



3 November 2010

PRESS SUMMARY

Dallah Real Estate and Tourism Holding Company (Appellant) v The Ministry of Religious Affairs, Government of Pakistan (Respondent) [2010] UKSC 46

On appeal from the Court of Appeal (Civil Division) [2009] EWCA Civ 755

JUSTICES: Lord Hope (Deputy President), Lord Saville, Lord Mance, Lord Collins, Lord Clarke

BACKGROUND TO THE APPEAL

The central issue on this appeal is whether the Government of Pakistan was a party to and bound by an arbitration agreement, so that an award made by an arbitral tribunal under that agreement can be enforced against the Government of Pakistan in the United Kingdom.

The appellant company (“Dallah”) is a member of a group providing services for the Holy Places in Saudi Arabia. In July 1995, it concluded a Memorandum of Understanding with the respondent Government (“the Government”) for the provision by Dallah of housing for pilgrims. In January 1996 the Awami Hajj Trust (“the Trust”) was established and subsequently continued by various ordinances of the President of Pakistan. In September 1996, after Dallah put forward a revised proposal which differed from the Memorandum of Understanding and after further negotiations with the Government, an agreement between Dallah and the Trust was signed (“the Agreement”). The Agreement contained an arbitration clause, whereby any dispute between Dallah and the Trust arising out of the Agreement was to be settled by arbitration. In December 1996, the ordinances lapsed and were not renewed, and Trust ceased to exist as a legal entity.

Dallah invoked arbitration against the Government in May 1998. On 23 June 2006 an International Chamber of Commerce arbitral tribunal sitting in Paris made an award in favour of Dallah in the sum of US\$20,588,040 against the Government. Dallah applied to the High Court in England for leave to enforce the award in this country.

The award was an award within the meaning of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958. Article V(1)(a) of the Convention and s.103 of the Arbitration Act 1996, which transposes Article V(1)(a) in the UK, provide that enforcement of an award may be refused if the arbitration agreement was not valid under the applicable law, which is the case, in particular, if the person against whom enforcement is sought was not a party to the agreement. The applicable law was in this case French law, where the arbitral tribunal sat and made its award. The High Court held that the Government was not a party to the Agreement or therefore to the arbitration agreement and refused leave to enforce the award. The Court of Appeal upheld the decision and Dallah appealed to the Supreme Court.

JUDGMENT

The Supreme Court unanimously dismisses the appeal. It holds that the Government was not a party to the arbitration agreement.

REASONS FOR THE JUDGMENT

An initial issue was the status and weight of the arbitral tribunal's own decision that it had jurisdiction, based on its conclusion that the Government was a party to the Agreement and so to the arbitration agreement. The Supreme Court, while recognising that a tribunal has jurisdiction to determine its own jurisdiction for its own purposes, held that a court, whether within the country where the tribunal is located or within a foreign country where an attempt is made to enforce the award, can and must revisit the question of jurisdiction. The arbitral tribunal could only have jurisdiction by consent, and could not give itself jurisdiction, if there was no relevant consent under the applicable law. Whether consent exists is an issue subject to ordinary judicial determination. Article V of the Convention safeguards the right of a party which has not agreed to arbitration to object to the jurisdiction of the tribunal. The language of Article V(1)(a) of the Convention and s.103(2)(b) of the 1996 Act requires the English court to revisit the tribunal's decision on jurisdiction where the person resisting enforcement maintains that it was not party to any relevant arbitration agreement under the applicable law. [26] – [31]; [79] – [104]

The central issue in the case was whether the Government could establish that, applying French law principles, there was no common intention on the part of the Government and Dallah, such as would make the Government a party to the Agreement. The Court held that the Government had established that there was no such common intention, having regard amongst other matters to:

- The clear change in the proposed transaction from an agreement with the Government (the Government was a party to the initial Memorandum of Understanding) to an agreement with the Trust. [134]
- The deliberate structuring of the Agreement to be between Dallah and the Trust: the Government's only role under the Agreement was to guarantee the Trust's loan obligations and to receive a counter-guarantee from the Trust. Further, Dallah was throughout the transaction advised by lawyers who must have understood the difference between an agreement with a State entity and an agreement with the State itself. [42] – [43]; [133] – [136]
- The fact that the Trust was established as a body corporate capable of holding property and of suing and being sued. [135]
- The fact that it was the Trust which commenced proceedings against Dallah in Pakistan in 1997. [137]

A final issue in the case concerned the nature and existence of any discretion to be found in Article V(1) and s.103(2), which provide that “recognition or enforcement of the award may be refused” if the arbitration agreement is proved to be invalid. Dallah submitted that even if the Government could prove that it is not bound by the Agreement, the Court should exercise its discretion under Article V(1) and s.103(2) to enforce the award. The Court refused to do this, saying that, in the absence of some fresh circumstance such as another agreement, it would be remarkable if the word “may” enabled a court to recognise or enforce an award which it found to have been made without jurisdiction. [68]

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for that decision. The full opinion of the Court is the only authoritative document. Judgments are public documents and are available at:

www.supremecourt.gov.uk/decided-cases/index.html