), which concerned an agreement between Svenska and a state-owned body, subsequently privatised under the name AB Geonafta, for the exploitation of oil reserves in Lithuania. The agreement contained a clause providing for ICC arbitration in Denmark. A dispute subsequently arose between Svenska and AB Geonafta, as a result of which Svenska began arbitration proceedings against both AB Geonafta and the Government of Lithuania. The Government denied being a party to the agreement or the arbitration clause. The tribunal decided to determine the question of its jurisdiction first and published an award declaring that the Government was bound by the arbitration agreement. No steps were taken to challenge that award in Denmark and the tribunal later published an award dealing with the substance of the dispute in which it awarded Svenska a substantial sum in damages.

51. When Svenska sought to enforce the award by proceedings in this country under section 101 of the Arbitration Act the Government of Lithuania claimed immunity under section 1 of the State Immunity Act 1978. A question whether the first award created an issue estoppel arose in relation to section 9 of the Act, which provides that where a state has agreed in writing to submit a dispute to arbitration it is not immune as respects proceedings which relate to the arbitration. The court found as a fact that the Government of Lithuania had agreed with Svenska to submit disputes to arbitration, that the tribunal therefore had jurisdiction to decide the issues before it, that the award was no longer open to challenge before the courts of Denmark and that it was therefore final and conclusive as between the parties.

52. The judge accurately summarised the court's reasoning on this issue in paragraph 141 of his judgment, but as he pointed out, there are significant differences between that case and the present. Two factors in particular stand out: first, in that case the court had found after considering the evidence that the Government was a party to the agreement and that the tribunal therefore had jurisdiction over it; second, the tribunal's first award had already been recognised in proceedings in this country. In the present case, by contrast, the judge found that the Government of Pakistan had not entered into an arbitration agreement with Dallah so that the tribunal did not constitute a court of competent jurisdiction for these purposes. He also held that the fact that the award had not been challenged in France was not sufficient to enhance its status so as to give rise to an issue estoppel. Finally, for good measure, he held that in any event the issue before him was not the same as that which had been decided by the tribunal, since he had to apply French law whereas it had applied transnational law.

53. Miss Heilbron submitted that the judge was wrong in all these respects. In support of her submission that the tribunal constituted a court of competent jurisdiction she drew our attention to the case of Watt v Ashan [2007] UKHL 51, [2008] 1 AC 696, in which the House of Lords held that a decision of the Employment Appeal Tribunal as to the existence of its own jurisdiction created an issue estoppel between the parties to it. She submitted that the same principle applies to an arbitration tribunal which has jurisdiction to decide its own jurisdiction.

54. I am unable to accept that submission. It is important to recognise that the Employment Tribunal and the Employment Appeal Tribunal are creatures of statute. Their jurisdiction may depend on the existence of certain facts, but it does not depend on the agreement of the parties. The Employment Tribunal's power to decide the existence of facts upon which its jurisdiction depends is derived from the statutory provisions and the decisions of the Employment Appeal Tribunal on questions of law are subject to review by the Court of Appeal. In these respects these tribunals differ from arbitral tribunals whose jurisdiction is entirely dependent on the parties' agreement to submit disputes to them for determination. In my view it is not possible to transfer the reasoning in Watts v Ashan to commercial arbitration.

55. It was common ground, quite rightly, that under Article 6.2 of the ICC Rules the tribunal had jurisdiction to determine its own jurisdiction. Moreover, its decision on this point was final, in the sense that it could not be re-opened by the arbitrators themselves, who on publication of their award became functus officio in relation to that issue. It was not final in every sense, however, because it was subject to review by the French court exercising its supervisory jurisdiction and by enforcing courts under Article V of the Convention. Accordingly, whether the tribunal represented a court of competent jurisdiction in the sense necessary to create an issue estoppel depends on whether the parties to the award had agreed to confer jurisdiction upon it, since the arbitrators' jurisdiction was derived from the consent of the parties. If the Government of Pakistan and Dallah were not parties to an agreement providing for ICC arbitration, the arbitrators had no jurisdiction over them, and the award was a nullity. That, of course, is the very issue that falls to be decided in these proceedings.

56. Miss Heilbron's second proposition is also flawed. It is true that the Government of Pakistan has stated that it does not intend to challenge the award in France, but it was common ground between the French law experts that the time allowed for doing so does not begin to run until steps are taken to enforce it. Dallah has as yet taken no steps to enforce the award in France and therefore time has not begun to run against the Government for this purpose. It follows that even now the award has not become invulnerable to challenge in the French courts. However, even if that were the case, it would not in my view be sufficient to prevent the Government of Pakistan from challenging its recognition and enforcement in this country on the grounds set out in section 103(2)(b) of the Act. It is in my view clear that the purpose of Article V.1 of the Convention was to preserve the right of a party to a foreign arbitration award to challenge enforcement on grounds that impugn its fundamental validity and integrity. The fact that it has not been challenged or that

a challenge has failed in the supervisory court does not affect that principle, although a decision of the supervisory court may finally determine such questions and thereby itself create an estoppel by record.

57. Finally, although there may be little difference in practice between the relevant principles of French law and the principles of transnational law which the tribunal applied, I agree with the judge that the issue that arose for decision before him was not the same as that which was determined by the tribunal and for that reason also no issue estoppel could arise.

(iv) Discretion

58. Miss Heilbron submitted that even if the Government of Pakistan were to establish that the arbitration agreement is not valid, the court would still have a discretion to allow enforcement of the award in this country and in this case should exercise that discretion in favour of doing so. It has been accepted in a number of cases that the use of the expression "enforcement of the award may be refused" in section 103(2)(b) gives the court a discretion to permit enforcement even where one of the grounds justifying refusal has been established. In Dardana Ltd v Yukos Oil Co [2002] EWCA Civ 543, [2002] 2 Lloyd's Rep. 326 Mance L.J. expressed the view that the statute cannot have been intended to give the court an open discretion but one based on some recognisable legal principle. In Kanoria v Guinness [2006] EWCA Civ 222, [2006] 1 Lloyd's Rep. 701 Lord Phillips C.J. expressed his own doubts about whether section 103(2) gives the court a broad discretion to allow enforcement of an award where one of the grounds set out in that subsection has been established and cited with approval the observations of Mance L.J. in Dardana v Yukos. May L.J. considered that section 103(2) is concerned with the fundamental structural integrity of the arbitration proceedings and expressed the view that the court is unlikely to allow enforcement of an award if it is satisfied that its integrity is fundamentally unsound.

59. I respectfully agree with those observations with one caveat. Mr. Landau drew our attention to a work entitled Enforcement of Arbitration Agreements and International Arbitral Awards (ed. Gaillard & Di Pietro), in chapter 3 of which there is a valuable discussion of the effect of Article VII.1 of the Convention (the so-called 'more favourable right' provisions). In the light of that discussion I think it may be necessary to consider on another occasion whether the discretion to permit enforcement may be somewhat broader than has previously been recognised and in particular whether there may be circumstances in which the court would be justified in exercising its discretion in favour of allowing enforcement of a foreign award notwithstanding that it had been set aside by the supervisory court. The question does not arise in this case, however, and I do not think that it would be helpful to do more at this stage than draw attention to the question.

60. In Svenska Petroleum Exploration AB v Government of the Republic of Lithuania [2005] EWCA 9 (Comm) Mr. Nigel Teare Q.C. sitting as a Deputy High Court Judge expressed the view that, where a person has unsuccessfully contested the issue of jurisdiction before the arbitral tribunal and has not sought to challenge its decision before the supervisory court, it may be appropriate for the court to exercise its discretion in favour of recognising the award, even though the party opposing recognition could prove that he was not a party to the relevant arbitration agreement. Indeed, in that case the judge decided that, since the Government of Lithuania had not attempted to challenge the tribunal's first award in Denmark, it was appropriate to exercise his discretion in favour of recognising it.

61. It was unnecessary in Svenska Petroleum v Government of Lithuania (No. 2) for this court to decide whether the judge had been right to take that course because it had already found that the Government of Lithuania was a party to the arbitration agreement and that the tribunal therefore did have jurisdiction over it. Moreover, the judge's decision had not been challenged and therefore remained binding as between the parties. In those circumstance I do not think that the court can be understood to have approved his decision rather than simply to have recognised

its existence. In my view, however, if the person opposing recognition or enforcement of an award can prove that he was not a party to the relevant arbitration agreement, it will rarely, if ever, be right to recognise or enforce it solely on the grounds that he has failed to take steps to challenge it before the supervisory court. That would be contrary to the policy of the Convention and would significantly undermine the principle which this court accepted in paragraph 104 of its judgment in that case (see paragraph 18 above). For those reasons I do not consider that it would be a proper exercise of the court's discretion in the present case to allow enforcement of the award once it had reached the conclusion that there was no valid arbitration agreement between Dallah and the Government of Pakistan. It follows that I can see no grounds for criticising the way in which the judge exercised his discretion.

62. For these reasons I would dismiss the appeal.

63. Since writing this judgment I have had the privilege of reading in draft the judgment of Lord Justice Rix. I have found his observations on the difficult questions of estoppel and the scope of the court's discretion most illuminating and I agree with the additional reasons he gives for dismissing the appeal.

Lord Justice Rix :

64. I am grateful to Lord Justice Moore-Bick for dealing in full with the facts and issues in this appeal. I agree with his judgment, and offer some further observations on the linked submissions of Miss Heilbron QC concerning estoppel and discretion.

65. For these purposes I need merely recapitulate the following facts. The Agreement contained no express choice of law. Before the arbitrators Dallah argued for Saudi Arabian law as the law of the Agreement, and the Government of Pakistan argued for Pakistani law. In the first place the arbitrators accepted neither submission: instead they contented themselves with ruling that the law to be applied to the clause 23 agreement to arbitrate was (for short) transnational law. Their first award, deciding that the Government of Pakistan was a party to the Agreement, was dated 26 June 2001. Their second award, holding the Government of Pakistan liable for the repudiation of the Agreement was dated 19 January 2004. Their third and final award, awarding Dallah damages of nearly US$19 million and costs, was dated 23 June 2006. The Government of Pakistan played no part in any stage of the arbitration, save that, under full reserves, it made written submissions to the arbitrators as to why it was not a party to the Agreement or its arbitration agreement. It is common ground that that did not amount to participation in the arbitration or to any waiver of the right to challenge the awards. The awards were ICC awards made in France. It is now common ground that, in the absence of any express proper law, the New York Convention looks to the law of the country where the award in question was made.

66. On 10 July 2006 Dallah issued its application to enforce the final award in the same manner as a judgment. On 9 October 2006 Christopher Clarke J made an order so to enforce that award, but gave the Government of Pakistan time to apply to set that order aside. On 19 February 2007 the Government of Pakistan issued an application for an extension of time in which to issue its proceedings to set aside. In its evidence in support of that application to extend time, its solicitors made a witness statement which said that it –

> "has been considering with its French lawyers whether it could challenge in the French courts the final award (and possibly the partial awards rendered by the same tribunal). A successful challenge of the award(s) in France would have provided the respondent with a ground to resist enforcement in England on the basis of section 103(2)(f) of the Arbitration Act 1996. This process in itself took a substantial amount of time and required a preliminary selection of French lawyers. Having carefully considered the advice provided by its French lawyers, the [Government of Pakistan] has decided not to challenge the award(s) in France."

67. In an extensive and fluid submission, Ms Heilbron argues that the decision not to challenge the awards in France is tantamount to a waiver of the right to challenge and, what is more, the equivalent of a decision from the French court that the first award, and thus the final award too, is valid and enforceable. The Government of Pakistan is therefore estopped from challenging the enforceability of any of the awards on the ground that it is not a party to the Agreement. Alternatively, the situation is the equivalent of an issue estoppel, which prevents the Government of Pakistan from any defence to the enforceability of the awards on that ground. Alternatively, even if the Government of Pakistan is or were able to show that it was not a party to the Agreement, the English court is entitled and ought to exercise its discretion for the purposes of section 103(2) of the Arbitration Act 1996 ("may be refused") by not refusing to enforce, but enforcing the final award. In this connection she also invokes by way of analogy the provisions of section 73(2) of the 1996 Act, whereby a party to arbitral proceedings covered by the English Act who fails to challenge an award or to do so within the time allowed (see sections 67(1) and 70(3)) may not object to a tribunal's substantive jurisdiction on any ground which was the subject of the tribunal's ruling.

68. It will be recalled that section 103 of the 1996 Act, reflecting the provisions of the New York Convention, provides inter alia as follows:

"(1) Recognition or enforcement of a New York Convention awards 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;…

(f) that the award has not yet become binding on the parties, or has been set aside by a competent authority of the country in which, or under the law of which, it was made…

(5) Where an application for the setting aside or suspension of the award has been made to such a competent authority as is mentioned in subsection (2)(f), the court before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the recognition or enforcement of the award.

It may also on the application of the party claiming recognition or enforcement of the award order the other party to give suitable security."

69. The Convention contains similar provisions in article V.1(a) and (e) and article VI. In particular the language at the beginning of article V contains similar language relating to what is described as the discretion of the court asked to enforce the award, viz "Recognition or enforcement of the award may be refused…only if…" The French text, however, does not contain the language of discretion: "ne seront refusées" ("shall not be refused…unless…").

70. French law does not provide for a defence to enforcement of a foreign New York Convention award on the article V.1(e) ground that an award has been set aside by a competent authority of the country in which or under the law of which, that award was made: see article 1502 of New Code of Civil Procedure. On the other hand article 1504 permits an award made in France in an international arbitration to be set aside inter alia "Where the arbitrator ruled in the absence of an arbitration agreement…" Article 1505 provides:

"An action to set aside as provided for in Article 1504 shall be brought before the Court of Appeals of the place where the award was made. Such an action is admissible immediately after the making of the award; it is no longer admissible if it has not been brought within one month of the official notification of the award bearing an enforcement order."

71. It follows that, under French law, the Government of Pakistan has at no time been out of time for the purpose of challenging the awards. Moreover, since the awards are not English awards, our provisions relating to the challenging of them are not applicable. Even as a matter of analogy, sections 67(1) and 70(3) of the 1996 Act are not applicable, because the Government of Pakistan has never participated in the arbitration. In such circumstances, the analogous provisions of the English Act are those contained in section 72: see the DAC Report at paras 295 and 298.

72. It also follows that there may be a number of reasons why the Government of Pakistan has chosen not to challenge the awards in France, although it was in time to do so. One is that it was not obliged to do so. There is no requirement under the New York Convention that a party facing enforcement proceedings in a state other than the state where the award was made need bring its challenge in the latter state. Moreover, if nevertheless it does so, it runs the risk that the state where enforcement is sought may require security for payment of the award as a term for adjourning the enforcement proceedings until the challenge has been decided in the state where the award was made: article VI of the Convention and section 103(2)(f) and (5) of the 1996 Act. Therefore one consequence of seeking to challenge the awards in France would have been the possibility of undertaking two sets of proceedings and of being required to provide security for the award. This may not have been an attractive alternative for the Government of Pakistan. In effect, Miss Heilbron's submission asks us to infer that the decision not to take proceedings to challenge the awards in France was tantamount to a concession that the awards would be upheld in France and thus to an issue estoppel. However, that is an impossible submission. Even if, for the sake of argument, the Government of Pakistan may have been advised or feared that the French courts would be likely to uphold the arbitrators' application of transnational law and their conclusion that the Government of Pakistan was a party to the Agreement, it was entitled to finesse that possibility and undertake the burden under the Convention of proving that under French law, as the law of the country in which the awards were made, it was not a party. See also the jurisprudence discussed below.

73. It is impossible therefore to found any form of waiver, estoppel, or issue estoppel out of the Government of Pakistan's choice, which under the Convention and under French law lay entirely in its option, to challenge the validity of the awards in England, where Dallah had for itself chosen to seek to enforce them.

74. I turn therefore to the question of a discretion under the Convention nevertheless to recognise or enforce the awards, even though the Government of Pakistan has succeeded in proving that it was not a party to the Agreement. It goes without saying that, if there is such a discretion, its positive use in this case to enforce an award when ex hypothesi the Government of Pakistan had never been a party to the Agreement, would be an immensely strong, not to say unjust, exercise of it. The whole basis of arbitration is that, as a means of deciding disputes, it is founded on consent.

75. Although on behalf of the Government of Pakistan Mr Landau QC submitted that the discretion retained in the words "may be refused" could not be exercised in favour of Dallah in this case, he nevertheless agreed that such a discretion in theory existed and might be exercised even where a challenge to an award had already succeeded in the country where the award was made. Indeed, he presented extensive material in which its use in such a case has been discussed: see, for instance, Gaillard and Di Pietro, Enforcement of Arbitration Agreements and International Arbitral Awards, The New York Convention in Practice at chapter 3, and Gaillard,

The Enforcement of Awards Set Aside in the Country of Origin, ICSID Rev 16 (1999). On closer examination, however, the thesis developed there appears to a large extent to depend on (a) a theory of arbitration recognised in France and perhaps other civil law jurisdictions rather than in England and other common law jurisdictions, to the effect that arbitrators do not derive their powers from the state in which they have their seat but rather from a transnational legal order which recognises, subject to certain conditions, the validity of arbitration agreements and awards; (b) the absence from the French statute (see article 1502 referred to above) of the defence to enforcement based on article V.1(e) of the New York Convention; (c) an argument derived from article VII of the New York Convention to the effect that domestic law may be relied on for the purpose of upholding an award "to the extent allowed by the law" (the "more-favourable-right" theory), which however is itself dependent on (b); and (d) a number of French court decisions which as a consequence have been prepared to ignore a successful challenge to the validity of an award in the courts of the country where it was made. Where, however, as in the case of our own domestic statute, article V.1(e) is a recognised source of a defence to enforcement in our courts, it is not easy to understand why a successful challenge in the courts of the country where an award was made cannot be relied on as an issue estoppel.

76. Moreover, it may be that this line of French jurisprudence depends not so much on a free-standing discretion, as on the ability granted by article VII of the Convention to states to enact in their domestic law tougher limits on the refusal of recognition and enforcement than even the Convention permits in article V. That this is a potentially controversial area may be indicated by Professor Gaillard's rejection of Professor van den Berg's comment, described by the former as having been made "somewhat derisively", that "if an award is set aside in the country of origin, a party can still try its luck in France": see Gaillard in ICSID Rev 16 (1999) at para 36 and footnote 57. It is nevertheless possible to understand the obvious French concern that the validity of an arbitration award might, under certain circumstances, be attacked and destroyed by a party, such as a government itself, with great influence in the country where the award was made. Be that as it may, we are not concerned here with a successful challenge in the courts of France and it is unnecessary to comment further on this particular thesis.

77. Miss Heilbron's reliance on the article V.1 or section 103(2) discretion remains and I therefore turn to consider what light English jurisprudence throws on it. The earliest case to consider the discretion is a Hong Kong case, later referred to in England by our court of appeal. In Paklito Investment Ltd v. Klockner East Asia Ltd [1993] HKLR 39 an attempt to enforce a Chinese award was met with a successful defence on the basis that the defendant had been prevented in the arbitration from presenting its case. Nevertheless the court was asked to enforce the award under its discretion. Kaplan J refused, but discussed a possible instance when it might be exercised in order to enforce an award. He said (at 48/49):

"He relied strongly upon the fact that the defendants had taken no steps to set aside the award in China and that this failure to so act was a factor upon which I could rely. I disagree. There is nothing in s.44 nor in the New York Convention which specifies that a defendant is obliged to apply to set aside an award in the country where it was made as a condition of opposing enforcement elsewhere…

It is clear to me that a party faced with a Convention award against him has two options. Firstly, he can apply to the courts of the country where the award was made to seek the setting aside of the award. If the award is set aside then this becomes a ground in itself for opposing enforcement under the Convention.

Secondly, the unsuccessful party can decide to take no steps to set aside the award but wait until enforcement is sought and attempt to establish a Convention ground of opposition.

That such a choice exists is made clear by Redfern and Hunter in International Commercial

Arbitration p.474 where they state:

"He may decide to take the initiative and challenge the award; or he may do nothing and resist any attempts by his adversary to obtain recognition and enforcement of the award. The choice is a clear one – to act or not to act."…

I therefore conclude that the defendant's failure to apply to set aside the award is not a factor upon which I should or could rely in relation to the exercise of my discretion…

In relation to the ground relied on in this case I could envisage circumstances where the court might exercise its discretion, having found the ground established, if the court were to conclude, having seen the new material which the defendant wished to put forward, that it would not affect the outcome of the dispute. This view is supported by Professor Albert Van den Berg in his book, the New York Convention of 1958, at p.302, where he states:

"Thus only if it is beyond any doubt that the decision could have been the same would a court be allowed to override the serious violation."

It is not necessary for me in this judgment to decide whether this is the only circumstance where the discretion could be exercised or to lay down circumstances where it would be appropriate for the court to exercise its discretion after finding a serious due process violation."

78. China Agribusiness Development Corporation v. Balli Trading [1998] 2 Lloyd's Rep 76 is only one of two English cases which have been brought to our attention in which the court has enforced a foreign award although a defence within our statute (then the Arbitration Act 1975) and the New York Convention had been established. The award was again a Chinese award following an arbitration in which the arbitration rules current at the time when the dispute arose rather than the old rules current at the time of agreement had been applied. However, the point had only been raised at the time of enforcement, and any relevant change in the rules (in their fee structure) was insufficient to prejudice the defendant. Longmore J accepted and applied the discretion to enforce despite the establishment of a defence under article V.1(d) (now, section 103(2)(e) of the 1996 Act) that "the arbitral procedure was not in accordance with the agreement of the parties". Longmore J said (at 79/80):

"It is clear from the terms of the statute that refusal to enforce a Convention award is a matter for the discretion of the Court. In that context it must be relevant to assess the degree of prejudice to Balli by the arbitration being conducted under the current, rather than the provisional, rules. Mr Justice Kaplan so decided in the Chen Jen case and I gratefully follow his lead. (See [1992] I H.K. Cases 328 at p. 336.)…

A party who, only at the door of the enforcing Court, dreams up a reason for suggesting that a convention award should not be enforced is unlikely to have the Court's sympathy in his favour, and for this reason also I would not on the facts of this case be prepared to refuse the enforcement of the award."

79. However, in Dardana Ltd v. Yukos Oil Co [2002] EWCA Civ 543, [2002] 2 Lloyd's Rep 326 it was submitted that the discretion would permit enforcement of a Swedish award before the court had finally adjudicated on the Convention defence to enforcement that the defendant had not been party to the arbitration agreement. Mance LJ, in a judgment with which Thorpe LJ and Neuberger J agreed, regarded the discretion as a narrow one dependent on some other legal principle of preclusion. Thus he said (at para 18):

"Second, so long as the applicants' application under section 103(2) remained undetermined, there could have been no question of the Court allowing enforcement. That would

have been a denial of justice. The word "may" at the start of section 103(2) does not have the "permissive", purely discretionary, or I would say arbitrary, force that the submission suggested. Section 103(2) is designed, as I have said in par. 8, 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 s. 103(2)."

Mance LJ had previously said at para 8:

"The use of the word "may" must have been intended to cater for the possibility that, despite the original existence of one or more of the listed circumstances, the right to rely on them had been lost, by for example another agreement or estoppel. Support for that is found in van den Berg, The New York Convention of 1958 (Kluwer), p.265."

80. In IPCO (Nigeria) Ltd v. Nigerian National Petroleum Corporation [2005] EWHC 726 (Comm), [2005] 2 Lloyd's Rep 326 a Nigerian award arising from an arbitration between two Nigerian companies was first the subject-matter of proceedings in Nigeria to set aside the award and subsequently of enforcement proceedings in England. Gross J refused to proceed to consider immediate enforcement, but adjourned the proceedings on the payment of what was common ground to be indisputably due and of a further $50 million by way of security. He said:

"11. For present purposes, the relevant principles can be shortly stated. First, there can be no realistic doubt that s. 103 of the Act embodies a pre-disposition in favour of enforcement of the New York Convention Awards, reflecting the underlying purpose of the New York Convention itself; indeed, even when a ground for refusing enforcement is established, the court retains a discretion to enforce the award: Mustill & Boyd, Commercial Arbitration, 2nd edn, 2001 Companion, at page 87…

14. Fourthly, s. 103(5) "achieves a compromise between two equally legitimate concerns": Fouchard, at page 981. On the one hand, enforcement should not be frustrated merely by the making of an application in the country of origin; on the other hand, pending proceedings in the country of origin should not necessarily be pre-empted by rapid enforcement of the award in another jurisdiction. Pro-enforcement assumptions are sometimes outweighed by the respect due to the courts exercising jurisdiction in the country of origin – the venue chosen by the parties for their arbitration: Mustill & Boyd, at page 90…"

81. Svenska Petroleum Exploration AB v. Government of the Republic of Lithuania [2005] EWHC 9 (Comm), [2005] 1 Lloyd's Rep 515 is the other English case where a discretion to enforce has been exercised despite the (assumed) proof of a Convention defence. The Government of Lithuania had agreed to arbitration in Denmark under Lithuanian law. A final Danish award had been issued against the Government, which Svenska was seeking to enforce in England. There had been an issue in the arbitration as to whether the Government was a party to the relevant agreement, but under Lithuanian law the arbitrators had had full power to resolve their jurisdiction and the Government had fully participated in the arbitration. Nevertheless it now sought to argue in England that it was immune from execution under our State Immunity Act 1978. In order to make good that defence, it had to show that it had never agreed to arbitrate. Svenska applied to strike out summarily the Government's application for sovereign immunity. Svenska said that the interim arbitration award which had resolved the question of jurisdiction, to the effect that the Government was a party to the agreement, had created an issue estoppel. Svenska also submitted that in any event the English court had a discretion to recognise the interim award even on the assumed hypothesis that the Government could show that it was not a party. Mr Nigel Teare QC, acting as a deputy high court judge, held: (i) that in his discretion he would recognise the interim award, even though the issue of whether the Government had agreed to arbitrate was still pending and was assumed to be decided against the Government; (ii) that therefore the interim award was capable of creating an issue estoppel on that question; however

(iii) an issue estoppel had to be "final and conclusive" as well as binding, and although it was binding, it was not "final and conclusive" because it could still be challenged in the Danish courts. Therefore Svenska's application for summary judgment failed.

82. We are concerned with what Mr Teare said on the subject of discretion. He referred (at para 19) to what Mance LJ had said in Dardana v. Yukos and sought to apply it to this case, applying by analogy the principle introduced into English law by section 73(2) of the 1996 Act (at paras 22/24). He concluded thus:

"27. In my judgment the present case is an appropriate case in which to exercise the discretion conferred upon the Court by section 103(2) of the Act to recognise an arbitration award by permitting the Claimants to rely upon it in defence of the Government's claim to set aside the proceedings notwithstanding that, leaving aside the effect of that award, the Government could, it is assumed, prove that it was not a party to the arbitration agreement. Firstly, having objected to the tribunal's jurisdiction on the grounds that it was not party to the arbitration agreement the Government participated in a two day hearing on that very issue in Denmark in October 2001 when both factual and expert evidence on the law of Lithuania was adduced. Secondly, the tribunal decided that issue against the Government in an interim award published in December 2001 of some 69 pages which set out extensively the facts and evidence relied upon, the expert evidence of Lithuanian law, the arguments of the parties and the reasoning and conclusions of the tribunal. Thirdly, having lost on that issue, the Government did not take the opportunity to seek a review of the interim award in the Danish Courts. No reason was suggested as to why this step could not have been taken. Fourthly, the Government participated in a 13 day hearing on the merits which resulted in a final award against the Government published in October 2003. Fifthly, having decided not to challenge the final award in the Danish Court in February 2004 and to notify the Claimants of the Government's position, the Government then, after the Claimants took steps to enforce the final award in April 2004, claimed immunity from the jurisdiction of this Court, a contention which could only made good if the State was not party to the arbitration agreement, contrary to the decision of the arbitral tribunal in its interim award which the Government had not challenged."

83. The Government's defence to the enforcement proceedings could not therefore be dismissed summarily. In the meantime, however, the time for challenging the interim award in Denmark had passed by without challenge by the Government. In due course the enforcement proceedings were determined on the basis that (i) the Government had indeed agreed to submit disputes under the agreement to arbitration, and thus was no longer entitled to dispute enforcement under the State Immunity Act 1978; (ii) the interim award had in the meantime become "final" and could therefore give rise to an issue estoppel; and (iii) on that ground too the interim award, having been recognised by Mr Teare, provided an independent answer to the Government's defence. It followed that the interim award was recognised and the final award enforced.

84. Thus in Svenska Petroleum Exploration AB v. Government of the Republic of Lithuania (No 2) [2006] EWCA 1529, [2007] QB 886 Moore-Bick LJ giving the judgment of this court, said this:

"(c) Was the first award "final"?

102. The judge found that by the time she came to give judgment in November 2005 sufficient time had passed since the publication of the first award for the Government to have lost its right to challenge that award under Danish law. In our view her decision, which involved the application of undisputed principles of Danish law to the facts of this case, cannot be faulted. Not only had there been a substantial lapse of time since the publication of the first award without any attempt to challenge it, but the Government had formally resolved in February 2004 not to challenge the second award, which depended for its validity on the correctness of the first award,

and had formally communicated that decision to Svenska.

(d) Recognition

103. On the basis that the first award was no longer capable of being challenged in Denmark the judge held that it finally determined the question of the tribunal's jurisdiction. We agree with her conclusion, primarily because we are satisfied that the Government had agreed to refer disputes to arbitration under the ICC rules, but there is one other matter that must not be overlooked in this context and to which attention was drawn by Mr. Shackleton, namely the question of recognition.

104. Mr. Shackleton submitted that the Government's failure to challenge the first award before the Danish courts did not prevent it from challenging its recognition and enforcement in this country on any of the grounds set out in section 103(2) of the Arbitration Act 1996. In support of that submission he drew our attention to two decisions of the courts of Hong Kong, Paklito Investment Ltd v Klockner East Asia Ltd [1993] 2 HKLR 39 and Hebei Peak Harvest Battery Co Ltd v Polytek Engineering Co Ltd, but the proposition is not one which we find difficult to accept as a matter of principle. In the first place, section 103 of the Arbitration Act is a mandatory provision which must be applied in accordance with its terms. It follows, therefore, that whenever an attempt is made to enforce or rely upon a foreign award the party against whom it is invoked is entitled to challenge its recognition on any of the grounds set out in the section. Quite apart from that, however, the first question a court has to ask itself whenever a party seeks to rely on an arbitration award is whether that award should be recognised as valid and binding. In the case of a New York Convention award, section 103(2) gives the court the right not to recognise the award if the person against whom it is invoked is able to prove any of the matters set out in that subsection and if the court is satisfied that the award should not be recognised, the matter ends there. In the present case, therefore, it was always open to the Government to challenge the recognition of the award by the English courts and therefore the fact that the award could no longer be challenged in Denmark does not lead inexorably to the conclusion that it can be relied on as giving rise to an issue estoppel. In fact, however, the Deputy Judge decided that the award should be recognised and there has been no challenge to that decision. Accordingly, for the reasons given earlier, we agree that the first award is now to be regarded as having finally disposed of the issue of jurisdiction."

85. I regard the two Svenska decisions as amounting to the recognition of the interim award in circumstances where (a) at the time of Mr Teare's judgment the issue on the merits of the Government's consent to arbitration had not yet been determined and was assumed for the sake of argument to have been decided against Svenska; but (b) at the time of the court of appeal's judgment that issue had been determined in Svenska's favour and against the Government. In the circumstances I do not consider that Mr Teare's judgment relating to the section 103(2) discretion has the added authority of this court. The matter was not however fully developed before us in this case. Indeed, we were not taken by Miss Heilbron to Mr Teare's judgment, even though it was in our bundles. Speaking for myself, and I hope consistently with this court's judgment in Svenska (No 2), I would be inclined to analyse the situation as follows. Mr Teare recognised the interim award in his discretion even upon the assumption that it could be proved that the Government of Lithuania was not a party to the agreement and he did so independently of and prior to his decision on whether the award amounted to an issue estoppel. As it was, he decided that at that time the interim award did not amount to an issue estoppel. In such a situation, I would have myself doubted whether such a case could be brought within the more restricted views of Mance LJ and of this court in Dardana v. Yukos. By the time the matter reached this court in Svenska (No 2), however, it had been established both that the Government had consented to arbitrate and that the interim award was final and so could amount to an issue estoppel: in such circumstances, I would see no problem in recognising the interim award. That was entirely irrespective of the separate question of any discretion to do so even where a section

103 defence has been proved.

86. In Kanoria v. Guinness [2006] EWCA Civ 122, [2006] 1 Lloyd's Rep 701, decided a little before Svenska (No 2), an Indian arbitration took place in the absence of Mr Guinness, who was unwell. Mr Kanoria sought to enforce the resulting award in England. Mr Guinness defended enforcement under section 103(2)(c) of the 1996 Act on the ground that he had been unable to present his case to the arbitrators. This court held that this ground was made out. It was invited nevertheless to enforce the award in its discretion, on the ground that Mr Guinness had had an opportunity to challenge the award in India, but had failed in his challenge, which had been ruled out of time. However, this court refused to enforce the award. Lord Phillips CJ referred to what Mance LJ had said in Dardana v. Yukos and expressed "doubt as to whether the broad discretion…is available to the court" (at para 25). In any event he would not exercise even a broad discretion on the facts of that case (at para 26). Sir Anthony Clarke MR agreed. May LJ also referred to Dardana v. Yukos as being against an "open discretion" and continued (at para 30):

"Speaking generally, that is not surprising when the limited circumstances in which an English court can be persuaded to refuse enforcement of a New York Convention award concern, as I think, the structural integrity of the arbitration proceedings. If the structural integrity is fundamentally unsound, the court is unlikely to make a discretionary decision in favour of enforcing the award."

87. These authorities as a whole, in my judgment, do not favour a broad discretion such as Miss Heilbron would need to pray in aid of her submission in this case. It is true that in China Agribusiness Longmore J exercised a discretion to enforce even where an article V defence had been made out, and that in Svenska at first instance Mr Teare QC (as he then was) came closest, in a situation somewhat similar to the present case, to being willing to recognise an award even on the assumption that a Convention defence had been made out. However, in this court, the dicta in Dardanos and in Kanoria suggest that any discretion is narrow and would be unlikely to be exercised where the award in question was subject to a fundamental or structural defect. There can hardly be a more fundamental defect than an award against someone who was never party to the relevant contract or agreement to arbitrate.

88. In any event, the differences between this case and Svenska need to be emphasised. In this case, the Government of Pakistan played no part in the arbitration, and there is no evidence before us that under French law the arbitrators had jurisdiction to decide their own jurisdiction free from review in the French courts. On the contrary, texts put before the court suggest that the rule in French law is the same as in English law, namely that, where the arbitrators' jurisdiction is properly challenged, the court is entitled to investigate an issue of consent to arbitration from the bottom up: see in France, Fouchard, Gaillard, Goldman On International Commercial Arbitration, at paras 1601ff, and in England the run of cases from Gulf Azov v. Baltic Shipping [1999] 1 Lloyd's Rep 68 to Peterson Farms Inc v. C&M Farming Ltd [2004] EWHC 121 (Comm), [2004] 1 Lloyd's Rep 603. In Svenska on the other hand, under Lithuanian law the arbitrators had full power to decide their jurisdiction: see Svenska (No 2) in this court at para 90. Moreover, the Government of Lithuania had played a full part in the arbitration, and had also (at any rate by the time of Svenska (No 2)) waived the right of challenge in the Danish court, and for good measure had "formally resolved" not to proceed to such a challenge and had informed Svenska of that decision (see at para 102 of the court of appeal judgment). Moreover, Mr Teare had proceeded on an assumption as to the making out of a Convention defence. I can conceive that where an estoppel could be proved, the court asked to recognise or enforce would be entitled to say that it need not investigate the defence. Where, however, a defence of no consent is proven, it seems to me much harder to ignore that in the exercise of any discretion. In any event, there is no question in this case of Dallah being able to rely on the interim award as any form of issue estoppel.

89. In sum, I see no reason arising out of the interesting arguments put before the court in this appeal to doubt, even if it was open to do so, this court's views in Dardana and Kanoria that any discretion to enforce despite the establishment of a Convention defence recognised in our 1996 Act is a narrow one. Indeed, it seems to me that in context the expression "may be refused…only if" (article V), especially against the background of the French text ("ne seront refusées"), and the expressions of the English statute "shall not be refused except" and "may be refused if" (section 103(1) and (2)), are really concerned to express a limitation on the power to refuse enforcement rather than to grant a discretion to enforce despite the existence of a proven defence. What one is left with therefore is a general requirement to enforce, subject to certain limited defences. There is no express provision however as to what is to happen if a defence is proven, but the strong inference is that a proven defence is a defence. It is possible to see that a defence allowed under Convention or statute may nevertheless no longer be open because of an estoppel (Professor van den Berg's view, see The New York Convention 1958 at 265), or that a minor and prejudicially irrelevant error, albeit within the Convention or statutory language, might not succeed as a defence (as in China Agribusiness). But it is difficult to think that anything as fundamental as the absence of consent or some substantial and material unfairness in the arbitral proceedings could leave it open to a court to ignore the proven defence and instead decide in favour of enforcement.

90. As for the case of a successful or unsuccessful (or waived) challenge in the courts of the country of origin, that is a more controversial area. My own view is that a successful challenge is not only in itself a potential defence under the Convention or our statute but likely also to raise an issue estoppel. As for an unsuccessful challenge, that may also set up an issue estoppel. As for a waived challenge, that cannot in itself set up an issue estoppel and is unlikely to be of significance, save possibly in the rare case where the residual discretion is in play. In this connection Mr Landau pressed us with the submission that to pay any regard to what occurs in the country of origin is to run the risk of re-introducing to the regime of the New York Convention the "double exequatur" of the earlier regime under the Geneva Convention of 1927. That was the need to show that the award would be enforced in the country of origin as well as in the country where enforcement was pursued. I agree that it is important to recognise this important change brought about by the New York Convention and to avoid interpreting it in ways which might prejudice that change. It is not clear to me, however, that to have regard to the setting aside of an award by the courts of the country of its origin is to revert to the "double exequatur" regime: on the contrary, it is a matter to which the New York Convention itself bids us have regard. A party seeking to enforce an award need prove nothing about its validity in its country of origin when he opts for enforcement in another country which is a party to the New York Convention. However, that is not to say that a party challenging the validity of an award can entirely ignore a challenge in the country of origin, at any rate where he has participated in the arbitration (a matter not considered by Kaplan J in Paklito).

91. Finally, I bear in mind (see para 76 above) the problem of an award perhaps improperly set aside in the courts of the country of origin. This is a delicate matter. However, it seems to me that this is not something which can be dealt with simply as a matter of an open discretion. The improper circumstances would, I think, have to be brought home to the court asked to enforce in such a way as either, in effect, to destroy the defence based on article V.1(e), or, which is perhaps effectively the same thing, to prevent an issue estoppel arising out of the judgment of the courts of the country of origin. In this connection see Carl Zeiss Stiftung v Rayner & Keeler Ltd (No2) [1967]1 AC 853, 947 and Dicey, Morris & Collins, The Conflict of Laws, at Rules 41/45.

Lord Justice Ward :

92. I agree that the appeal should be dismissed for the reasons given by Lord Justice Moore-Bick and Lord Justice Rix.

Neutral Citation Number: [2008] EWHC 1901 (Comm)
Case No: 2006-686

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL
01/08/2008

B e f o r e :

THE HONOURABLE MR JUSTICE AIKENS

Between:

DALLAH REAL ESTATE AND TOURISM HOLDING COMPANY
Claimant
- and -

THE MINISTRY OF RELIGIOUS AFFAIRS, GOVERNMENT OF PAKISTAN
Defendant

Hilary Heilbron QC and Klaus Reichert (instructed by Kearns & Co, Solicitors, London) for the Claimant
Toby Landau QC and Patrick Angénieux (instructed by Watson Farley & Williams, Solicitors, London) for the Defendant
Hearing dates: 8th, 9th and 10th July 2008

HTML VERSION OF JUDGMENT

Mr Justice Aikens:

1. On 9 October 2006, Christopher Clarke J made an ex parte order, pursuant to section 101 of the Arbitration Act 1996 ("the Act") and CPR Part 62.18, giving the Claimant ("Dallah") leave to enforce an ICC arbitration award made in Paris, France, and dated 23 June 2006 ("the Final Award") in the same manner as a judgment of the court. This Final Award of a distinguished

tribunal consisting of Lord Mustill, Mr Justice Dr Nassim Shah and Dr Ghaleb Mahmassani, ruled that the Respondent ("the GoP"), must pay compensation to Dallah of US$18,907,603 and costs, making a total of US$ 20,588,040. The order of Christopher Clarke J. gave the GoP a period of 2 months and 23 days after service of the order to apply to the court to set the order aside.

2. On 23 March 2008,[1] the GoP issued an Arbitration Application to set aside Christopher Clarke J's order on two grounds. First, that the GoP, as a State entity, is immune from the enforcement proceedings. Secondly, that enforcement of the Final Award should be refused because the arbitration agreement on which it was based 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", pursuant to section 103(2)(b) of the Act.

3. The hearing of this application took place before me on 8, 9 and 10 July 2008. The first ground was not specifically argued, but Mr Landau QC, appearing for the GoP, made it clear that his client is a state entity and it reserved all its arguments that it was entitled to plead state immunity and strike out Dallah's action on that basis. On the second ground, the argument of the GoP was that it was not a party to the arbitration agreement and so, as between the GoP and Dallah, there was no valid arbitration agreement that could found the tribunal's jurisdiction to make the Final Award. It was common ground at the hearing that, for the purposes of section 103(2)(b) of the Act, there was no clear "indication" as to which law the parties had "subjected the arbitration agreement". Therefore the issue of the "validity" of the arbitration agreement had to be determined according to French law, that being the law of the country where the Final Award was made.

4. At the hearing there was no oral evidence from witnesses of fact. There were three witness statements in evidence, however. First, I had two witness statements of Mr Patrick Angénieux, a solicitor with Watson, Farley and Williams, ("WFW"), solicitors for the GoP. They were largely formal. Secondly, there was a witness statement that had been adduced as evidence in the course of the ICC arbitration proceedings. This is an undated witness statement from Mr Shezi Nackvi, a director of a company related to Dallah.

5. I heard oral evidence from two experts in French law, M. Le Bâtonnier Bernard Vatier, on behalf of the GoP, and M. Yves Derains on behalf of Dallah. The arguments of the parties also raised issues on the law of Pakistan. I heard evidence from two experts on Pakistani laws: Mr Mehmood Mandviwalla, on behalf of the GoP; and Dr Abdul Hafeez Pirzada on behalf of Dallah. Prior to the hearing all the experts had served reports and each pair of experts had prepared a Joint Memorandum on agreed and contested issues. All the expert witnesses were very helpful in dealing with the issues put to them by counsel and by me.

6. Mr Landau QC, for the GoP, and Miss Heilbron QC, for Dallah, had submitted comprehensive Outline Submissions before the start of the hearing. Miss Heilbron also very helpfully produced a written summary of her submissions on various documents and an Outline of her submissions on the evidence. I was much assisted by both the written and the oral submissions of both counsel. I reserved judgment.

A. The parties and the background to the relevant contracts

7. Dallah is a Saudi Arabian company, which is engaged in the provision of services to Muslims who perform Hajj at Mecca. Dallah is one of a number of companies in the Dallah Group of Companies, which are ultimately owned by Albaraka Investment and Development Trading ("Albaraka"). That is the trading name of a Saudi Arabian partnership between the Chairman of the Dallah Group, Sheikh Salleh Al Kamel, and his family members. Albaraka is based in Jeddah. The Dallah Group as a whole is involved in the provision of services, such as

accommodation, transportation and medical facilities, for pilgrims visiting Mecca. It is the largest provider of such services in Saudi Arabia.

8. The Ministry of Religious Affairs, Government of Pakistan, ("the MORA") is one of the ministries of the Federal Government of Pakistan, as defined by the Rules of Business 1973. Those Rules were promulgated under Articles 90 and 99 of the Constitution of the Islamic Republic of Pakistan of 1973.[2] The full name of the ministry is "Ministry of Religious Affairs and Zakat and Ushr". The ministry is divided into two divisions, one of which is the Religious Affairs Division. Amongst the subjects that are within the work of the ministry are "pilgrimage beyond Pakistan", "the welfare and safety of pilgrims" and "donations for religious purposes".

9. The start of the project: In December 1994, the Pakistani cabinet approved in principle a proposal to establish the "Awami Hajj Trust" ("the Trust") for the purpose of mobilising savings from intending Hajj pilgrims and for the investment of those savings in Shariah approved schemes. A cabinet committee was set up under the chairmanship of the Minister of State for Finance to work out the details. It was decided that the Trust should take the form of a corporate body which would have four principal objectives. These were: (i) to mobilise savings from intended pilgrims; (ii) to invest such savings in Shariah approved modes of investment; (iii) to meet the cost of performance of Hajj by members out of the balances in their accounts; and (iv) to take steps to facilitate the performance of Hajj by members.[3]

10. In 1995, Mr Shezi Nackvi, a director of Samaha Holdings Limited, which is also ultimately owned by Albaraka, proposed to the MORA that the Dallah Group be permitted to provide to the GoP a housing complex in Mecca or Medina on a long term lease for use by Pakistani pilgrims. Discussions with the MORA followed in March and April 1995. An announcement was made by the GoP in May 1995.

11. The Memorandum of Understanding: On 24 July 1995 a Memorandum of Understanding (the "MOU") was concluded between Dallah and the President of the Islamic Republic of Pakistan "through the Ministry of Religious Affairs". The relevant terms of the MOU are set out in Annex 1 to this judgment. I will only summarise the effects of its terms here. Under clause 1, Dallah agreed to acquire land within Mecca for the construction of housing facilities for Pakistani pilgrims "whilst performing Hajj and Umra". Dallah would construct the housing on that land. The total cost of the land and housing would not exceed US$ 242 million: clause 2. Under clause 3, the parties agreed that Dallah would lease the houses and the land to the GoP on a 99 year lease, "subject to Dallah arranging the necessary Financing for [the GoP] on terms approved by [the GoP] in accordance with the provisions of this Agreement". Clause 4 stipulated that Dallah must, within 30 days of the execution of the MOU, prepare and submit to the GoP the terms and conditions of the proposed lease. By clause 6, within 60 days of the approval of the lease by the GoP, Dallah must prepare and submit to the GoP detailed specifications and drawings for the housing.

12. Clause 23 states that the MOU will be governed by Saudi Arabian law. By clause 24, disputes would be resolved by arbitration under Saudi laws and regulations, with any arbitration taking place in Jeddah. The wording of clause 25 appears to be mangled. (I suspect there was a word – processing error or proof – reading failure). It is attempting to deal with the issue of immunity of the GoP, but it seems that part of the paragraph is missing, so it is impossible to determine its meaning. However, clause 27 states that the GoP consents to proceedings arising in connection with the MOU, including those concerning the "making, enforcement or execution against any award, order or judgment which ma be made or given in such proceedings". Although, strictly speaking, the correct interpretation of that clause is a matter of Saudi Arabian law, it appears to me to be a waiver by the GoP of immunity from suit and execution.

13. On 17 August 1995, (ie. within 30 days of the MOU), Mr Nackvi, on behalf of Dallah, sent

to Mr Lutfallah Mufti Dallah's proposals in respect of the lease and financing of the project. On 18 November 1995, Dallah acquired 43,000 square metres of land in Mecca.[4] However, the GoP did not approve the financing and lease proposals within the period of 90 days after they were sent to the GoP on 17 August 1995.

14. The Ordinance: On 31 January 1996, the President of Pakistan promulgated Ordinance No. VII of 1996, under powers conferred by Article 89(1) of the Constitution of Pakistan. The Ordinance is entitled: "An Ordinance to provide for the establishment of an Awami Hajj Trust" ("the Trust"). The relevant articles of the Ordinance are reproduced in Annex 2 to this judgment. In summary, it provides as follows: first, the preamble states that it is "expedient to provide for the establishment of an Awami Hajj Trust to mobilize savings from the pilgrims desirous of performing Hajj and investment thereof in the Islamic modes of investment and for facilitating Hajj operations and matters connected therewith and incidental thereto". Article 2 sets out various definitions, including a "member", who is defined as an intending Haji who wishes to save and finance the Hajj expenses by becoming a member of the Trust. Article 3(1) stipulated that the Trust would be established by Notification in the Official Gazette "by the Federal Government". Article 3(2) stipulates that the Trust will be 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". Article 3(3) provides for the Trust's headquarters to be in Islamabad and it may establish regional offices at other places "as the Federal Government shall determine". Article 4 sets out the purposes of the Trust. Article 5 provides that the general direction and administration of the Trust will vest in a board of trustees. The Chairman of the board is to be the Minister of Religious Affairs. The Secretary of the Religious Affairs Division of the MORA, if he is not appointed the Managing Trustee, is to be a member of the board and also is to act as its Secretary. Article 6 sets out the powers and functions of the board. Article 7 sets out the powers and functions of the Managing Trustee. Article 12 stipulates that the board of the Trust may, "with the prior approval of the Federal Government, make rules for carrying out the purposes of this Ordinance".

15. On 14 February 1996, a Notification of the establishment of the Trust was made by the MORA. Dallah was fully aware of this. Discussions between Dallah and officials of the MORA continued. In a letter dated 14 April 1996, from Mr Nackvi to Mr Lutfallah Mufti, addressed to him as Secretary of the MORA, the Dallah Group proposed that the Al Towfeek Investment Bank be appointed as Managing Trustee of the Trust. The Board of Trustees of the Trust resolved to adopt this proposal at a meeting on 30 July 1996.

16. At the same meeting the Board of Trustees also agreed to the proposal of the Dallah Group that it should raise a loan of US$100 million, to be granted to the GoP to pay for the cost of the development of the housing facilities. The Trust was to give a guarantee to repay it, with a counter – guarantee by the GoP itself.

17. Under the provisions of Article 89(2) of the Constitution of Pakistan, an Ordinance "shall stand repealed" at the expiration of four months from its promulgation if it is not laid before Parliament. However, under the Constitution of Pakistan, Ordinances can be renewed. In this case, Ordinance VII of 1996 was renewed on 2 May 1996 (as Ordinance XLIX of 1996), then again on 12 August 1996, as Ordinance LXXXI of 1996.

18. No further renewals of this Ordinance were promulgated thereafter. The parties' Pakistani law experts agree that this meant that the Ordinance lapsed at midnight on 11/12 December 1996. The precise consequences of that was a matter of dispute between the Pakistani law experts. However, they do agree that once the Ordinance lapsed, the Trust ceased to exist as a legal entity.[5]

19. The Agreement between Dallah and The Trust: On 10 September 1996, that is whilst the

last renewal Ordinance was still in force, Dallah and the Trust entered into an agreement ("the Agreement"). The preamble states that the Agreement is between "the Awami Hajj Trust established under section 3 of the Awami Trust Ordinance 1996 (No VII of 1996)….and Dallah Real Estate and Tourism Holding Company". I have set out the relevant provisions in Annex 3 to this judgment. I will summarise the main terms here.

20. By clause 1, Dallah undertook to develop and construct housing for 45,000 Pakistani pilgrims whilst performing Hajj and Umra, on a plot of land in the Al – Misfalah district of Mecca. By clause 2, the Trust agreed to pay to Dallah a lump sum of US$ 100 million, by way of an "Advance Lease Payment", within 30 days of the date of execution of the Agreement. This was subject to Dallah arranging, through one of its affiliates, a financing facility in the same amount, against a guarantee of the GoP. Dallah also had to provide within that time a Performance Bond covering the amount of the Advance Lease Payment. The Trust and the Trustee Bank had to provide a counter – guarantee in favour of the GoP. By clause 3, the Agreement "shall come into effect" on the date that Dallah received the Advance Lease Payment and it, in turn, submitted the Performance Guarantee to the Trust.

21. By clause 4, Dallah agreed to develop, construct and complete the Housing in accordance with "such detailed specifications and drawings that shall be approved by the Trust within 90 days from the date of execution…" of the Agreement. When signed by the parties, those would become the "Approved Specifications". Under clause 5(a), the Trust agreed irrevocably and unconditionally to take on a lease of the housing to be developed by Dallah.

22. By clause 19, the Agreement would be binding upon and would "enure to the benefit of" the parties and to "the benefit of their successors and permitted assigns", to the extent permitted by the Agreement and by applicable law.

23. Clause 24 provides that the Trust would not claim and would irrevocably waive immunity from "suit, award, execution, [and] attachment…" or other legal process, to the extent that in any jurisdiction there may be attributed such immunity to the Trust. Clause 27 permits the Trust to assign or transfer its rights and obligations under the Agreement to the GoP, without the prior consent in writing of Dallah.

24. Clause 23 is the arbitration clause. As it is at the centre of the present application, I will set it out in full here:

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

B. The Dispute, the subsequent litigation in Pakistan and the ICC arbitration

25. On 19 January 1997, Mr Lutfullah Mufti wrote to Dr Muhammad Saad Yamani, the chairman of Dallah. The letter was under a letterhead which stated "Government of Pakistan, Ministry of Religious Affairs, Zakat & Ushr and Minorities Affairs". Mr Lutfallah Mufti signed it as "Secretary", but the organisation of which he was secretary is not identified.[6] Logically, as the Trust had ceased to exist at that stage as a matter of law, he could not have been writing the letter in his capacity as Secretary to the Board of Trustees of the Trust, which must have evaporated with the Trust itself.

26. The letter is headed: "Agreement dated 10.9.1996 – Makkah Housing Project, Makkah Mukarramah". The letter stated that, under the terms of the Agreement, Dallah was required within 90 days of its execution to "get the detailed specifications and drawings approved by the

Trust". The letter continued:

"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 (sic) 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 US$ 100,000,000,00 within 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".

27. On 20 January 1997, the Trust, as plaintiff, purported[7] to begin proceedings against Dallah, as defendant, in the Court of the Senior Civil Judge, Islamabad. This suit was entitled a "Suit for [a] Declaration to the effect that [the] Agreement dated 10.09.1996 stood repudiated on account of [the] default of the Defendant…". The claim also sought a permanent injunction restraining Dallah from claiming any right against the Trust under the Agreement or representing or holding out that the Trust had any contractual relations with Dallah. The pleading has at its foot a "Verification" of truth, which is signed by Mr Lutfallah Mufti as "Plaintiff". Mr Lutfallah Mufti also swore an affidavit, stated to be in his capacity as "Secretary Board of Trustees of the Trust", in which he confirmed the facts set out in the plaint, ie. that the Agreement was between Dallah and the Trust.

28. At the same time, the Trust sought an interim injunction against Dallah from the same court and in the same terms as the permanent injunction. That application document was also signed by Mr Lutfallah Mufti.

29. On about 6 March 1997, Dallah applied to the court to stay those proceedings, under section 34 of the Arbitration Act 1940.[8] The application form is not in the bundles for the hearing. I assume that Dallah applied on the footing that there is an arbitration clause, clause 23, in the Agreement. The application was resisted by the Trust and Mr Lutfallah Mufti swore two "counter affidavits" in opposition to the application.

30. This set of proceedings terminated when a court order was made on 21 February 1998. The order of the Civil Judge First Class of Islamabad states that at the time the proceedings were started, the Trust had ceased to exist and so could not bring any proceedings in its name. The order continues, in paragraph 2:

"Moreover the things done during the Ordinance can be sued and can sue by the parent department for whom 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…..

But before 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. File be consigned to the record room".

31. The spotlight then moves to the ICC. On 19 May 1998, Kearns & Co., solicitors for Dallah, wrote to the ICC and requested arbitration against the MORA, Government of Pakistan. Dallah nominated Lord Mustill as its arbitrator. The letter of 19 May enclosed Points of Claim on behalf of Dallah, naming Dallah as Claimant and the GoP as Respondent. Paragraphs 18 and 19 of the Points of Claim state:

"18. On 19.01.97 the Secretary, Ministry of Religious Affairs of the Respondent [ie. the MORA], acting on behalf of itself as principal and on behalf of the Trust, purported to repudiate the Agreement….

19. The letter of 19.01.97 amounted to an unlawful repudiation of the Agreement and evinced an intention on the part of the Respondent [ie. the MORA] not to be bound by its terms. The Respondent continues to refuse to implement the Agreement. Accordingly the Claimant has accepted the Respondent's repudiation".

32. Paragraph 23 of the Points of Claim sets out the arbitration clause in the Agreement, ie. clause 23. It asserts that the "Respondent was at all material times a party to the Agreement and the Arbitration Agreement".

33. The ICC notified the GoP of Dallah's request for arbitration. On 5 June 1998, Messrs Walker Martineau Saleem, advocates and legal consultants in Islamabad ("WMS"), replied to the ICC on behalf of the MORA. The letter stated that the MORA had filed legal proceedings before the Court of the Civil Judge First Class, Islamabad and a hearing had been fixed for 13 June 1998. The letter referred to section 35 of the Arbitration Act 1940, which provides (broadly) that once legal proceedings concerning the whole of the subject matter of the reference have been started, then all further proceedings in the reference will be invalid, unless a stay of legal proceedings has been granted under section 34 of that Act. The letter also quoted section 35(2) of that Act, which provides: "In this section the expression "parties to the reference" includes any person claiming under any of the parties and litigating under the same title". The letter concluded "…in view of the above legal provision the arbitration proceedings cannot proceed". It also included a copy of an order that had been made by the judge in the proceedings to which the letter referred.

34. The MORA had indeed started new proceedings before the Court of the Senior Civil Judge, Islamabad, on 2 June 1998. The plaintiff was named as the "Islamic Republic of Pakistan through Secretary, Ministry of Religious Affairs, Government of Pakistan, Islamabad". Dallah was named as the defendant. The terms of the claim are identical to those that had been dismissed by the judge in the previous proceedings brought by the Trust, including the claim for a permanent injunction in the same terms. The new claim explains (in paragraph 2) that because Ordinance LXXXI of 1996 dated 12 August 1996 "stood repealed," then the Trust established under the Ordinance "no longer remained in field", so that the "…present suit is, therefore, being filed by Pakistan who issued the said Ordinance". Paragraph 14 refers to the terms of the order of the judge in the previous proceedings. Paragraph 15 then states:

"That the cause of action accrued to the plaintiff against the defendant at Islamabad firstly when the defendant entered into the Agreement and thereafter when it defaulted in fulfilling the pre-conditions of the Agreement and the same was repudiated and finally in January 1997 when it refused to treat the Agreement as repudiated".

The claim was verified by Mr Lutfallah Mufti, this time in his capacity as Secretary, MORA.

35. The Civil Judge ordered that a notice should be sent to Dallah, inviting it to appear at a hearing on 13 June 1998. In the meantime Dallah was restrained from representing or holding itself out as having contractual relations with the GoP on the basis of the Agreement. This was the order that accompanied the letter of WMS to the ICC dated 5 June 1998, which I mentioned above.

36. On 12 June 1998 Dallah applied for a stay of those proceedings, pursuant to section 3 of the Arbitration (Protocol and Convention) Act 1937 and section 34 of the Arbitration Act 1940. Dallah relied on the arbitration provision in clause 23 of the Agreement, to which it was said that the MORA was a party. The MORA replied that there was no valid and effective Agreement

between the parties because it had never become effective. It is implied, therefore, that there was no valid arbitration agreement between the parties. However, the GoP did not specifically deny that it was a party to the Agreement or the arbitration clause: only that it had not come into effect. The GoP also took the point that, in the ICC proceedings, Dallah had made a claim against the MORA, which the GoP said was not a juristic person and so those proceedings were "not tenable in law".

37. On 18 September 1998, the Civil Judge First Class dismissed Dallah's application for a stay. He did so on various grounds. He concluded that the GoP was not a signatory to the Agreement and that the MORA was not a juristic person. He also held that Dallah had not put forward any evidence of a transfer of rights and obligations of the Trust. He held that there could only be a stay if there was a reference or submission by both parties before the court. He also held that the relevant Arbitration Act did not apply to foreign arbitrations.

38. Dallah appealed to the District Court against that ruling. Whilst the appeal was pending, counsel for the MORA applied to withdraw the proceedings on the ground that it suffered from a "formal defect". On 14 January 1999 the District Judge ruled that the MORA was entitled to withdraw its suit and he permitted it be done. He also ruled that "after withdrawal of the suit, the instant appeal has become infructuous and is disposed of…".

39. Meanwhile, the GoP took only a very limited part in the ICC arbitration proceedings. A letter from WMS dated 15 August 1998 to the ICC Secretariat stated that it would not submit to the jurisdiction of the International Court of Arbitration because there was no contract or arbitration agreement between the GoP and Dallah. On 16 September 1998 the Court of Arbitration appointed Mr Justice Dr Shah as the arbitrator for the GoP, because it had not nominated one itself. On 21 October 1998, the Court of Arbitration nominated Dr Ghaleb Mahmassani as chairman of the tribunal.

40. The next series of steps, which I will deal with together, concern further proceedings in Pakistan. On 12 January 1999, the GoP filed a further suit against Dallah in the Court of the Senior Civil Judge, Islamabad. This was an application under section 33 of the Arbitration Act 1940.[9] The suit sought six declarations in particular. The first was that Pakistan was not the legal representative, successor or assignee of the "defunct" Trust. The second was that Pakistan had not taken on the responsibilities of the defunct Trust. The third was that there was no privity of contract between Pakistan and Dallah and that Pakistan was not a signatory to any arbitration agreement. The fourth was that the Agreement was invalid and so could not form the basis of any arbitral reference to the ICC. The fifth was that the arbitral proceedings of Dallah, "being against a non – juristic person, ie. MORA, Islamabad, are incompetent". The last was that the Agreement was contrary to the public interest and void. At the same time the GoP applied for a stay of the arbitration, pending disposal of its main claims. These applications were verified by the then Secretary of the Ministry of Religious Affairs, Mr Saiyed Siddiqui.

41. Dallah objected to these applications on the ground that the GoP did not have locus standi to make an application under section 33 of the Arbitration Act 1940 of Pakistan, because the GoP denied being a party to the arbitration agreement in clause 23 of the Agreement and also disclaimed any relationship with the Trust. On 19 June 1999, the Civil Judge First Class, Islamabad, ruled in favour of Dallah's arguments and so dismissed all the applications of the GoP.

42. The GoP filed a "Revision Petition" in the Court of the District Judge, Islamabad, in which it maintained its applications that had been dismissed by the Civil Judge First Class. The Court of the District Judge dismissed the Revision Petition on 25 October 2000 on the same grounds as the Civil Judge First Class.[10]

43. The GoP then filed a second Revision Petition in the Lahore High Court. This was also dismissed. In doing so, the judge in the High Court made observations on whether the GoP was a party to the Agreement or clause 23 of it. He said:

"I therefore do find that the learned trial judge has very correctly found that the petitioner GoP is neither a party to the said agreement nor it claims under any of the parties to the same. This being so the petitioner cannot be proceeded against under the said arbitration agreement which forms part of the said agreement dated 10.9.1996".

44. On 6 June 2003 Dallah filed an appeal in the Supreme Court of Pakistan. On 17 July 2006 (sic) the Supreme Court gave leave to consider a number of points. One of the points taken in the Petition concerns the effect of Article 264 of the Constitution of Pakistan when, as here, an Ordinance lapses and, as a result, a statutory corporation ceases to exist. This issue is relevant in the present application, as I explain below.

45. Meanwhile in the ICC arbitration the Terms of Reference were signed by the arbitrators and Dallah at a hearing on 26 March 1999. Those were approved by the ICC on 17 April. The seat of the arbitration was determined to be Paris, France. The GoP refused to participate in the arbitration proceedings or sign the Terms of Reference.[11]

46. The tribunal decided that it should deal with the issue of its jurisdiction first. It posed the following question for answer:

"Does an agreement to arbitrate under the ICC Rules exist between the Claimant [ie. Dallah] and the Defendant [ie. the GoP] and does the Arbitral Tribunal have jurisdiction in respect to the Defendant over the claims submitted by the claimant in the present case?".

47. On 23 July 1999 Dallah served its submissions and documents on that issue. On 11 September 1999 the GoP submitted, without prejudice, its written observations with attachments. An oral hearing took place on 17 September 1999, which was attended by representatives of Dallah but not the GoP. In a letter dated 15 October 1999, the tribunal asked for further assistance from the parties. On 17 November 1999 the GoP served, without prejudice, a "Memorial" addressing the matters raised by the tribunal. Dallah served a response on 19 November 1999. A further oral hearing took place on 27 March 2000 in Paris. The GoP did not attend and was not represented. Dallah made further submissions and produced more documents both then and subsequently.

C. The ICC First and Second Partial Awards and the Final Award

48. The First Partial Award ("FPA") was rendered in Paris on 26 June 2001. It dealt solely with the issue of jurisdiction. The conclusion of the tribunal was unanimous, although the arbitrators did not agree on all points in their reasoning. The tribunal held that "the Ministry of Religious Affairs, Government of Pakistan", which was named as Defendant, was bound by the arbitration agreement in clause 23 of "…the Agreement with the Claimant dated 10 September 1996". Therefore "an agreement to arbitrate under the ICC Rules exists between the Claimant and the Defendant, and such Defendant is the proper Defendant party to the Arbitration". The tribunal also held that the dispute submitted to arbitration by Dallah fell within clause 23 of the Agreement "…as it is a dispute arising out of such Agreement between the Claimant and the party determined to be a contracting party to such Agreement by the Arbitral Tribunal". Accordingly, the tribunal held it had jurisdiction in respect of the GoP over the claims submitted by Dallah in the reference.

49. I will have to consider the findings and reasoning of the tribunal in more detail later in this judgment, but there are several points to note at this stage. First, the tribunal characterised the

question it had to answer as "…whether or not an agreement to arbitrate the present dispute exists between [Dallah] and [the GoP]".[12] Secondly, the tribunal decided that, given the internationally accepted rule that an arbitration agreement is autonomous from the "main agreement" between parties, it was not necessary to decide on the applicable law to the main agreement. As far as the "Arbitration Agreement" is concerned, the tribunal concluded that "such Agreement is not to be assessed, as to its existence, validity and scope, either under the laws of Saudi Arabia or under those of Pakistan, nor under the rules of any other specific local law, connected or not, to the present dispute". As I read the FPA, this reference to the "Arbitration Agreement" is a reference to clause 23 of the Agreement, not a reference to any further agreement to refer the particular dispute that had arisen to arbitration.[13] Instead, the tribunal held it should decide the issue of its jurisdiction and all matters relating to the validity and scope of the arbitration agreement (ie. clause 23 of the Agreement) and therefore whether the GoP is a party to it and to the arbitration, "…by reference to those transnational general principles and usages reflecting the fundamental requirements of justice in international trade and the concept of good faith in business".[14] Thirdly, the tribunal characterised the test to be applied to see if the GoP was bound by the arbitration clause in the following terms:

"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 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".[15]

50. Using that test, the tribunal analysed the whole history of the venture between Dallah, the GoP and the Trust from the outset of negotiations to the letter of WMS to the ICC on 5 June 1998. Having done so it concluded:

"13. 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."

51. Dr Mahamassini also concluded that "the requirements of good faith and morality" demanded that the GoP be bound by both the Agreement and the arbitration agreement. However, the FPA records that Dr Justice Shah and Lord Mustill were "not convinced" that a duty of good faith could operate "to make someone a party to an arbitration who on other grounds could not be regarded as such". Nonetheless the three arbitrators agreed on the result, which they regarded as conforming with "the general justice of the case".[16]

52. The GoP asked the tribunal to adjourn the hearing of the merits of Dallah's case pending resolution of the proceedings in Pakistan. The tribunal rejected that application after a hearing in April 2003. The Second Partial Award was rendered in Paris on 19 January 2004. In this award the tribunal made the following determinations on the merits of Dallah's claim: (i) the law applicable to the merits of the case was that of Saudi Arabia; (ii) the MORA was a "true party to the Agreement" and so was bound by it; (iii) the Agreement was valid; (iv) the letter of 19 January 1997 addressed to Dallah "by the defendant [ie. the MORA]" constituted an unlawful

repudiation of the Agreement "…entailing the liability of the Defendant for such repudiation"; (v) therefore Dallah was entitled to compensation for its claims for damage suffered as a result of that repudiation; (vi) damages would be assessed in a further award.

53. In the Final Award, rendered on 23 June 2006, the tribunal ordered the GoP to pay Dallah US$ 18,907,603 by way of damages for breach of the Agreement. It also ordered the GoP to pay Dallah's costs and the tribunal's fees and expenses, totalling US$ 1,680,437, making a grand total payable by the GoP of US$ 20,588,040.

D. The proceedings for recognition and enforcement of the Final Award and the application of the GoP to set them aside

54. On 10 July 2006 Dallah made an ex parte application to the Commercial Court pursuant to section 101 of the Act for leave to enforce the Final Award as a judgment of the High Court. Gloster J granted that order on 12 July 1996. Unfortunately paragraph 2 of the order, which (in accordance with Commercial Court practice[17]) had been drawn up by the Claimants' solicitors, failed to provide properly for the time in which the GoP, as a state entity, could apply to set aside the order.[18] Therefore Dallah resubmitted its application. The order of Christopher Clarke J. dated 9 October 2006 set aside Gloster J's order and granted Dallah permission to enforce the Final Award in the same manner as a judgment or order of the High Court, giving the GoP 2 months and 23 days after service to apply to set the order aside.

55. On 19 February 2007, WFW, solicitors for the GoP, applied to the court to extend the time for applying to set aside the order of Christopher Clarke J by six weeks. The reasons for doing so were set out in a witness statement of Mr David Kavanagh, solicitor with WFW. At paragraph 5 of his statement, Mr Kavanagh records that the GoP had been considering with its French lawyers whether the GoP could challenge the Final Award (and possibly the Partial Awards) in the French courts.[19] The statement continues:

> "A successful challenge to the award(s) in France would have provided the [GoP] with a ground to resist enforcement in England on the basis of section 103(2)(f)[20] of the Arbitration Act 1996. This process in itself took a substantial amount of time….Having carefully considered the advice provided by its French lawyers, [the GoP] has decided not to challenge the award(s) in France".

56. By a Consent Order made on 23 February 2007, Langley J extended the time for the GoP to apply to set aside Christopher Clarke J's order until 23 March 2007. The application was duly issued on that day, leading to the present hearing.

E. The Provisions of the New York Convention 1958 and the Act

57. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 ("the Convention") was signed on 10 June 1958. Both the UK and France are parties to it. On the first issue that has to be considered it will be necessary to examine Articles II, III, IV and V, so I have reproduced them in Annex 4 to this judgment. Statutory effect to the Convention was first given in England and Wales (and Northern Ireland) by the Arbitration Act 1975. That Act was repealed by the 1996 Act and effect was given to the Convention by Part III of the latter Act in sections 99 – 104. I have set out sections 100 – 103 in Annex 5 to this judgment. Broadly, Article V of the Convention is covered by section 103 of the Act. Section 103(2)(a) and (b) deal with Article V.1(a) of the Convention. As I have already indicated, the main argument before me concerns section 103(2)(b) of the Act. This provides that recognition or enforcement of a Convention award may be refused if the person against whom it is invoked proves 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".

F. The Issues raised on the application and the parties' positions on them.

58. Mr Landau and Miss Heilbron stated that there were a number of points of common ground and some issues which were not going to be argued at this hearing. These can be summarised as follows: (1) The GoP is not named as a party to the Agreement or the arbitration clause (clause 23), nor did it sign any part of the Agreement. (2) The Agreement named the Trust as a party and the Agreement was signed and concluded on behalf of the Trust. (3) The Trust was, under Pakistani law, established as a statutory corporation with a legal personality and the capacity to contract. (4) At all relevant times the GoP and the Trust were separate legal entities with distinct legal personalities as a matter of Pakistani law.[21] (5) Upon the lapse of Ordinance LXXXI of 1996 at midnight on 11/12 December 1996, the Trust ceased to exist as a legal entity. (6) The parties to the "arbitration agreement" (whoever they might be and whatever that is taken to be – see below) did not identify any particular law to which the "arbitration agreement" was "subjected" for the purposes of section 103(2)(b) of the Act. Therefore any question concerning the validity of the "arbitration agreement" had to be decided according to the law of the country where the Final Award was made, viz. France.[22] (7) No separate argument would be advanced by the GoP on its ability to claim state immunity from these proceedings in its capacity as a state entity, but it reserved its position on that issue both in this jurisdiction and elsewhere.

59. In the light of these agreements, I have attempted to summarise the issues for decision and the parties' positions on them.

60. Issue One: What is the correct construction of section 103(2)(b) of the Act? This raises three separate questions. First, what is being referred to by the phrase "the arbitration agreement" in that section? As I have already pointed out,[23] under English law this could mean the agreement to refer future disputes to arbitration, ie. in this case, clause 23 of the Agreement. Or it could mean an agreement between parties to refer a particular dispute to arbitration, pursuant to the first arbitration agreement.

61. The second question is: what does the phrase in section 103(2)(b) "the arbitration agreement was not valid" cover? Does it include an argument that the party against whom an award is invoked was not bound by the arbitration agreement on which the arbitral tribunal founded jurisdiction?

62. The third point concerns the ambit of the phrase at the end of section 103(2)(b) – "…within the law of the country where the award was made". Does this mean that the English court must consider only the domestic law of the country where the award was made; or does it entitle the English court to look at a third country's laws if, by virtue of the conflict of laws rules of the law of the country where the award was made - or otherwise - that law would do so in order to decide whether "the arbitration agreement" is valid?

63. Mr Landau and Miss Heilbron were largely agreed on the answers to these three questions. On the first question they agreed that "arbitration agreement" in section 103(2)(b) meant a reference to clause 23, ie. the agreement to refer future disputes to arbitration. On the second question they agreed that an argument on whether someone was a party to the arbitration agreement was covered by the phrase "the arbitration agreement was not valid". On the third issue, I have set out the agreed position below.[24] As a result I must consider Pakistani law to a limited extent.

64. Although there is no significant disagreement between counsel on these issues, they call for some explanation.[25] I have set out my analysis on the first and third questions later on in this

judgment. However, because the explanation on the second question is more extended, I have decided to make it Annex 6 of this judgment.

65. Issue Two: When a party challenges the recognition and enforcement of a Convention award under section 103(2)(b), what is the scope of the enquiry that the court has to undertake? Is it in the nature of a full hearing of all the relevant evidence, as Mr Landau submits, or, at least in this case, is it more in the nature of a review of the decision of the arbitrators on the issue of jurisdiction, as Miss Heilbron argues?

66. Issue Three: Given that questions of the validity of the arbitration clause have to be decided by principles according to French law, what are the French law principles by which to decide whether the GoP was and is bound by the arbitration agreement in clause 23 of the Agreement between Dallah and the Trust? The parties and the French law experts were largely agreed on these although there were differences of emphasis between the witnesses, in particular over two questions. The first is the extent to which French law will apply principles of "transnational law" to this issue. The second is the extent to which French law demands that a court is more cautious before concluding that a state is bound by an arbitration agreement. I will set out the areas of agreement and disagreement of the French law experts in more detail when I consider this issue.

67. Issue Four: If the English court is entitled to take account of Pakistani law for the purposes of determining whether the GoP is bound by the arbitration clause,[26] then the next issue concerns Article 173 of the Pakistan Constitution. The issue is: does Article 173 of the Constitution state a mandatory rule that the State of Pakistan can only validly enter into and be bound by an agreement provided that such agreement is made in the name of the President of Pakistan and is executed on his behalf by such person and in such manner as the President may direct or authorise?[27] Mr Landau submits that it so provides. Miss Heilbron argues that Article 173 is only directory and if a contract is concluded in the name of "the Ministry of Religious Affairs" or some other government title other than the President, the contract will not be void and would bind the GoP.

68. Issue Five: Applying the relevant principles of French law (and taking account of any "transnational law" and Pakistani law principles that may be relevant according to French law), what is the answer to the question of whether the GoP is bound by the arbitration agreement? Mr Landau submits that the GoP is not bound by it. Miss Heilbron submits the opposite.

69. Issue Six: Assuming that, applying French law principles, the GoP is not bound by the Agreement and the arbitration clause, has the GoP satisfied the burden of proving, for the purposes of section 103(2)(b), that the arbitration agreement in clause 23 is not valid? Given that the burden of proof under section 103(2) is upon the party that wishes a court to refuse recognition and enforcement of the Convention Award, logically there is a further step between a conclusion, under French law, that the GoP is not bound and a conclusion that the GoP has proved, to the relevant English law standard of proof, the issues that have to be demonstrated to satisfy section 103(2)(b). This may involve no extra considerations, on the facts of particular cases, but I think that, formally, this is a separate issue.

70. Issue Seven: Assuming that the court is satisfied, for the purposes of section 103(2)(b) of the Act, that the GoP has proved that the arbitration agreement is not valid because the GoP is not bound by the arbitration agreement in clause 23 of the Agreement, is the GoP nonetheless prevented, by virtue of an issue estoppel arising out of the tribunal's First Partial Award on jurisdiction, from asserting that it is not so bound? Miss Heilbron, relying on the decision of the Court of Appeal in Svenska Petroleum Exploration AB v Government of the Republic of Lithuania and another (No 2),[28] submits that there can be and is such an issue estoppel, thus preventing the GoP from relying on section 103(2)(b) to set aside the ex parte order for recognition and enforcement of the Final Award. Mr Landau accepts that issue estoppel could

arise in theory. But he submits that in this case there is no issue estoppel because no tribunal of competent jurisdiction has decided the relevant issue that arises as between Dallah and the GoP, under section 103(2)(b) of the Act, in accordance with the relevant law, ie. French law. He reserved any points that he might have to make on State Immunity in relation to this issue.

71. Issue Eight: Even if the court concludes the GoP has proved that it was not bound by the arbitration agreement and it also concludes that the GoP is not bound by an issue estoppel as to the validity of the arbitration clause, should the court exercise a discretion, under section 103(2) of the Act, to recognise and enforce the Final Award against the GoP? Miss Heilbron submits that there is a residuary discretion to do so that should be exercised in this case. Mr Landau submits that, on the proper construction of section 103(2), there is no such residuary discretion and even if there is, it should not be exercised in this instance.

72. Issue no longer being pursued: If, on principles of French law (and any other laws it is legitimate to consider), it was not the common subjective intention of the parties that the GoP be bound by the arbitration clause directly, then a further issue of French and Pakistani law might have arisen. The French law experts agree that, as a matter of French conflict of laws rules, Pakistani law would govern issues concerning the effect of the lapse of the Ordinances and whether the GoP thereupon became the successor to the non - existent Trust.[29] The only argument that was originally raised in these proceedings on this aspect of Pakistani law was whether the GoP became the successor to the rights and obligations of the Trust, including the obligation to arbitrate, (so that the GoP would become bound by the arbitration agreement) by virtue of Article 264[30] of the Constitution of Pakistan,

73. However, the position has changed as a result of the evidence in the hearing. During the cross – examination of Dallah's Pakistani law expert, Dr Pirzada, I asked him a question about the effect of Article 264.[31] Dr Pirzada accepted that Article 264 would not, of itself, make the GoP the successor to the Trust once the latter ceased to exist. Mr Landau submitted that there is no evidence of any other mechanism, under Pakistani law, whereby the GoP could become the successor of the Trust upon its demise. Miss Heilbron accepts, (for the purposes of this application only),[32] that there is now no evidence before the court to establish that it would be possible in a Pakistani court for Dallah to bring a claim against the GoP, based on a case that, by virtue of Article 264, the Agreement and the arbitration agreement were transferred to the GoP from the Trust upon its demise. Miss Heilbron also accepts that there is no evidence before this court of any other mechanism to do so by Pakistani law. However, Miss Heilbron maintains her submission that the effect of Article 264 is to preserve rights that have arisen under the Agreement at the time the Trust ceased to exist. She submits that this is relevant to the overall factual enquiry that the French court would undertake. Miss Heilbron also submits that it is relevant to questions of "good faith" which a French court would take into account in deciding whether the GoP is a party to the arbitration agreement.

G. Issue One: The correct construction of section 103(2)(b) of the Act.

74. Question (1) Which "arbitration agreement" is being referred to in section 103(2)(b) of the Act?

As I have already pointed out, under English law, if parties have agreed to submit future disputes to arbitration, then when a dispute arises and they submit that particular dispute to specific arbitrators, it gives rise to a further arbitration agreement, commonly called "the reference to arbitration".[33] This is sometimes called the doctrine of "double separability". Although other systems of law draw a distinction between the underlying arbitration agreement and the individual reference, unlike English law they do not analyse it in terms of separate contracts which might have distinct governing laws. Article V of the Convention expressly distinguishes between the underlying arbitration agreement and the individual reference. Article

V(a) speaks of "the agreement referred to in Article II" and "the said agreement is not valid". The cross – reference to Article II indicates clearly that the "arbitration agreement" being referred to in Article V(a) is the underlying arbitration agreement. In contrast, Article V(c) refers to "the submission to arbitration", which is clearly intended to point to the individual reference of the present dispute between the parties. This analysis of the Convention is supported by the authoritative commentary on the Convention by Van den Berg, published in 1981.[34]

75. This distinction is reflected in the structure of section 103(2) of the Act. The phrase "arbitration agreement" is defined for the purposes of Part III of the Act (in section 100(2)(a)) as being an "arbitration agreement in writing", and that is given the same definition for Part III as it has for Part I of the Act. Although the phrase "arbitration agreement" as defined in section 6(1) of the Act (in Part I) covers an agreement to submit both present or future disputes to arbitration, the sense of "arbitration agreement" in section 103(2)(a) must be taken from the rest of that section and the meaning given to it in the Convention. Thus it is to be contrasted with the phrase "submission to arbitration" in section 103(2)(d), which clearly encompasses the individual reference of a present dispute.[35]

76. The consequence of this analysis is that, assuming that section 103(2)(b) covers issues of whether an entity is bound by "an arbitration agreement", the focus has to be on the agreement to refer future disputes to arbitration, not the individual reference. In this case, therefore, that means focusing on the issue: was the GoP bound by clause 23 of the Agreement?

77. Issue One: Question (2) Does the phrase "..the arbitration agreement was not valid" in section 103(2)(b) of the Act cover the case where the party against whom the award is invoked (party A) wishes to prove that he is not a party to or otherwise bound by the arbitration agreement that gives the arbitral tribunal jurisdiction to make the award that is sought to be enforced?

Imagine party A is the party against whom an award is invoked. The question is: if party A succeeds in the argument that it is not bound by the arbitration agreement, then does it follow that, for the purposes of section 103(2)(b), the relevant arbitration agreement is therefore "not valid" as between the party wishing to enforce the award and party A? I was initially a little sceptical of Mr Landau's submission that this type of argument was covered by section 103(2)(b). My first reaction would be to interpret the phrase "the arbitration agreement is not valid" as giving rise, not to questions of who is bound by it, but to issues concerning formal validity, such as whether, under the applicable law of the arbitration agreement, it had to be in a certain form, or signed by the parties and such like matters.[36] However, once Mr Landau referred me to the analysis of Mance LJ in Dardana Ltd v Yukos Oil Co and Petroalliance Services Co Ltd,[37] I accepted that I must be wrong and was, in any case, bound by Court of Appeal authority. I will not therefore set out here my own analysis. I have done so in Annex 6 to this judgment for anyone who is interested.

78. Issue One: Question (3): Does the phrase "within the law of the country where the award was made" in section 103(2)(b) include a reference to the conflict of laws rules of that country?

On this issue, counsel agree that the part of Article V(1)(a) of the Convention which is dealing with the validity of the arbitration agreement establishes two conflict of laws rules. The first is the primary rule of party autonomy; the parties can choose the law that governs the validity of the arbitration agreement. In default of that agreement, the law by which to test validity is that of the country where the award to be enforced was made. Van den Berg, in his authoritative commentary on the Convention[38] states that it has never been questioned that these are to be treated as "uniform" conflict of laws rules. Therefore, logically, the reference to "the law of the country where the award was made" in Article V(1)(a) of the Convention and the same words in section 103(2)(b) of the Act, must be directed at that country's substantive law rules, rather than its conflicts of law rules.[39] In this case, it means I must have regard to French substantive law and not its conflict of laws rules. In this regard, I note that paragraph 2.6 of the

Joint Memorandum of the French Law experts states the following:

"Where a French court is called upon to decide the challenge of an arbitral award rendered by a tribunal seated in France, it has not to apply French conflict of laws in order to determine whether the arbitral tribunal has jurisdiction".

79. However, counsel also point out that, on the question of whether a party is bound by an arbitration clause, the approach of substantive French law is to have a broad factual enquiry into the issue. This allows for consideration of all the circumstances of the case. In their evidence, despite this statement in the Joint Memorandum, the French law experts agree that this factual enquiry can extend to the consideration of issues of foreign law in specific circumstances. I think that the rationale for this approach, at least in the present case which involves the question of whether a state entity is bound, is that a State's activities and its intentions in doing various things must be viewed against the background of the legislation of that State and any other applicable laws. Thus the position of the GoP, its power to contract and whether it intended to be bound by contractual terms must all be judged against the constitutional, legislative and general legal background of Pakistan at the time. This was certainly the approach of the Cour d'appel, Paris, in its decision of 12 July 1984, the so – called "Pyramides" case.[40] That is a leading case in French law on the question of whether a state is bound by an arbitration clause. I accept the rationale set out in that case for the purposes of deciding whether, in this case, the GoP is bound by the arbitration clause.

80. Therefore, it is agreed that, if I put myself in the position of a French court when considering whether the GoP is bound by the arbitration agreement in clause 23 of the Agreement, I should consider the one remaining issue of Pakistani law. This concerns the true effect of Article 173 of the Constitution: is there a mandatory rule that the State of Pakistan can only validly enter into and be bound by an agreement provided that such agreement is made in the name of the President and it is signed by a duly authorised person? I analyse this point under Issue Four.

H. Issue Two: When a party challenges the recognition and enforcement of a Convention award under section 103(2)(b), what is the scope of the enquiry that the court has to undertake?

81. The suggested dichotomy is between a total re-hearing of all relevant evidence, as opposed to a review of the decision of the arbitral tribunal. In arguing for the more restricted approach of a review, Miss Heilbron pointed out that this is not an appeal from an award on jurisdiction, to which section 67 of the Act would apply. Therefore the decisions[41] that hold that appeals under section 67 should be by way of re-hearing are not relevant. Miss Heilbron submitted that international comity and the general "pro – enforcement" approach of both the Convention and Part III of the Act, suggested that a limited enquiry should be carried out by the English court if a party made an application under section 103(2)(b).

82. I cannot agree with this submission. It seems to me that I am bound by the wording of the Act itself, which reflects faithfully that of the Convention. A party who wishes to persuade a court to refuse recognition or enforcement of a Convention award has to prove one of the matters set out in paragraphs (a) to (f) of section 103(2). Those paragraphs are definitive of what a party can prove in order that a court "may" refuse recognition or enforcement of a Convention award. If a party has to "prove" a matter, that must mean, in the context of English civil proceedings, prove the existence of the relevant matters on a balance of probabilities. Challenges under section 103(2) will be challenges to the recognition and enforcement of awards that have been made in a country other than England and Wales. Therefore, so far as English law is concerned, the matters set out in paragraphs (a) to (f), including issues of foreign law, are all matters of fact.

83. Thus, a party must be entitled to adduce all evidence necessary to satisfy the burden of proof

on it to establish the existence of one of the grounds set out in section 103(2). I accept, of course, that questions of issue estoppel may arise (as in this case), which would prevent one or other party re-fighting issues of fact that have already been specifically argued and decided, as between those parties, "on the merits" by a competent tribunal.[42] But, subject to that constraint, it seems to me that the statutory wording of section 103(2) requires that the party wishing to challenge the recognition and enforcement of a Convention award must be entitled to ask the court to reconsider all relevant evidence on the facts (including foreign law), as well as apply relevant English law.

84. I have already set out the test that the arbitrators stated had to be applied to see if the GoP was a party to the arbitration clause.[43] The GoP's French law expert, M. Le Bâtonnier Vatier, accepted that, in general, the arbitrators had applied the correct test as would be enunciated by a French court.[44] However, it seems to me, on the correct construction of section 103(2) that despite this concession, I cannot evade going through the exercise of considering all the relevant evidence to see whether the GoP has proved (applying French law principles) that it is not a party to the arbitration clause, which is therefore not valid. The exercise is, to that extent, a rehearing, not a review.

I. Issue Three: What are the principles of French law by which to decide whether the GoP was and is bound by the arbitration agreement in clause 23 of the Agreement?

85. The French law experts set out in their Joint Memorandum the following principle of French law on which they are agreed: [45]

"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."

"When a French court has to determine the existence and effectiveness of an arbitration agreement over the parties to an arbitration which is founded upon that agreement, and when for these purposes it must decide whether the said agreement extends to a party who was neither a signatory nor a named party thereto, it examines all the factual elements necessary to decide whether that agreement is binding upon that person".

86. The experts agree that those principles also apply when the issue is whether a State is bound by an arbitration agreement.[46]

87. The agreement on this area was elaborated in oral evidence. Both experts agreed that 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.[47] 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.[48]

88. In four leading cases in the Paris Cour d'appel, to which M. Derains specifically referred in his report, identical wording is used concerning the French law's approach to whether non – signatories are bound by an arbitration clause. M. Derains confirmed that this is the French "jurisprudence constante". The formula is, in translation:

"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." [49]

89. As I read the rule as stated in those cases, the court has to decide (1) whether the non – signatory party was "implicated in the performance of the contract"; and (2) to see if it accepted the terms of the arbitration clause. In performing the latter exercise, it has to be demonstrated that the non – signatory was aware of the existence and scope of the arbitration clause. M. Derains accepted in cross – examination that this expression of the test by the Cour d'appel of Paris did not detract from the basic quest, which is to find the common will of the parties.[50]

90. The experts agreed that when a French court is considering the question of the common intention of the parties, it will take into account "good faith".[51]

91. The French law experts also agree that, under French law, a State that enters into an arbitration agreement thereby waives its immunity from both jurisdiction and execution.[52] However, there was disagreement on the weight that French law would give to this fact if a tribunal has to decide whether a State or emanation of a State had become part of a common intention to be bound by the arbitration agreement. M. Le Bâtonnier Vatier's evidence was that the tribunal that has to decide whether a State entity is bound by an arbitration agreement will have to consider whether the state entity appreciated that it could thereby lose immunity from jurisdiction and execution under French law. M. Derains' evidence was that a tribunal would not take this into account as a separate factor. The loss of immunity was no more than a consequence of adherence to the arbitration agreement. In my view 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 loose its state immunity if it were to become a party to the arbitration agreement. It is no more than one factor amongst many.

92. The French law experts also agree the following principle in relation to how French law will regard "transnational" law on the issue of the existence, validity and effectiveness of an arbitration agreement in an international arbitration agreement. Paragraph 2.8 of the Joint Memorandum states:

"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".

93. As I read this statement, the second sentence states a general principle of French law which permits a court to hold that an arbitration agreement is governed by a system of law other than a national law. The first sentence stipulates that, as a matter of French law, "transnational law" can be applied to issues of the specific questions of the existence, validity and effectiveness of an arbitration agreement in an international arbitration. I think that both of these principles must be regarded as French conflict of laws rules. The statement cannot, of course, identify any principles of "transnational law" by which to test the existence, validity and effectiveness of an arbitration agreement in an international arbitration. That, I suppose, is a matter for a "transnational law" expert; none gave evidence before the court.

94. The French law experts were also asked to consider whether there was a rule applicable to international arbitrations that if a person or legal entity behaves as if it were the legal successor or beneficiary of a defunct or dissolved legal entity (which had been a party to an arbitration agreement), then that second person or legal entity becomes bound by the arbitration agreement. M. Le Bâtonnier Vatier's evidence was that there was no such rule of French law. It depends on the role that the successor entity takes and whether it becomes involved in the contract in such a way as to consent to being bound by the arbitration clause.[53] M. Derains emphasised that there is a difference according to the method of succession. If an entity is a successor as a matter of law, the successor will be bound by the arbitration agreement. But, it does not follow that it will be bound by the principal contract. That is an issue on the merits for the arbitral tribunal itself to determine.[54]

95. However, the position is different if the basis for asserting that the "successor" entity is bound is by virtue of its behaviour. If a legal entity appeared to be behaving as if it were the successor to the previous entity, (rather than there having been a legal transfer), then the question of whether it was bound by the arbitration clause would be decided by the usual general test of subjective common intention of the parties.[55]

96. Both experts agreed that Pakistani law governed the issue of the nature and status of the Trust and the effect of the lapse of the Ordinance.[56] There is no Pakistani law evidence before the court on whether the GoP became the successor of the Trust as a matter of law. Therefore I am only concerned with behaviour. On that aspect, the two French law experts are, in my view, agreed.

J. Issue Four: Pakistani law: does Article 173 of the Pakistan Constitution state a mandatory rule that the State of Pakistan can only validly enter into and be bound by an agreement provided that such agreement is made in the name of the President of Pakistan and is executed on his behalf?

97. As I have already stated, counsel agree that because a French court considering the issue of whether the GoP is bound by the arbitration agreement in clause 23 of the Agreement is bound to engage in a broad factual enquiry, a French court could consider relevant issues of Pakistani law. The only one that is now relevant is that concerning Article 173 of the Constitution of Pakistan. On this topic it is also necessary to refer to Article 99 of the Constitution. The relevant parts of those Articles provide as follows:

"CONSTITUTION OF PAKISTAN

CHAPTER 3 – THE FEDERAL GOVERNMENT

99. (1) All executive actions of the Federal Government shall be expressed to be taken in the name of the President.

(2) The President shall by rules specify the manner in which orders and other instruments made and executed in his name shall be authenticated and the validity of any order or instrument so authenticated shall not be questioned in any court on the ground that it was not made or executed by the President.

CHAPTER 3 - PROPERTY, CONTRACTS LIABILITIES AND SUITS

173. …….

(3) All contracts made in the exercise of the executive authority of the Federation or of a Province shall be expressed to be made in the name of the President, or, as the case may be,

the Governor of the Province, and all such contracts and all assurances of property made in the exercise of that authority shall be executed on behalf of the President or Governor by such persons and in such manner as he may direct or authorize."

98. I was told by both the Pakistani law experts that there are no rules for the construction of Articles of the Constitution of Pakistan that differ from the English law rules of statutory construction. Indeed, it is clear from the reports of the experts that Maxwell on Statutory Interpretation is still used by Pakistan's lawyers and judges.

99. The opinion of Mr Mandviwalla, called by the GoP, is that because the Agreement was signed by the Managing Trustee of the Trust, and was not expressed to be in the name of the President of Pakistan, therefore, by virtue of the wording of Article 173, it could not bind the GoP. Any contract that is intended to bind the GoP (ie. the Federal Government of Pakistan) must be made in the name of the President of Pakistan and with his authority. Article 173 is mandatory, not simply directory.

100. Mr Mandviwalla relied on the decision of Government of Pakistan v Shoaib Bilal Corporation, [57] which is a decision of a two member Division Bench of the High Court at Lahore. In that case the original contract and two "Annexures" were signed in the name of the President. The contract was then "rescinded" by an official, who did not have express authority to do so in the name of the President. At paragraph 11 of the judgment of Muhammad Muzammal Khan J. stated:

"Article 99 and 173(1)(3) of the Constitution require all the executive actions, including contracts made on behalf of Federal Government to be expressed in the name of the President. Any executive action, contract or rescission thereof, not so expressed in the name of the President, would be void. Appellants have neither referred to any letter by the President, equipping appellant No 2 with the authority to pass any such order nor have they produced any document of authority before the learned Single Judge in Chamber or during the course of he hearing of this appeal, as such we are unable to attach any kind of regularity or presumption as urged by learned counsel for the appellants…..This brings us to conclude that original contract having been expressed in the name of the President, could be rescinded only by the President and by no one else, below his rank, without authority from him".

101. Dr Pirzada, the Pakistani law expert for Dallah, gave the opinion that the provision of Article 173 is directory only. He relied on two earlier decisions by two member benches of the West Pakistan[58] High Court. These two cases held that directions in Article 135 of the 1956 Constitution were directory and not mandatory and that a contract otherwise completed would not be rendered void simply because it does not comply with the provisions of Article 135 of the 1956 Constitution.[59] Mr Pirzada stated that those two cases constitute decisions of a two member Division Bench of the High Court and such decisions are binding on a court of co-ordinate jurisdiction (such as that in the Shoaib case), so that those cases should prevail. In oral evidence he said that the Supreme Court of Pakistan had laid down guidelines for dealing with a situation where a court wished to differ from a decision of a court of co-ordinate jurisdiction. The second court cannot overrule or not follow the earlier decision. Instead it must ask the Chief Justice to constitute a larger court to reconsider the matter.[60] That was not done in the case of these later decisions.

102. In response, Mr Mandviwalla relied upon the decision of LaClaire Pakistan Corporation v Islamic Republic of Pakistan,[61] which had been decided before the Azim Khan case and by the same court. In the LaClaire case the court had to construe Article 175(3) of the Government of India Act 1935, which was in the same terms as Article 135(1) of the Constitution of Pakistan of 1956. The court decided that "the word "shall" in clause (3) of section 175 of the Act renders the compliance of the provision mandatory". However, that decision was not referred to in the

subsequent Azim Khan case.

103. In the light of this disagreement in both the cases and the opinions of the experts, if I had to decide the point I would do so on the basis of the materials I have, but sitting as if I were the Supreme Court of Pakistan ruling upon the issue.[62] But I do not think that I do need to decide the point, because of the way this issue arises. It does so in the context of whether a French court would conclude that there was a common, subjective, intention of all the parties (Dallah, the Trust, the GoP) that the GoP would be bound by the arbitration agreement. Plainly, if the effect of Article 173(3) of the Constitution of Pakistan made it mandatory that all contracts that were intended to bind the GoP must be expressed in the name of the President or else they would be void, then in this case, the lack of such an expression would militate strongly against there being any intention to bind the GoP to either the Agreement or the arbitration agreement. However, it seems to me that even if the correct construction of Article 173 is that it is only directory, it must also be a powerful factor against a conclusion that the common, subjective, intention of the parties was that the GoP should be bound by the Agreement. This must be so particularly when there is no reference at all to the GoP in the Agreement. But this is only one factor in many that the French court would consider before deciding finally on the common intention of the parties.

104. Before I go onto the next issue, I should mention one further point of Pakistani law which was debated by the experts to some extent. That was the question, whether the Hajj is a personal responsibility only or a governmental one under the law of Pakistan. The argument of Dallah was, as I understood it, that it is a governmental responsibility, therefore this is a factor which goes towards a common intention that the GoP intended to be bound by the Agreement and the arbitration clause. I would be most reluctant to make any finding on the nature of the responsibility for Hajj unless forced to do so. But I do not need to do so. As Mr Landau correctly pointed out, even if it is a governmental responsibility, part of it could be delegated to a statutory corporation set up by the state, ie. in this case the Trust. So this point does not assist Dallah.

K. Issue Five: Applying the relevant principles of French law, including any relevant principles of "transnational law" and Pakistani law, what is the answer to whether the GoP is bound by the arbitration clause in the Agreement?

105. As I have already stated, it is agreed that this analysis involves going through the chronology "from beginning to end", looking at the statements and actions of all the parties and the issue of good faith, to divine their subjective common intention. The arbitrators considered the facts under the following headings and I shall do likewise: (i) Negotiations; (ii) Signature (by which I include all the terms of the Agreement); (iii) performance of the Agreement; (iv) events following the repeal of the Ordinance, including the proceedings in Pakistan. Of necessity the focus will be almost entirely on the actions and inactions of the GoP and its officers viz a viz Dallah.

106. Negotiations: Miss Heilbron points first to the fact that the GoP, in particular the MORA, was involved from the outset in the project with Dallah. I accept that this was so. It is clear from the correspondence between Mr Shezi Nackvi and the MORA.[63] The GoP's involvement in the project is evident at the time of the MOU, which was signed on 24 July 1995 and was between Dallah and the GoP, through the President of Pakistan. The MOU contemplates, by clause 3, that Dallah would lease to the GoP both the land that it was to buy and the houses to be built on it, on a 99 year lease. Dallah had to submit the proposed plans to the GoP: see clause 5.

107. The Ordinance (VII of 1996, dated 31 January 1996), indicates that the GoP contemplated creating a statutory corporation to facilitate Hajj operations and connected matters. The chairman of the Trust's board was to be the Minister of Religious Affairs and the secretary to the board could be the Secretary of the Religious Affairs Division of the MORA. Article 12 of the Ordinance makes it clear that the Federal Government would maintain control over the rules that

the Trust wished to make to carry out the purposes of the Ordinance. So I would be prepared to accept, as the arbitrators found,[64] that the decree of the Ordinance was an exercise of sovereign power by the GoP; that the GoP thereby determined the objects and the scope of the powers of the proposed statutory corporation; and that the GoP would maintain control over the activities of the proposed trust by virtue of the composition of the board and control of the Trust's rule making power. The Trust was actually created by the exercise of the powers granted by the Ordinance when the Notification was made in the Official Gazette on 14 February 1996.

108. Thereafter the GoP continued to be involved in negotiations with Dallah. Mr Nackvi has stated that he continued to deal with the MORA and also the Prime Minister of Pakistan.[65]

109. Signature of the Agreement and its terms: The arbitrators pointed to three particular aspects of the Agreement which, they concluded, showed an involvement by the GoP. First, the signature of the Minister of Religious Affairs, although he signed as chairman of the board of the Trust. Secondly, the fact that the GoP was to provide a guarantee for the US$100 million financing that was to be provided by an affiliate of Dallah.[66] Thirdly, the unilateral right of the Trust to assign both its rights and obligations under the Agreement to the GoP, without the prior consent of Dallah.[67]

110. I do not regard these as powerful factors indicating that the GoP subjectively intended to be bound by the terms of the Agreement or the arbitration clause, or that this indicates a common intention to that effect. The obvious person to sign the Agreement on behalf of the Trust would be the chairman of its board. In fact it is the Managing Trustee (Mr Zubair Kidwai) who signed on behalf of the Trust. The GoP guarantee was to be a separate contract. Contracts frequently indicate that a third party is going to guarantee an obligation in the contract. That does not indicate that the third party and the parties to the contract all intended that the third party should be bound by the contract.[68]

111. In my view there are clear indications in the wording of the Agreement that the GoP did not intend to be bound by it. First, (and obviously) the GoP is not a party. Secondly, the fact that the obligations of the Trust and those of the GoP (to provide a guarantee) are kept separate. Thirdly, the assignment clause is a very strong indication that the GoP has no rights or obligations under this Agreement until such an assignment takes place.[69]

112. Perhaps most striking of all is the radical change from the position under the MOU. That had contemplated that the GoP would be a party to an agreement to implement the project. The change to the Trust being the counterparty had been noted by Mr Nackvi in a fax he sent to Dallah's lawyers, Orr Dignam & Company, dated 3 April 1996.[70] Dallah does not appear to have questioned the fact that the position in the MOU was to be changed so fundamentally. Nor does it seem to have been particularly concerned with the fact that the Trust would have limited funds, which would come only from subscriptions by pilgrims and from philanthropists. Dallah seems to have been content with the arrangement that it had bought the land in advance of the Agreement and it would not be obliged to start construction of the housing until the Trust had made the advance lease payment, which was to be financed by an affiliate of Dallah.[71]

113. Performance: The arbitrators referred to two particular letters between the MORA and Dallah after the Agreement was signed and before the Termination Letter of 19 January 1997 in support of their conclusion that the GoP was bound by the Agreement and the arbitration clause.[72] However, the first relates to the appointment of the Trustee Bank, which had already been done by the Trustees: see clause 2 of the Agreement. The second requests Dallah to send to the MORA "proposed rupee based saving schemes for Hajj finalised so far…". There is no reference to the Agreement in either letter. In my view these do not exhibit any subjective intention on the part of the GoP to be bound by the Agreement, let alone a common intention.

114. The arbitrators relied upon the fact that the Trust did little after the Agreement was signed and that no funds were forthcoming.[73] This does not, in my view, assist either way. The GoP was not obliged to find funds for the Trust. They were to come from pilgrims and philanthropists. This does not indicate one way or the other whether the GoP intended to be bound by the Agreement or that Dallah or the Trust intended it should.

115. The arbitrators also relied on the fact that the GoP took a decision not to re-promulgate the Ordinance; they say this was an indication of the GoP's intention.[74] I find this difficult to follow. It is correct that a new administration took over the GoP on 6 November 1996.[75] I would be prepared to infer that the new government made a positive decision not to re-promulgate the Ordinance. But I do not see why, logically, that leads to any conclusion that the GoP intended to step into the shoes of the Trust which would cease to exist, under Pakistani law, once the Ordinance "stood repealed". There is no logical reason why that consequence should flow from the decision not to re-promulgate the Ordinance.

116. Events following the repeal of the Ordinance: The Termination Letter. The key event, on which the arbitrators placed great weight, is the Termination Letter of 19 January 1997, written by Mr Lutfallah Mufti under the letterhead of the MORA and signed by him as "Secretary". The arbitrators stated:[76]

> "Such letter is very significant because it confirmed in the clearest way possible, that [the GoP] after the elapse of the Trust, regarded the Agreement with [Dallah] as its own and considered itself as a party to such Agreement, and as such, was entitled to exercise all rights and assume all responsibilities provided for under such Agreement".

117. At the time that this letter was written, the Trust had ceased to exist under Pakistani law. Therefore, the writer of the letter, Mr Lutfallah Mufti, could not have been writing it in his capacity of Secretary to the board of the Trust. He could not be Secretary to the non - existent board of a non – existent entity. I have no direct evidence from Mr Lutfallah Mufti about the capacity he thought he was exercising when he wrote this letter. However, logically, he must, in fact, have been writing the letter in his capacity of Secretary to MORA, whatever he may have thought at the time.

118. The actual wording of the letter is important, however. It refers to the alleged failures of Dallah as tantamount to a repudiation of the whole Agreement "which repudiation is hereby accepted". It does not identify the acceptor. The letter goes on to assert that the Agreement is not effective in law at all. It concludes by reserving rights and remedies "which may be available to us under the law". The identity of the entity reserving rights and remedies is not revealed. The letter is equivocal because, given the circumstances in which it was written, it is unclear.

119. However it is possible to get a clearer indication of the state of mind of the GoP at this stage if account is taken of the proceedings that were begun, by Mr Lutfallah Mufti, on the following day. These were the first Pakistani proceedings in the Court of the Senior Judge, Islamabad, in which the Trust is named as plaintiff. The proceedings sought a declaration that the Agreement "…stood repudiated on account of [the] default of [Dallah]…". Paragraph one of the application refers to the Trust as still existing. Paragraph 10 refers to the alleged defaults of Dallah and states that this "…repudiation was accordingly accepted by [the Trust] vide its letter dated 19.01.97". Mr Lutfallah Mufti signed the verification at the foot of the application, stating that "…paragraphs 1 to 13 are correct to the best of my knowledge and belief…". That is the best evidence I have of the state of mind of the Secretary of the MORA at the time It indicates that he, on the part of the GoP, thought the Trust had rights it could enforce. It does not indicate an intention on the part of the GoP to be bound by the Agreement or the arbitration clause or any intention to step into the shoes of the Trust.

120. The 1998 proceedings and the letter of 5 June 1998 to the ICC: The arbitrators referred to two further pieces of evidence which they concluded were support for their finding that there was a common intention that the GoP be bound by the Agreement and the arbitration clause. First, the GoP's instigation of the 1998 proceedings on 2 June 1998. Secondly, the terms of the letter of the GoP to the ICC on 5 June 1998.

121. In relation to the 1998 proceedings, the arbitrators concluded that the effect of the GoP's case was that it was admitting that it was a party to the Agreement with Dallah and had accepted Dallah's repudiation of that Agreement.[77] However, if one examines the pleading carefully, it does not state expressly that the GoP was a party to the Agreement, save in paragraph 16, where it refers to "the Agreement being entered into between the parties in Islamabad". That paragraph is there to establish jurisdiction in the Court of the Senior Judge, Islamabad. I do not read it (or the terms of the prayer at the end of the pleading) as an admission by the GoP that it was or had become a party to the Agreement. That would be inconsistent with the pleading in paragraph 14, which refers to the judgment of the judge in the 1997 proceedings by the Trust, when the judge had stated that "liabilities and duties against [Dallah] can be agitated by the Government of Pakistan".

122. If the GoP had pursued these proceedings to their logical conclusion then I accept that they might be a powerful factor in favour of a conclusion that the GoP had subjectively determined to become bound by the Agreement and the arbitration clause. But the process under French law principles requires me to consider the whole chronology, not to take a snapshot at any particular date. Therefore I have to put into the balance the fact that the GoP withdrew its 1998 proceedings in January 1999 and then started a further set of proceedings in which it expressly sought a declaration that it had never been a party to the Agreement.

123. Before I consider the effect of the GoP's solicitors' letter of 5 June 1998, I must record one other point on which Mr Landau and Miss Heilbron were agreed concerning the Pakistani proceedings. Both accepted, having considered the principles set out by Bingham J in Westfal – Larsen and Co A/S v Ikerigi Compania Naviera SA (the "Messiniaki Bergen")[78] that none of the proceedings could give rise to issue estoppel in the current application concerning the question of whether or not the GoP was a party to the Agreement or the arbitration agreement.

124. With regard to WMS' letter of 5 June 1998 to the ICC, the arbitrators point out, correctly, that the letter did not say that the ICC arbitration could not go ahead because the GoP was not a party to the Agreement.[79] The letter stated that the arbitration could not go ahead because of the 1998 proceedings in Pakistan, in which the GoP was the claimant and it was seeking a declaration that the Agreement had been repudiated or was void.

125. In my view, the letter is equivocal. I accept it certainly does not state expressly that the GoP is not a party to the Agreement. At the same time, it does not say that it is. The effect of the Pakistani proceedings to which it refers is left opaque, although a copy of the court's order was enclosed.

126. Principles of "transnational law" Even assuming that the French court would consider, as part of the overall equation, principles of "transnational law", the parties have not adduced any evidence nor identified any specific principles that might be brought into account in this case. I note that the arbitrators refer in their Reasons to "transnational general principles and usages".[80] But, these are left on a high level of generality. It is said that these reflect "the fundamental requirements of justice in international trade and the concept of good faith in business".[81] With respect, I have concluded that this does not add anything to the exercise I have to undertake.

127. Article 173 of the Constitution of Pakistan. It is agreed that, at the least, this Article directs

that contracts which are intended to bind the GoP shall be in the name of the President. The fact that the Agreement is not in the name of the President - and that no one ever suggested that it ought to have been - suggests that there was no initial intention that the GoP should be bound by the Agreement or the arbitration clause. Thereafter this issue is not discussed and so it is a neutral factor.

128. Conclusions on the chronology as a whole applying the principles of French law. To recall: the parties agree that, as a matter of French law, the underlying question to be considered when deciding whether a party is bound by an arbitration clause is: was the subjective common intention of all the parties that the relevant party should be bound by the arbitration clause? I have to consider whether the relevant party was directly implicated in the underlying contract and any disputes arising out of it. I have to consider the respective contractual situations of the parties and their existing commercial relations. I have to decide whether the relevant party was aware of the existence and scope of the arbitration clause by which it is said that party is bound. I must also bear in mind the fact that the relevant party sought to be bound in this case is a state entity and that, if it were bound, it might thereby lose its immunity from suit and enforcement. I must take account of the doctrine of good faith. In doing all this I have to analyse the whole chronology, from beginning to end.

129. On the evidence before me, my conclusion is that it was not the subjective intention of all the parties that the GoP should be bound by the Agreement or the arbitration clause. In fact, I am clear that the opposite was the case from beginning to end. That is why the GoP distanced itself from the contractual arrangements in the Agreement and that is why it sought to argue from the time of the Termination Letter that the Agreement was void and illegal. As for the doctrine of good faith, I accept that the parties are obliged to act in good faith. But I do not see how the doctrine can carry matters any further. There is no evidence that the GoP acted in bad faith at any stage. Even if it did, that could not make it a party to the arbitration agreement.

130. I find it difficult to follow the logic of the statement at paragraph 14 of Section III of the Reasons in the FPA. If, on whatever principles are applicable, it is found that the GoP was a party to the arbitration clause and the Agreement, good faith adds nothing. If, on the other hand, it is found that the GoP is not a party, then I hold, on the French law evidence before me, that the invocation of a general principle of good faith in commercial relations and international arbitration is insufficient to make it a party. Unlike the arbitrators, I cannot take into account Article 264 of the Constitution of Pakistan in this regard. Dallah accepts that it cannot use that provision as a means of showing that the GoP became a party to the Agreement or arbitration agreement. Therefore I respectfully agree with the comment of Justice Dr Shah and Lord Mustill, stated at the end of paragraph 14 of Section III of the FPA, that they are not convinced that "…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".

L. Issue Six: Has the GoP satisfied the burden of proving, for the purposes of section 103(2)(b), that the arbitration agreement in clause 23 is not valid?

131. In this case I think that once the GoP has demonstrated that, according to French law principles, it is not bound by the Agreement or the arbitration clause, then there is nothing more it need prove, to the English standard of proof, in order to satisfy the test in section 103(2)(b) of the Act. Therefore, subject to Issues Seven and Eight, the court will refuse to recognise or enforce the Final Award. This is because the assumption on which it is based, ie. that the GoP is bound by the arbitration agreement, thus giving the arbitrators jurisdiction to make the Final Award, has been held to be false. In the words of section 103(2)(b), the arbitration agreement (in clause 23) is not valid.

M. Issue Seven: Is there an issue estoppel arising out of the First Partial Award that prevents

the GoP from being able to argue that the arbitration agreement is not valid for the purposes of section 103(2)(b) of the Act?

132. Miss Heilbron argues that the issue of whether the GoP is bound by the arbitration clause in the Agreement has already been decided by the arbitral tribunal in the FPA. She submits that, as a matter of English law,[82] this gives rise to an issue estoppel between the GoP and Dallah on that matter. The effect of this, it is submitted, is to preclude the GoP from re-arguing that point in these proceedings for the recognition and enforcement of the Final Award. In short, it prevents the GoP from relying on section 103(2)(b) as a ground for asking the court not to recognise and enforce the Final Award.

133. Miss Heilbron's argument runs as follows: first, under Article 6.2 of the ICC Rules, an ICC arbitral tribunal has the power to decide its own jurisdiction. That is not in dispute.[83] Secondly, if it has power to decide its own jurisdiction, therefore it is a competent tribunal to do so. In this regard, Miss Heilbron relies on remarks of the Court of Appeal in the Svenska case,[84] at paragraph 90 in particular. Thirdly, under French law, an arbitration agreement is regarded as independent from the underlying contract.[85] The FPA has not been set aside by the French court, who are the "supervising court" because Paris was the seat of the arbitration. The GoP has confirmed that it does not intend to apply to the French court to set aside the FPA. Therefore, fourthly, in French law the FPA is valid and is res judicata in relation to the dispute it resolves.[86] Fifthly, the English court should, under section 101 of the Act, recognise the FPA as a final and conclusive Convention award between Dallah and the GoP concerning the issues decided by it. Lastly, therefore the decision in the FPA that the GoP is bound by the arbitration clause gives rise, in the English court, to an issue estoppel as between Dallah and the GoP. This is because the decision on whether the GoP was a party to the arbitration clause was made by a competent tribunal; it was final and conclusive between those parties and it was on "the merits" of that issue.[87] This prevents the GoP from raising the same point now in attempting to rely on section 103(2)(b) to challenge the validity of the arbitration agreement that gave rise to the Final Award.

134. Because the decision of the Court of Appeal in the Svenska case is so fundamental to Miss Heilbron's argument on this issue, it is best to set out now its facts and what it decided. The claimant ("Svenska") had entered into a joint venture agreement with a Lithuanian state – owned oil company to exploit oil reserves in Lithuania. The agreement made references to the rights and obligations of the Lithuanian government. The Lithuanian government was not expressed to be a party to the agreement and it did not sign it. However, over the signatures of the state owned entity and Svenska there was a rubric that the Lithuanian government acknowledged itself to be legally and contractually bound as if it were a signatory to the agreement. The agreement contained an arbitration clause whereby disputes were to be submitted to an ICC tribunal in Denmark. It also contained a clause waiving all rights to sovereign immunity.

135. The state owned company was privatised as AB Geonafta ("ABG"). Disputes arose between Svenska and ABG. Svenska brought an ICC arbitration against both ABG and the Republic of Lithuania ("RoL"). The RoL challenged the jurisdiction of the arbitrators over it. The arbitrators held that the RoL had agreed to refer disputes to arbitration, so that they had jurisdiction to decide the claim against both ABG and the RoL. In a second award the tribunal awarded Svenska damages of US$ 12,579,000 against both the RoL and ABG.

136. Svenska brought proceedings in the English court for the recognition and enforcement of the second award, as a Convention award, against the RoL and ABG. An order was made ex parte under section 101 of the Act and CPR Pt 62.18, giving Svenska leave to enforce the second award as a judgment. The RoL applied to set this order aside on the ground of state immunity.[88] After a hearing of six days, Gloster J dismissed the RoL's application. She held that the RoL had agreed to submit the dispute with Svenska to ICC arbitration in Denmark and

that the application to enforce the second award involved proceedings relating to the arbitration award within section 9 of the State Immunity Act 1978. [89] Therefore the RoL could not rely on state immunity to avoid enforcement of the award. Amongst the arguments advanced by Svenska before Gloster J was one that the first award (which had never been challenged in Denmark) had finally determined in its favour that the RoL had agreed to refer the dispute to arbitration and so gave rise to an issue estoppel against RoL. Gloster J ruled in Svenska's favour on that issue. The RoL appealed.

137. It will be apparent that the issues facing Gloster J and the Court of Appeal were not precisely the same as in this case. The fundamental issue for decision in the Svenska case was whether the RoL could challenge the jurisdiction of the English court to make orders recognising and enforcing the second award by relying on state immunity under section 1 of the State Immunity Act 1978. Svenska argued the RoL had submitted to the jurisdiction under either section 2, section 3 or section 9. The question of issue estoppel arose in relation to whether, for the purposes of section 9, it had already been decided by the arbitrators, as between Svenska and the RoL, that the RoL had agreed in writing to submit a dispute to arbitration.

138. In the Court of Appeal, the court dealt first with the issue of whether the RoL had in fact agreed to submit disputes with Svenska to ICC arbitration.[90] Its conclusion, after a full analysis, was that the judge had been correct to hold that the RoL agreed to submit disputes with Svenska to arbitration under the ICC rules in accordance with the provisions of article 9 of the agreement.[91] The court therefore agreed with the conclusion of the arbitrators, although it said that its reasons were slightly different.

139. The court then stated, at paragraph 90:

"However, the question that must now concern us is not whether the arbitrators were right, but whether the first award finally disposed of the issue as far as these parties are concerned. In our view it did. Under Lithuanian law an arbitration clause is regarded as an autonomous agreement which gives rise to rights and obligations which exist independently of the contact within which it is found, and an agreement to arbitrate under the ICC rules confers on the arbitrators jurisdiction to decide whether they have jurisdiction in any given case. In the present case by agreeing to ICC arbitration the parties conferred on the arbitrators jurisdiction to determine that question and are therefore bound by their award".

140. The court noted, in paragraph 92, that once it had been decided that the RoL had agreed to refer disputes to arbitration, the debate about the effect of the first award (on jurisdiction) ceased to have any significance. Nevertheless, the court agreed with the judge that the first award was "final" as far as Danish law was concerned and that it was no longer capable of being challenged in the Danish courts.[92] The court also noted that Mr Nigel Teare QC, sitting as a Deputy Judge, had (in the interlocutory proceedings involving these parties) concluded that the first award should be recognised for the purposes of section 103 of the Act. Therefore, the Court of Appeal concluded, the first award must finally have disposed of the issue of jurisdiction of the arbitrators.[93]

141. I hope I accurately summarise the conclusions of the Court of Appeal on the issue estoppel point as follows: first, it concluded that the judge was correct to find that the RoL had agreed to submit disputes with Svenska to ICC arbitration in Denmark. Secondly, it has to follow from that conclusion and the terms of Article 6 of the ICC rules that the ICC arbitration tribunal must have had jurisdiction, over both Svenska and the RoL, to decide the scope of its own jurisdiction. In short, it was a competent tribunal to decide the issue of whether or not the RoL had agreed to arbitrate disputes with Svenska before an ICC arbitral tribunal in Denmark. Thirdly, the first award of the arbitrators was final and conclusive between Svenska and the RoL. Fourthly, therefore, all the necessary components were present to establish an issue estoppel, as understood

in English law. First, the relevant issue, which was the same before the ICC arbitrators and the English court, was whether the RoL had agreed to submit disputes with Svenska under the agreement to an ICC arbitration panel in Denmark. Secondly, the parties were identical in the ICC arbitration and the London court proceedings. Thirdly, the issue had been decided by a competent tribunal and it had done so "on the merits".[94] Fourthly, the competent tribunal had decided the issue in a manner that was final and binding between the parties.

142. I must now deal with the stages in Miss Heilbron's arguments. In my view the first flaw arises at the second stage of the argument. The tribunal does indeed have the power to decide its own jurisdiction, by virtue of Article 6 of the ICC rules. But whether or not it can do so in a manner that binds the parties over whom the tribunal purports to rule must depend on the prior question of whether those parties have agreed to confer that jurisdiction on the tribunal. That is the very issue at stake here. I have held that the GoP did not agree to confer that jurisdiction on the ICC tribunal because the GoP did not agree to be bound by the arbitration clause. So, unlike the Court of Appeal in Svenska, I do not uphold the arbitrators' view. If the Court of Appeal in Svenska had held that the arbitrators had been wrong, I find it difficult to see how it could have concluded that the arbitral tribunal was a competent tribunal to decide the issue of jurisdiction.

143. The next flaw, in my view, lies in the proposition that the English court should recognise the FPA because it is valid under French law (the law of the seat) and has not been challenged in the French courts and will not be. I accept that section 101 of the Act gives the English court the power to recognise the FPA as a Convention award. But it also has the power not to do so if one of the grounds set out in section 103(2) is proved. I have held that the ground in section103(2)(b) is proved. Although the present application concerns the recognition and enforcement of the Final Award, it seems to me that it would be illogical to hold that the arbitration agreement is invalid for the purposes of the Final Award, yet have to hold it is valid for the purposes of the FPA.

144. Is the fact that the FPA has not been challenged in the French court sufficient to prevent this court from holding that the FPA is valid and binding and so capable of giving rise to an issue estoppel between the parties? In my view it is clear from the Court of Appeal's decision in the Svenska case that this does not prevent this court from ruling on that issue, at least on the facts of this case. It will be recalled that in Svenska the first award of the ICC arbitrators in Denmark was not challenged in the Danish courts and could not be challenged by the time the enforcement proceedings were before the English court. Gloster J held that because the first award was no longer capable of being challenged in Denmark, it finally determined the question of the tribunal's jurisdiction. The Court of Appeal agreed with that conclusion, but "….primarily because we are satisfied that the [RoL] had agreed to refer disputes to arbitration under the ICC rules…".[95]

145. The court went on to deal with an argument that the RoL was entitled to challenge that first award under any of the grounds set out in section 103(2) of the Act despite the lack of challenge in the Danish courts. The court held that it was always open to the RoL to challenge the first award by proving one of the grounds in section 103(2). Furthermore, it held that "…the fact that the award could no longer be challenged in Denmark does not lead inexorably to the conclusion that it can be relied on as giving rise to an issue estoppel".[96] However, that prima facie position was changed by the fact that, in interlocutory proceedings, the Deputy Judge had held that the first award should be recognised and there had been no challenge to that decision. Therefore the first award had finally disposed of the question of jurisdiction.[97]

146. Thus in Svenska the Court of Appeal decided it would recognise the ICC award on jurisdiction for two reasons. First because it had concluded that the RoL had agreed to submit disputes to ICC arbitration. Secondly, because the Deputy Judge had decided that the first award on jurisdiction should be recognised and there had been no appeal from that ruling.

147. In the present case there has been no decision by the English court on the recognition of the FPA. I refuse to recognise it because I have held that the GoP has proved that arbitration agreement is not valid for the purposes of section 103(2)(b). I see no further discretionary ground why I should nevertheless recognise and enforce the FPA or the Final Award, despite the fact that the ground in section 103(2)(b) has been proved.[98]

148. My refusal to recognise the FPA makes the position different from the Svenska case. In the present case there is no basis in this court on which to found an issue estoppel on the jurisdiction issue. But even if I were prepared to recognise the FPA, there would remain the question of whether the issue that had been decided by the arbitrators is the same issue as the one I have to decide under section 103(2)(b). As the Court of Appeal noted in Svenska, even if it is clear that some issues have been finally determined, it is important to identify with care what those issues are.[99] The arbitrators did not have to decide whether the ground set out in section 103(2)(b) had been proved. They were considering the issue of whether the GoP was bound by the arbitration clause on broad, international arbitration law principles. Despite the fact that M. Derains agreed that the tests applied by the arbitrators accorded with that under French law, I am very doubtful that the issue decided by the arbitrators is sufficiently the same issue as I have decided under section 103(2)(b) as to be capable of giving rise to an issue estoppel.

149. I conclude, therefore, that no issue estoppel can arise out of the First Partial Award that prevents the GoP from being able to argue that the arbitration agreement is not valid for the purposes of section 103(2)(b) of the Act.

N. Issue Eight: Is there a residuary discretion under section 103 of the Act to recognise and enforce the Final Award, even if the ground in section 103(2)(b) is proved and there is no issue estoppel operating against the GoP?

150. Miss Heilbron argues that on the correct construction of section 103, there is a residual discretion to recognise and enforce a Convention award, despite the fact that the party seeking to avoid this has proved a ground under section 103(2) and despite there being no issue estoppel operating against the GoP. She submits that the Final Award should be enforced because the FPA decision, reached in 2001, has stood unchallenged until the present application of the GoP. It is clear, she submits, that the GoP has taken careful advice from French lawyers before deciding not to challenge the FPA in the Paris Cour d'appel.[100] Miss Heilbron does not submit that the GoP has done or said anything that would give rise to any other sort of estoppel, other than the issue estoppel for which she contends under Issue Seven. Nonetheless she submits that, following the purpose of the Convention, the circumstances require the court to exercise its discretion to recognise and enforce the Final Award despite proof of the section 103(2)(b) ground.

151. I cannot accept this submission. In Dardana Ltd v Yukos Oil Co,[101] Mance LJ stated, at paragraph 8, that section 103(2) could not introduce an "open discretion". He accepted that the word "may" in that sub-section was intended to cater for the possibility that, despite the existence of one of the grounds set out in section 103(2), the right to rely on the relevant ground might have been lost by the party trying to avoid recognition and enforcement. This might be done by either contract or estoppel.

152. This comment was followed in the subsequent Court of Appeal decision of Ajay Kanoria v Tony Francis Guinness:[102] see the remarks of Lord Phillips of Worth Matravers CJ at paragraph 25 and May LJ at paragraph 30. May LJ states that section 103(2) and (3) are concerned with "the fundamental structural integrity of the arbitration proceedings". If there is something unsound about the arbitration proceedings, so that the person who is trying to resist recognition and enforcement proves one of the grounds set out in section 103(2) or (3), then "the court is unlikely to make a discretionary decision in favour of enforcement".[103]

153. In this case I have held that there is something unsound in the fundamental structural integrity of the ICC arbitration proceedings, viz. that the GoP did not agree to be bound by the arbitration agreement in clause 23 of the Agreement. I have also concluded that there is no issue estoppel that prevents the GoP from raising that issue and proving the ground set out in section 103(2)(b) of the Act. Miss Heilbron has not suggested that there is any other form of contractual agreement or estoppel which can be used against the GoP in this regard. The fact that the FPA has not been challenged in the French court these last 7 years cannot be a sufficient basis for saying that I should exercise a discretion to allow the recognition and enforcement of the Final Award, given my finding that the non – challenge does not found any issue estoppel against the GoP.

O. Overall Conclusions

154. Dallah seeks to enforce the Final Award of the arbitrators. That award was made in Paris, which was the seat of the ICC arbitration that took place between Dallah and the GoP. However, the GoP has proved, under section 103(2)(b) of the Act, that the arbitration agreement in clause 23 of the Agreement entered into between the Trust and Dallah was not valid as between the GoP and Dallah under French law,[104] that being the law of the country in which the Final Award was made.

155. There is no issue estoppel which prevents the GoP from asserting that the arbitration agreement in clause 23 of the Agreement was not valid as between the GoP and Dallah under French law.

156. There is no other reason to exercise a discretion to recognise and enforce the Final Award.

157. Accordingly, the ex parte order of Christopher Clarke J. made on 9 October 2006, which gave Dallah leave to enforce the Final Award in the same manner as a judgment of the Court, must be set aside.

158. I wish to repeat my thanks to counsel for their industry and assistance in their most interesting arguments.

ANNEX 1

"MEMORANDUM of UNDERSTANDING

THIS Memorandum of Understanding is made this 24 July 1995, between the President of the Islamic Republic of Pakistan through the Ministry of Religious Affairs Government of Pakistan. ……. Of the first part and Dallah Real Estate & Tourism Holding Company, a Company duly organized and existing under the laws of the Kingdom of Saudi Arabia,…… of the second part.

WHEREAS GOP is interested in taking on lease reliable housing facilities in the holy city of Makkah, Kingdom of Saudi Arabia, for Pakistani pilgrims whilst performing Hajj and Umra; and

WHEREAS Dallah has agreed to acquire the necessary real estate, construct the required structures and buildings for the purpose and lease the same to GOP.

NOW, THEREFORE, in consideration of the mutual covenants and conditions hereinafter

set forth, the parties hereto agree as follows:

1. Dallah shall acquire within the holy city of Makkah the lands necessary for the development and construction of housing facilities sought by GOP for Pakistani pilgrims whilst performing Hajj and Umra, as more specifically described in the Schedule A attached hereto, and develop, construct and complete said housing facilities thereon.

2. That the total cost of the lands and the housing facilities to be constructed thereon by Dallah shall not exceed U.S.$ 242 million ($ 242,000,000.00), as itemized in the Schedule-B attached hereto.

3. Upon completion of the housing facilities Dallah shall demise and lease them to the GOP along with the land and GOP shall take the said facilities and land on such lease for a term of ninety-nine (99) years subject to Dallah arranging the necessary financing for GOP on terms approved by GOP in accordance with the provisions of this Agreement ("Lease Financing").

4. Within thirty (30) days of the execution hereof, Dallah shall prepare and submit to GOP for its approval, the terms and conditions of the proposed lease ("the Lease") and the detailed plan for financing of the same ("the Financial Plan"). Approval and acceptance of the Lease and the Financial Plan by GOP will be communicated in writing to Dallah. The date of receipt of such approval by Dallah will be the Approval Date. Where such approval and acceptance is not conveyed by GOP within ninety days of submission of terms and conditions of the proposed lease and detailed financing plan by Dallah to GOP or GOP conveys its disapproval or non-acceptance of such terms and conditions of lease and financing plan, no liability or claim shall be incurred by either party.

5. The Lease Financing to be arranged and organized by Dallah as per the approved Financial Plan will be secured by the Borrower designated by GOP under the Sovereign Guarantee of GOP.

6. Within sixty (60) days of the Approval Date, Dallah shall prepare and submit to GOP detailed specifications and drawings of the housing facilities based upon the requirements of GOP as contained in Schedule A. Within twenty-four (24) months from the date that GOP approves in writing said specifications and drawings, Dallah shall develop, construct, complete in all respects and hand over vacant possession of the housing facilities to GOP upon execution and registration of the lease.

……..

19. This Agreement shall be binding upon and shall enure to the benefit of the parties hereto and to the benefit of their successors and permitted assigns to the extent that such enurement does not violate any specific provisions of the Lease and applicable Saudi Arabian and Pakistani laws.

……..

23. This Agreement shall be governed by the applicable laws and regulations of the Kingdom of Saudi Arabia.

24. Any dispute between the parties hereto as to the interpretation of this Agreement or in respect of any matter arising under, out of or in connection with this Agreement shall be resolved in accordance with the Saudi laws and regulations for the time being in force relating to arbitration through an arbitration committee composed of three arbitrators, GOP shall appoint one arbitrator and Dallah shall appoint one arbitrator and the two arbitrators so appointed shall

appoint the third arbitrator who shall preside over the arbitration committee. The arbitration proceedings shall be held in Jeddah or such other place as the parties may agree and the decision of the arbitration committee shall be final and binding upon the parties hereto.

25. To the extent that GOP may be entitled in any jurisdiction to claim for itself immunity in respect of its obligations under this Agreement itself from any proceedings, suit, award, execution, attachment (whether in aid of execution, before award, judgment or otherwise) or other legal process or to the extent that in any jurisdiction there may be attributed such immunity (whether or not claimed).

26. GOP hereby irrevocably waives any objection now or hereafter to the siting of the venue of any arbitration, action, suit or proceeding in any such place or court as is referred to in Article 24 and any claim that any such action, suit or arbitration proceedings have been brought in an inconvenient forum under such proceedings are brought outside Saudi Arabia.

27. GOP also hereby consents generally in respect of any proceedings arising out of or in connection with this Agreement to the giving of any relief related thereto or the issue of any process in connection with such proceedings including, without limitation, the making, enforcement or execution against any award, order or judgment which may be made or given in such proceedings.

……."

ANNEX 2

"PART 1

Acts, Ordinances, President's Orders and Regulations

GOVERNMENT OF PAKISTAN

MINISTRY OF LAW, JUSTICE AND PARLIAMENTARY AFFAIRS

(Law and Justice Division)

Islamabad, the 31st January 1996

No. F. 2(1)/96-Pub. – The following Ordinance made by the President is hereby published for general information:-

ORDINANCE NO. VII OF 1996

AN

ORDINANCE

To provide for the establishment of an Awami Hajj Trust

WHEREAS it is expedient to provide for the establishment of an Awami Hajj Trust to mobilize savings from the pilgrims desirous of performing Hajj and investment thereof in the Islamic modes of investment and for facilitating Hajj operations and matters connected therewith and incidental thereto:

AND WHEREAS the National Assembly is not in session and the President is satisfied

that circumstances exist which render it necessary to take immediate action:

(67)

……

68 THE GAZETTE OF PAKISTAN, EXTRA, JA:

NOW THEREFORE, exercise of the powers conferred by clause (1) of Article 89 of the Constitution of the Islamic Republic of Pakistan, the President is pleased to make and promulgate the following Ordinance:-

1. Short title, extent and commencement. –

(1) This Ordinance may be called the Awami Hajj Trust Ordinance, 1996.

……

2. Definitions – In this Ordinance unless there is anything repugnant in the subject or context:

(a) "Board" means the Board of Trustees of the Awami Hajj Trust constituted under section 5;

(b) "Fund" means the Awami Hajj Savings, and Investment Fund established under section 10;

(c) "Haji" or "Hujjaj" means a person or persons who have performed, or are intending to proceed to perform Hajj;

(d) "Hajj" means performance of Hajj by visiting Makkah and Madina in Saudi Arabia in accordance with the Injunctions of Islam as laid down in Holy Quran and Sunnah of the Holy Prophet (peace be upon him):

(e) "Managing Trustee" means the Secretary, Religious Affairs Division, Government of Pakistan, or such other person of integrity having a good record of fiduciary conduct and expertise in financial management and knowledge of Shariah as the Federal Government may appoint to perform the functions of the Managing Trustee;

(f) "member" means an intending Haji who wishes to save and finance the Hajj expenses by becoming a member of the Fund;

(g) "Trust" means the Awami Hajj Trust established under section 3; and

(h) "Trustee Bank" means a bank or financial institution appointed by the Board to collect deposits from embers, maintain their accounts in the Fund and make investment thereof in accordance with the directions of the Board.

3. Establishment of the Trust –

(1) As soon as may be, after the commencement of this Ordinance, the Federal Government shall, by notification in the Official Gazette, establish a trust to be known as the Awami Hajj Trust.

(2) The Trust shall be 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.

(3) The headquarters of the Trust shall be at Islamabad and it may establish its regional offices in such other places as the Federal Government may determine.

4. Purposes and objects of the Trust – The purposes and objects of the Trust shall be to:

(a) mobilize savings from members;

(b) invest savings of the members in appropriate schemes yielding maximum returns and credit profits accrued therefrom in the members' accounts;

(c) defray the expenses of Hajj and individual members out of their savings and profit accrued thereon; and

(d) adopt measures for facilitating the performance of Hajj by members.

5. Board of Trustees –

(1) The general direction and administration of the Trust and its affairs shall vest in the Board of Trustees consisting of -

(i) Federal Minister for Religious Affair …. Chairman

(ii) Federal Minister for France …….. Member

(iii) Chairman, Council of Islamic Ideology … Member

(iv) Deputy Chairman, Planning Commission ... Member

(v) Secretary, Ministry of Finance …….. Member

(vi) Secretary, Religious Affairs Division, Government of Pakistan, if he is not Appointed as the Managing Trustee …..... Member

(vii) Chairman, Pakistan Banking Council …… Member

(viii) Managing Trustee …….. Member

(2) The Secretary, Religious Affairs Division, Government of Pakistan shall act as Secretary of the Board.

6. Powers and function of the Board - The powers and functions of the Board shall be to –

(a) provide guidelines to the Managing Trustee for managing Hajj savings and investment operations in an efficient and productive manner;

(b) approve the budget of the Managing Trustee relating to the Fund;

(c) review and approve the audited income and expenditure of the Fund;

(d) approve implementation plans for functions assigned to the Trustees bank;

(e) adopt measures for promotion and welfare of the Hujjaj during Hajj operations; and

(f) perform such other functions as may be assigned to it by the Federal Government for the purposes of this Ordinance.

……

11. Reports – The Managing Trustee shall, by the end of each financial year or as and when the Federal Government may direct, submit annual audited report of Fund to the Board and such other reports about its activities as the Board or the Federal Government may direct.

12. Rules – (1) The Board may, with the prior approval of the Federal Government, make rules for carrying out the purposes of this Ordinance.

(2) Without prejudice to the foregoing powers, such rules may provide for –

(a) the procedure for deposit of amounts in the Fund and its utilization for defraying Hajj expenses of the members;

(b) determination of Hajj expenses; and

(c) such other activities as may facilitate the performance of Hajj in conformity with the purposes of the Trust.

…… "

ANNEX 3

"AGREEMENT

THIS AGREEMENT is made this tenth day of September, 1996 between the AWAMI HAJJ TRUST, established under section 3 of the Awami Hajj Trust Ordinance, 1996 (Ordinance No. VII of 1996)…….of the first part and Dallah Real Estate and Tourism Holding Company, a Company duly organised and existing under the laws of the Kingdom of Saudi Arabia,…… of the second part.

WITNESSETH

WHEREAS the Trust is interested in leasing reliable housing facilities in the holy city of Makkah, Kingdom of Saudi Arabia, for Pakistani pilgrims whilst performing Hajj and Umra; and

WHEREAS Dallah owns adequate and appropriate real estate at a distance of 1500 metres from the Haram, and has agreed to construct the required structures and buildings on the same for the purpose and to lease them to the Trust.

NOW THEREFORE, in consideration of the mutual covenants and conditions hereinafter set forth, the parties hereto agree as follows:

1. Dallah shall undertake, within the holy city of Makkah, development and construction necessary for the accommodation of 45,000 Pakistani pilgrims (on the basis of 2.5 cu. Metres per person) whilst performing Hajj and Umra on a part of the plot of land owned by Dallah in the Al-Misfalah district of Makkah comprising an area of 22,000 square metres which is at a distance of 1500 metres from the Haram as identified and described in Schedule "A" attached hereto (referred to as "the Housing").

2. The total leased value of the said land area of 22,000 square metres and the total construction cost of the Housing is computed at US$210,000,000 and US$135,000,000 respectively aggregating US$345,000,000 (U.S.$ Three Hundred and Forty-five Million only), out of which the Trust shall pay a lump sum of U.S.$100,000,000 (U.S. Dollars One Hundred Million only) to Dallah by way of advance ("the Advance Lease Payment") within thirty (30) days from the date of execution of this Agreement by the Parties, subject to (i) Dallah arranging through one of its affiliates a U.S. Dollars 100,000,000 (U.S.$ One Hundred Million only) Financing Facility for the Trust against a guarantee of the Government of Pakistan, (ii) Dallah submitting to the Trust a Performance Bond covering the Advance Lease Payment in the format attached as Schedule "B" to this Agreement. (iii) A counter guarantee issued by the Trust and Al-Baraka Islamic Investment Bank, E.C., Bahrain, (Hereinafter referred to as the (Trustee Bank") appointed by the Board of Trustees pursuant to Section 8 of the Awami Hajj Trust Ordinance, 1996 in favour of the Government of Pakistan.

3. This Agreement shall come into effect on the date that Dallah receives from the Trust the Advance Lease Payment and submits the aforesaid Performance Bond to the Trust ("Date of Effectiveness").

4. Dallah shall develop, construct and complete the Housing in accordance with such detailed specifications and drawings that shall be approved by the Trust within ninety (90) days of the execution of this Agreement. Upon such approval they will be signed by both parties. Such signed documents will be referred to herein as "the Approved Specifications". Within twenty-four (24) months from the Date of Effectiveness hereof Dallah shall make available to the Trust the Housing, subject to execution and registration of the Lease Agreement specified in Clause 5(a) below, for occupation by Pakistani pilgrims, complete in all respects, and prior to Dhul-qa'da 1, 1420 HIJRA.

5(a) The Trust irrevocably and unconditionally agrees to take on lease the Housing for a term of ninety-nine (99) years in terms of the draft lease contained in Schedule "C" hereto ("the Lease Agreement") for which entire term the Lease Payments shall be made in strict accordance with either of the two options specified in the attached Schedule "D" hereto. On the completion of the Housing as aforesaid the Lease Agreement shall be executed by and between the parties, which will be governed by the provisions of this Agreement insofar as applicable.

……..

19. This Agreement shall be binding upon and shall enure to the benefit of the parties hereto and to the benefit of their successors and permitted assigns to the extent that such enurement does not violate any specific provision of the Lease Agreement and applicable law.

……..

23. Any dispute or difference of any kind whatsoever between the Trust and Dallah arising out of or in connection with this Agreement shall be settled by arbitration held under the Rules of the Conciliation and Arbitration of the International Chamber ofCommerce, Paris, by three arbitrators appointed under such Rules.

24. To the extent that the Trust may be entitled in any jurisdiction to claim for itself immunity in respect of its obligations under this Agreement from any proceedings, suit, award, execution, attachment (whether in aid of execution, before award, judgment or otherwise) or other legal process or to the extent that in any jurisdiction there may be attributed such immunity (whether or not claimed), the Trust hereby irrevocably agrees not to claim and hereby irrevocably waives such immunity to the fullest extent permitted by the law of such jurisdiction.

25. The Trust hereby irrevocably waive any objection now or hereafter to the siting of the venue of any arbitration, action, suit or proceeding in any such place or court as is referred to in Clause 23 and any claim that any action, suit or arbitration proceedings have been brought in an inconvenient forum.

26. The Trust also hereby consents generally in respect of any proceedings arising out of or in connection with this Agreement to the giving of any relief related thereto or the issue of any process in connection with such proceedings including, without limitation, the making, enforcement or execution against any award, order or judgment which may be made or given in such proceedings.

27. The Trust may assign or transfer its rights andobligations under this Agreement to the Government of Pakistan without the prior consent in writing of Dallah.

…….".

ANNEX 4

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958

……..

"Article II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Article III

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

Article IV

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

(a) The duly authenticated original award or a duly certified copy thereof;

(b) The original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

"Article V

1. 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 parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said 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; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

……. "

ANNEX 5

The Arbitration Act 1996: Part III

"101 Recognition and enforcement of awards

(1) A New York Convention award shall be recognized as binding on the persons as

between whom it was made, and may accordingly be relied on by those persons by way of defence, set-off or otherwise in any legal proceedings in England and Wales or Northern Ireland.

(2) A New York Convention award may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect.

As to the meaning of "the court" see section 105.

…….

102 Evidence to be produced by party seeking recognition or enforcement

(1) A party seeking the recognition or enforcement of a New York Convention award must produce—

(a) the duly authenticated original award or a duly certified copy of it, and

(b) the original arbitration agreement or a duly certified copy of it.

(2) If the award or agreement is in a foreign language, the party must also produce a translation of it certified by an official or sworn translator or by a diplomatic or consular agent.

103 Refusal of recognition or enforcement

(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—

(a) that a party to the arbitration agreement was (under the law applicable to him) under some incapacity;

(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;

……

(3) Recognition or enforcement of the award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to recognize or enforce the award.

(4) An award which contains decisions on matters not submitted to arbitration may be recognized or enforced to the extent that it contains decisions on matters submitted to arbitration which can be separated from those on matters not so submitted.

(5) Where an application for the setting aside or suspension of the award has been made to such a competent authority as is mentioned in subsection (2)(f), the court before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the recognition or enforcement of the award.

It may also on the application of the party claiming recognition or enforcement of the award order the other party to give suitable security

……."

ANNEX 6

Does section 103(2)(b) of the Arbitration Act 1996 ("the Act") cover the argument of a party who says that he is not bound by the arbitration agreement?

1. Consideration of this issue must start with the Convention, on which the Arbitration Act 1975 and Part III of the 1996 Act are based. The Convention contemplates two stages of recognition and enforcement of a Convention award. The first stage is dealt with in Article IV. A party to an arbitration agreement who applies for it to be recognised and enforced in a Convention state other than the one in which the award was made must "supply" the award and also the original "agreement", as defined in Article II of the Convention.[105] Those requirements are carried into the current English statute in section 102(1) of the Act.

2. The second stage is dealt with in Article V of the Convention. Recognition and enforcement of the Convention award may be refused, at the request of the party against whom it is invoked, but only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof of one of the matters set out in Article V.1 (a) to (e). Section 103(2)(b), like its predecessor section 5(2)(b) of the Arbitration Act 1975, is the parliamentary draftsman's version of the second half of Article V.1(a) of the Convention.

3. As Mance LJ has demonstrated in his analysis of the Convention and the provisions of sections 102 and 103 of the Act in Dardana Ltd v Yukos Oil Co and Petroalliance Services Co Ltd,[106] there appears to be a possible inconsistency between the approach of the Convention and that of the Act concerning what has to be proved at the first stage and what topics can be challenged at the second stage.[107]

4. Part III of the Act, which comprises sections 99 – 104, covers the recognition and enforcement of Convention awards. Section 100(2)(a) of the Act provides that, for the purposes of Part III of the Act, an "arbitration agreement means an arbitration agreement in writing", which will have the same meaning as in Part I of the Act. Section 5 of the Act (in Part 1), sets out the scope of the phrase an "agreement in writing" for the purposes of the Act. Section 6 of the Act defines "arbitration agreement". It means "an agreement to submit to arbitration present or future disputes (whether they are contractual or not)". Together, these definitions give a broader meaning to "arbitration agreement" than that in the Convention. In Article II.2 of the Convention only a partial definition is given to that phrase: "The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams".

5. In Dardana Ltd v Yukos Oil Co and Petroalliance Services Co Ltd,[108] Mance LJ concluded that an analysis of the interrelationship between sections 102 and 103 of the Act would assist in determining the scope of what is covered by phrase in section 103(2)(b). The facts of that case were as follows: the predecessor in title to Dardana had obtained two arbitration awards from the same Swedish arbitral tribunal; one against Yuganskenftegas ("YNG") and one against Yukos. The awards concerned sums that Dardana's predecessor in title claimed under a contract. The Swedish tribunal made the award against Yukos having held that it, by its conduct, had become a party to the contract and the arbitration agreement, despite the fact that there was no written agreement to that effect.

6. In May 2000, Yukos applied to the Stockholm District Court to set aside the award against it. In June 2000, Dardana applied ex parte to David Steel J for leave to enforce the Swedish award against Yukos as a judgment, pursuant to section 102 of the Act. He granted leave to do so. Yukos then applied to set that order aside on the ground that there was no valid arbitration

clause,[109] or, in the alternative, for an adjournment pursuant to section 103(5) .[110] Dardana sought an order (under section 103(5)) that Yukos provide security if the English proceedings were to be adjourned pending a decision of the Stockholm court. HHJ Chambers QC adjourned Yukos' application to set aside David Steel J's order (ie. he adjourned the section 103(2)(b) point) until after the decision of the Stockholm court, but ordered Yukos to give security in the meantime.

7. Yukos appealed, as it wished not only to set aside David Steel J's order entirely, but also to reverse the order of HHJ Chambers QC that it provide security. In the Court of Appeal, Mance LJ, who gave the only substantial judgment, dealt first with the issue of the basis on which Yukos could resist enforcement of the Swedish award before the English Courts.

8. At paragraph 8 of his judgment, he records that it was common ground before the court that Yukos could challenge the recognition and enforcement of the Swedish award under section 103(2)(b) of the Act, by maintaining that it never became a party to the contract and arbitration agreement. Nevertheless, Mance LJ analysed the scheme of the Act to show why Yukos could mount this challenge under section 103(2)(b).

9. First of all, Mance LJ noted that there appeared to be some overlap and inconsistency between section 102 and section 103 of the Act. This was because under section 102, a party seeking recognition and enforcement of the Convention award has to produce first, the award itself and secondly, the arbitration agreement in writing. He pointed out that the latter could be interpreted to mean an arbitration agreement that is proved to give the tribunal jurisdiction over the party against whom it is sought to enforce the award. Yet issues concerning defects in the arbitration agreement are also dealt with specifically in section 103(2).

10. Mance LJ resolved this possible overlap and inconsistency through an interpretation of section 100. He noted that this provided that the award to be recognised or enforced under the Convention must be "…an award made in pursuance of an arbitration agreement…". He construed this as meaning an award "purporting to be made under an arbitration agreement". Therefore all that was required at the first stage of recognition and enforcement was production of apparently valid documents, including an apparently valid arbitration clause, by reference to which the arbitrators accepted that the parties had agreed to arbitrate.[111] Accordingly, he decided, it is only at the second stage, when the prima facie right to recognition and enforcement is challenged, that the court will consider the issue of whether the apparently valid arbitration clause was, in fact, an agreement to arbitrate between the party seeking recognition and enforcement of the award and the party against whom the award was to be invoked. Also at that stage the court can consider, under section 103(2)(b), any issue of whether (under the relevant law applicable) the arbitration agreement was validly made.[112]

11. Therefore, in section 103(2)(b), the phrase "the arbitration agreement was not valid under…" the relevant law, must be construed as including the issue of whether, in fact, the party against whom the award is to be invoked is indeed bound by the arbitration clause which gave the arbitrators their jurisdiction to make the award.

12. As Mr Landau pointed out in argument, this construction accords with common sense. A party that alleges that it never agreed to arbitrate a dispute must have the right to argue that point in the courts of countries where it is sought to enforce the award. The party should not be confined to remedies in the courts of the state in which the award was made. In England and Wales, the only statutory wording that enables this to be done is that in section 103(2)(b).

FOOTNOTES

Note 1 The reason for the delay is explained below. [Back]

Note 2 The 1973 Constitution has been modified from time to time since then. I was shown the details of the Constitution as amended up to 31 December 2003. [Back]

Note 3 Letter of Mr Lutfullah Mufti, Secretary of the MORA, to Mr Hussain Luwai, President of the Muslim Commercial Bank Ltd in Karachi, dated 18 July 1995. It is clear from the context of the letter that "members" means members of the proposed Trust. [Back]

Note 4 This was, in fact, much larger than the area contemplated in the MOU. [Back]

Note 5 I made it clear to counsel for the parties at an early stage in the hearing that I found this a puzzling conclusion, given the wording of the Ordinance (particularly article 3(2)) and the fact that the Trust had been created long before the last Ordinance "stood repealed". I put the point to both experts on Pakistani law, but they both insisted that, as a matter of Pakistani law, once the Ordinance "stood repealed" because it had not been presented to Parliament in time, the statutory corporation that had been created by the Ordinance, as notified on 14 February 1996, then automatically ceased to exist. It was also the conclusion of the Civil Judge First Class in the first set of proceedings in Pakistan, to which I refer below. As this is an issue of Pakistani law, which I have to receive as a fact, it is therefore effectively an agreed fact, which it seems to me I have to accept. [Back]

Note 6 It will be recalled that he was Secretary of the MORA and Secretary of the Board of Trustees of the Trust. He was also, by this time, Secretary of the Managing Trustee, the Al – Baraka Islamic Investment Bank. [Back]

Note 7 I say "purported" because it is agreed by the Pakistani law experts that by this time the Trust had ceased to exist as a legal entity under Pakistani law. [Back]

Note 8 When passed, that Act would have applied to both what is now India and Pakistan. [Back]

Note 9 This provides that "Any party to an arbitration agreement or any person claiming under him desiring to challenge the existence or validity of an arbitration agreement or an award or to have the effect of either determined shall apply to the Court and the Court shall decide the question on affidavit…". [Back]

Note 10 See in particular para 17 of the judgment. [Back]

Note 11 See para 17 of the tribunal's First Partial Award. [Back]

Note 12 FPA: Section III first para, page 19. [Back]

Note 13 In English law, although perhaps not in other laws, a distinction must be drawn between two arbitration agreements. The first is an agreement of parties to submit future disputes to arbitration; the second is the reference, ie. the agreement to refer a particular dispute to arbitration: see: Black Clawson International Ltd v Papierwerk Waldhof-Aschaffenburg AG [1981] 2 Lloyd's Rep 446; Mustill & Boyd on Commercial Arbitration (2nd Ed. 1989 page 61). The definition of "arbitration agreement" in section 6 of the Act covers both. I will have to consider this question further: see below. [Back]

Note 14 FPA: Section III, para 4 (bis), page 20. Lord Mustill and Dr Justice Shah expressed doubts as to whether there could be a "transnational procedural law independent of all national laws", in an arbitration, but appear to have accepted that the applicable law for the purposes of

deciding the issue of who was bound by the "Arbitration Agreement" was not the procedural or "curial" law, but the applicable law of the "Arbitration Agreement", viz. clause 23 of the Agreement. [Back]

Note 15 FPA: Section III, para 6, page 26. [Back]

Note 16 FPA : Section III, para 14, page 35. [Back]

Note 17 See CPR Pt 62.18(7)(a). [Back]

Note 18 Section 12(2) of the State Immunity Act 1978 provides that the time for entering an appearance to proceedings against a state shall begin to run two months after the judgment has been received at the Ministry of Foreign Affairs of the state concerned. Paragraph 2 of the order of Gloster J gave the GoP only 31 days after service of the order. [Back]

Note 19 As France was the "seat" of the ICC Arbitration, the French courts would be the "supervising" courts. The French law experts agreed that the Paris Cour d'appel was the court with jurisdiction over any challenge to the awards: Joint Memorandum paragraph 2.2. [Back]

Note 20 That provides that a New York Convention award may be refused if the person against whom it is invoked proves "that the award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made". [Back]

Note 21 There are two related issues of Pakistani law which remained in dispute, on which counsel agreed that both sides would not adduce argument in these proceedings but would reserve their position in case there were further proceedings in this or other jurisdictions. These were: (a) whether the Trust was the "alter ego" of the GoP; and (b) whether the corporate veil of the Trust could be lifted and, if so, what it would reveal. [Back]

Note 22 As I note below, there remain issues about what is meant by the "arbitration agreement" and what is comprised within the phrase "the law of the country where the award was made", in particular does it permit the application of that country's conflict of laws rules or any reference to "transnational" law or the laws of any other country, such as Pakistan. [Back]

Note 23 See footnote 13 above. [Back]

Note 24 See paragraphs 78 – 79. [Back]

Note 25 I confess that all these points were raised by me in the course of argument. [Back]

Note 26 That is not because, as a matter of construction of section 103(2)(b), the English court should take account of the conflicts of law rules of the law of the country where the award was made, but because the French courts would engage in a "broad factual enquiry", including issues of foreign law. [Back]

Note 27 Mr Landau was prepared to accept for this application that Article 173 does not stipulate that the agreement must be in writing, in the narrow sense of that phrase. (Compare the definition of "agreement in writing" in section 5(2) of the Act). [Back]

Note 28 [2007] QB 886. [Back]

Note 29 Joint Memorandum of French Law Experts: paragraph 2.4. [Back]

Note 30 The relevant part of Article 264 of the Constitution provides: "Where a law is repealed, or is deemed to have been repealed, by, under, or by virtue of the Constitution, the repeal shall not, except as otherwise provided in the Constitution – (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under the law". [Back]

Note 31 See Transcript for Day 3/page 36 line 19 to page 37 line 22. [Back]

Note 32 Miss Heilbron reserves her position on any arguments on this point that might be made in any other action in this or any other jurisdiction. [Back]

Note 33 See the references given at footnote 13 above. [Back]

Note 34 Albert Jan van den Berg "The New York Arbitration Convention 1958" at pages 295 – 6 and 314 – 6. [Back]

Note 35 See also section 103(2)(e), which refers to "the agreement of the parties", which must refer to the individual reference. [Back]

Note 36 Compare, eg. Dallal v Bank Mellat [1986] 1 QB 441 at 455 – 6 per Hobhouse J. [Back]

Note 37 [2002] 2 Lloyd's Rep 326 at paragraphs 8 – 15. [Back]

Note 38 Albert Jan van den Berg "The New York Convention of 1958 – Towards a Uniform Judicial Interpretation" (Kluwer 1981) page 291. [Back]

Note 39 So far as the Act is concerned, further support for this conclusion might be found in section 46(2) of the Act, which defines "the law chosen by the parties" as "the substantive laws of that country and not its conflict of laws rules". That provision is, of course in Part 1 of the Act. It is said that this provision was specifically inserted to avoid the problems of renvoi: Mustill & Boyd on Commercial Arbitration (2001 Companion), page 328. See also Dicey, Morris & Collins, The Conflict of Laws (14th Ed. 2006) at para 4.034, in Vol 1 page 89 – 90. But it must be likely that the same approach is intended for section 103(2)(b) in Part III of the Act. [Back]

Note 40 Republique arabe d'Egypte/Southern Pacific Properties Ltd et Southern Pacific Properties (Middle East). [Back]

Note 41 There are a number of decisions of the Commercial Court at first instance all to this effect, following the decision of Rix J in Azov Shipping Co v Baltic Shipping Co (No 1) [1999] 1 Lloyd's Rep 68. In Peterson Farms Inc v C&M Farming Ltd [2004] 1 Lloyd's Rep 603 at para 18, Langley J refers to the many cases that have followed Rix J's decision. Langley J states that he would follow it even if he did not agree with it, which he did. [Back]

Note 42 For what is required to establish an issue estoppel see Issue Seven below. [Back]

Note 43 FPA Section III, paragraph 6, quoted at para 49 above. [Back]

Note 44 Vatier XX: Day 2/page 53 lines 5 – 15. [Back]

Note 45 Joint Memorandum, paragraphs 2.9 and 2.10. [Back]

Note 46 Clause 2.11 of the Joint Memorandum. I have assumed that this extends to emanations of the State, such as the GoP. [Back]

Note 47 Transcript of M. Vatier's evidence: Day 2/page 48 line 24 to page 49 line 19. M. Derains agreed: Day 2/page 71 lines 6-7; page 77 line 13. [Back]

Note 48 M. Derains XX: Day 2/page 81 line 22 to page 82 line 8. [Back]

Note 49 I have amended very slightly the translation given by M. Derains in his report at paragraph 19, which he wrote in English. The decisions of the Paris Cour d'appel referred to are: decision of 30 November 1988 (Société Korsnas Marma/ société Durand – Auzias); decision of 14 February 1989 (Société Ofer Brothers/The Tokyo Marine and Fire Insurance Co Ltd et autres) ; decision of 28 November 1989 (Compagnie tunisienne de navigation (Cotunav)/; Société Comptoir commercial André); decision of 11 January 1990 (Orri/ Société des Lubrificant Elf Acquitaine). See also to the like effect the decision of the Paris Cour d'appel of 21 October 1983 (Société Isover Saint – Gobain/ Sociétés Dow Chemicals). [Back]

Note 50 Day 2/page 81 lines 5 – 7. [Back]

Note 51 M. Vatier XX: Day 2 page 63 lines 18 – 21; M. Derains Re – X: Day 2 page 99 line 25 to page 100 line 1. [Back]

Note 52 Clause 2.12 of the Joint Memorandum. Strictly speaking, as I read the leading decision of the Cour de cassation of 6 July 2000 (Société Creighton/Ministry of Finance of the State of Qatar), it decides that it is consistent with ordre publique for a state entity to renounce its right to immunity from execution by entering into an arbitration clause, but it depends on the intention of the party and the terms of the clause. In that case it was held that the Ministry of Finance had renounced its right to immunity from execution by virtue of agreeing to Article 24 of the ICC Rules of Arbitration. [Back]

Note 53 Vatier XX: Day 2 page 60 line 1 to page 61 line 10. [Back]

Note 54 Report, paragraph 23; decision of the Cour de cassation of 8 February 2000 (Société Taurus Films/Les Films de Jeudi). [Back]

Note 55 Derains: XX Day 2 page 90 line 1 to page 92 line 1. [Back]

Note 56 Joint Memorandum paragraph 2.4. [Back]

Note 57 2004 CLC 1104. [Back]

Note 58 These were decided at the time when Pakistan also consisted of what was East Pakistan, now Bangladesh. Dr Pirzada explained that in those days West and East Pakistan were "provinces" of Pakistan and each had a High Court. After 1971, what had been West Pakistan became one federated state, but with four provinces, each of which had a High Court; that remains the position today: Day 3/page 22 line 3 to page 23 line 18. [Back]

Note 59 See: Azim Khan v State Bank of Pakistan (PLD 1957 (WP) Karichi 892); Pakistan v Amin Agencies Ltd (PLD 1962 (WP) Karichi 467). [Back]

Note 60 Day 3/page 24 lines 1 – 7. [Back]

Note 61 PLD 1957(WP) Karachi 285. [Back]

Note 62 See: In re the Duke of Wellington [1947] 1 Ch 506 at 520 per Wynn – Parry J. [Back]

Note 63 See: Bundle B/pp 46 – 48; 51, 73; 78. [Back]

Note 64 FPA Section III, paragraphs 8.3 and 8.4. [Back]

Note 65 Statement paras 27 to 38. [Back]

Note 66 Clause 2 of the Agreement. [Back]

Note 67 Clause 27 of the Agreement. [Back]

Note 68 The arbitrators held (para 9.2 of Section III the FPA) that the GoP was "bound" by Article 2 to give its guarantee to the facility to be raised by the affiliate of Dallah. This is difficult to understand, at least as a matter of English law. If the GoP is not a party to the Agreement, it cannot therefore be contractually bound by its terms. One cannot start out with the a priori proposition that it is a party, therefore it is bound, therefore it is bound by the arbitration agreement. That is starting with what is to be demonstrated. The position may be different in Saudi Arabian law, but there is no evidence that this is so, nor was there before the arbitrators. [Back]

Note 69 Article 23 of the draft Transport and Maintenance Agreement which is at Schedule E to the Agreement also gives the Trust the right to assign or transfer its rights and obligations under that agreement to the GoP without the prior consent of Dallah. [Back]

Note 70 B/page 113. It stated: "Dallah….will enter into an Agreement with the Awami Hajj Trust "Trust" for the following…". The fax then set out the key matters which were later reproduced in the Agreement. [Back]

Note 71 Repayment was, of course, guaranteed by the GoP. [Back]

Note 72 Letters of 26 September 1996 and 4 November 1996. [Back]

Note 73 FPA Section III paragraph 10.2. [Back]

Note 74 FPA Section III paragraph 10.3. [Back]

Note 75 The government of the late Mrs Benazir Bhutto was replaced by that of Mr Nawaz Sharif: Nackvi witness statement para 69. [Back]

Note 76 FPA paragraph 11.1. [Back]

Note 77 FPA: Section III paragraph 11.2. [Back]

Note 78 [1983] 1 Lloyd's Rep 424 at 426 and 428 – 9. [Back]

Note 79 FPA Section III paragraph 11.2 [Back]

Note 80 FPA Section III para 4 (bis). [Back]

Note 81 Ibid. [Back]

Note 82 It was agreed between counsel that the question of whether or not an issue estoppel binds the GoP must be decided according to English law principles, even though the findings said to give rise to the issue estoppel were made by an arbitral tribunal that was not purporting to apply English law. [Back]

Note 83 Nor is it suggested that this would be inconsistent with French ordre publique. [Back]

Note 84 [2007] QB 886. [Back]

Note 85 Joint Memorandum of French law experts: para 2.7. [Back]

Note 86 Article 1476 of the French New Code of Civil Procedure, as applied to international arbitration pursuant to Article 1500 of the NCCP, quoted in the report of M. Derains, para 10. This is not in dispute. [Back]

Note 87 Cf. DSV Silo – Und Verwaltungs-gesellschaft MBH v Owners of the "Sennar" and 13 other ships (The "Sennar") (No2) [1985] 1 WLR 490, particularly at 499, per Lord Brandon of Oakbrook. [Back]

Note 88 There were interlocutory proceedings before Mr Nigel Teare QC, sitting as a Deputy Judge in the Commercial Court, but I do not need to refer to those in detail here. [Back]

Note 89 Section 9(1) provides: "Where a State has agreed in writing to submit a dispute which has arisen or may arise, to arbitration the state is not immune as respects proceedings in the courts of the United Kingdom which relate to the arbitration". [Back]

Note 90 Para 16. [Back]

Note 91 Para 90. [Back]

Note 92 Para 102. [Back]

Note 93 Para 104. [Back]

Note 94 As defined by Lord Brandon of Oakbrook in the "Sennar" No 2, (supra) at page 499 E – G: "…a decision on the merits is a decision which establishes certain facts as proved or not in dispute; states what are the relevant principles of law applicable to such facts; and expresses a conclusion with regard to the effect of applying those principles to the factual situation concerned" [Back]

Note 95 Paragraph 103 of the judgment. [Back]

Note 96 Paragraph 104 of the judgment. [Back]

Note 97 Paragraph 104 and also 105 of the judgment. [Back]

Note 98 In relation to the Final Award, see the argument under Issue Eight. [Back]

Note 99 Paragraph 109 of the judgment, citing Arnold v National Westminster Bank plc [1991] 2 AC 93. [Back]

Note 100 The French law experts agree that it is the Paris Cour d'appel that would have had jurisdiction to determine any challenge to the FPA: Joint Memorandum paragraph 2.2. [Back]

Note 101 [2002] 2 Lloyd's Rep 326 [Back]

Note 102 [2006] 1 Lloyd's Rep 701. [Back]

Note 103 See paragraph 30 of the report. [Back]

Note 104 I am using "French law" here as a shorthand for French law in the extended way that has been discussed under Issue Three. [Back]

Note 105 That is: "…an agreement in writing under which the parties undertake to submit to arbitration all or any difference which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration". [Back]

Note 106 [2002] 2 Lloyd's Rep 326 at paragraphs 8 – 15. [Back]

Note 107 See paragraphs 11 and 12 of the judgment. [Back]

Note 108 [2002] 2 Lloyd's Rep 326. [Back]

Note 109 That is, it relied on section 103(2)(b) of the Act. [Back]

Note 110 This provides that where an application to set aside an award has been made to a "competent authority", then the court in which recognition or enforcement is sought can adjourn the decision on recognition or enforcement. [Back]

Note 111 Paragraphs 10 and 12 of the judgment. [Back]

Note 112 Paragraph 12 of the judgment. [Back]