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Problematic Arbitration Awards under the New York Convention (1958).[1] Probing the Arbitration Tribunal's Jurisdictional Decision that a Resisting Party is a Party to an Arbitration Agreement

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Abstract: The United Kingdom Supreme Court in *Dallah Real Estate & Tourism Holding Co v Pakistan* (2010)[2] has held that if a person or entity (`the resisting party') consistently denies that it is a party to an arbitration agreement, and so opposes the arbitrators' supposed jurisdiction, and the award against the resisting party falls for recognition or enforcement under the New York Convention (1958), the enforcing court (where recognition or enforcement is sought) can re-open and re-examine in full and afresh the disputed issues of law and fact on the question whether the resisting party was truly a party to the relevant arbitration agreement.

[1] New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958; set out in appendix 3 in Mustill and Boyd, *Commercial Arbitration: Companion Volume* (2001), and in appendix B in Redfern and Hunter, *International Commercial Arbitration* (5th edn, Oxford University Press, 2009).
[2] [2010] UKSC 46; [2010] 3 WLR 1472.

INTRODUCTION[3]

The United Kingdom Supreme Court in *Dallah Real Estate & Tourism Holding Co v Pakistan* (2010)[4] (affirming Aikens J, in the (London) Commercial Court,[5] and the (English) Court of Appeal)[6] held that the English courts were obliged not to recognise and enforce the present arbitration award made in France against the Government of Pakistan (`Pakistan'). The award was not valid because Pakistan was not a party to the arbitration agreement, and had not later become a party to it.

The enforcing court's capacity to conduct a searching review of this matter will inject rigour and accuracy into this fundamental threshold issue. Given the explicit hesitation of two members of the Paris arbitration tribunal in this case on this very jurisdictional issue, it was inevitable that the enforcing court's search-light would be trained closely at this possible weakness.

Under the New York Convention (1958), the question whether a person or entity was truly a party to the arbitration agreement must be determined in accordance with either the parties'

[3] Literature on International Commercial Arbitration:
G Born, *International Commercial Arbitration* (2 vols: Kluwer, 2009); Buhring-Uhle, *Arbitration and Mediation in International Business* (Kluwer, The Hague, 1996); WL Craig, WW Park, J Paulsson, *International Chamber of Commerce Arbitration* (3rd edn, 2000, Oceana/ICC Publishing); Fouchard, Gaillard, Goldman's *International Commercial Arbitration* (ed's Gaillard and Savage) (1999) (Kluwer); E Gaillard, *Legal Theory of International Arbitration* (2010); JDM Lew (ed), *Contemporary Problems in International Arbitration* (Kluwer, The Hague, 1987); Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration* (2003); LW Newman and RD Hill (eds), *The Leading Arbitrators' Guide to International Arbitration* (Juris Publishers, Bern, Switzerland, 2004); WW Park, *Arbitration of International Business Disputes: Studies in Law and Practice* (Oxford UP, 2006); Redfern and Hunter, *International Arbitration* (eds Blackaby and Partasides) (5th edn, Oxford University Press, 2009); Poudret and Besson's *Comparative Law of International Arbitration* 2nd ed (2007); Schreuer, *The ICSID Convention: A Commentary* (2nd ed 2009); see also the Montreal 2006 conference papers in *International Arbitration 2006: Back to Basics* (Kluwer, 2007) (International Council for Commercial Arbitration Congress No 13).
English arbitration:
Russell on Arbitration (23rd edn, 2007); Mustill and Boyd, *Commercial Arbitration* (2001 Companion Volume); R Merkin, *Arbitration Law* (2006 update); J Tackaberry and A Marriott (eds), *Bernstein's Handbook of Arbitration and Dispute Resolution Practice* (4th edn, 2003); JG Collier and V Lowe, *The Settlement of Disputes in International Law* (Oxford UP, 1999); *The Freshfields Guide to Arbitration and ADR* (2nd edn, Kluwer, 1999); D Joseph, *Jurisdiction and Arbitration Agreements and their Enforcement* (2005); R Merkin, Arbitration Law (Informa Business Publishing, 2006); A Tweeddale and K Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice* (Oxford UP, 2005); also important is *Dicey, Morris, and Collins on the Conflict of Laws* (14th edn, 2006), ch 16 (and referring to other literature).
French arbitration law:
Delvolvé, Pointon and Rouche, *French Arbitration Law and Practice* (2nd edn, 2009).
[4] [2010] UKSC 46; [2010] 3 WLR 1472.
[5] [2008] EWHC 1901 (Comm); [2009] 1 All ER (Comm) 505.
[6] [2009] EWCA Civ 755; [2010] 1 All ER 592; [2009] 2 CLC 84.

chosen law (but in this case the arbitration agreement did not contain any such choice of law), or the law of the jurisdiction in which the award was made (here French law). That law would supply the test for determining whether the putative party was indeed truly a party to the relevant arbitration agreement.

Applying the relevant French test for this purpose, the UK Supreme Court was satisfied that the Paris arbitration tribunal had adopted faulty reasoning when concluding that Pakistan was a party to the agreement (even though it had not been named as a party within the arbitration clause, nor had it signed that clause). The correct approach, founded on French law, required investigation whether the parties' dealings disclosed a common subjective intention (express or implied), shared by Pakistan and the named arbitration parties, that Pakistan would be treated as party to the arbitration agreement. Instead the Paris arbitration tribunal had erred by invoking more general notions of `good faith', insufficiently tied to the question of common intention, to buttress their conclusion that Pakistan was party to this arbitration agreement.

The sequel to the UK enforcement proceedings, as noted by Lord Mance,[7] is that in August 2009 Dallah began proceedings in the French courts for enforcement, and in December 2009, Pakistan applied to the French courts to rescind all the arbitral awards.

Although the *Dallah* case is `bad news' for the marketability of international commercial arbitration, it is not a complete disaster. It seems unlikely that this development will seriously damage the overall attractiveness of international commercial arbitration when compared to court litigation. The advantages of confidentiality and selection of arbitrators render arbitration a more comfortable style of dispute-resolution for many commercial parties.

BACKGROUND DISPUTE

Dallah was a member of a group of Saudi companies. Dallah and the Government of Pakistan (`Pakistan') signed a memorandum of understanding under which Dallah agreed to acquire land in Mecca, to build accommodation suitable for pilgrims, and then to lease it to

[7] *Dallah* case [2010] UKSC 46; [2010] 3 WLR 1472.

Pakistan for 99 years. Dallah then acquired the land with a view to implementing the agreement. Pakistan established a Trust as the vehicle for the project. An agreement was then formed between Dallah and the Trust. Pakistan was not expressed to be a party to the Agreement, nor did it sign it in any capacity. The agreement provided for disputes to be settled by arbitration held under the Rules of Conciliation and Arbitration of the International Chamber of Commerce, Paris. It stated:

> *'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.'*

After a change of government in Pakistan (the fall of the Bhutto government in November 1996) the relationship between the Government, the Trust, and Dallah broke down.

THE PARIS ARBITRATION

The Trust issued proceedings in Pakistan seeking a declaration that Dallah had repudiated the agreement. Dallah commenced arbitration against the Ministry of Religious Affairs of the Pakistan Government under the rules of the ICC claiming damages for breach of the agreement (May 1998). Pakistan challenged the jurisdiction of the tribunal on the ground that it was not a party to the agreement. The three-arbitrator panel consisted of Lord Mustill, a former Law Lord, Dr Shah, a former Chief Justice of Pakistan, and Dr Ghaleb Mahmassani, an experienced Lebanese lawyer. They made the following awards in this reference (although Lord Mustill and Dr Shah expressed the opinion that the jurisdictional decision at (i) was `very close to the line'):[8]

[8] Lord Mance at [38]: `*The [arbitration] tribunal acknowledged (para 13) that " 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" , but it recorded that Dr Mahmassani believed that, when looked at " 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" , and that " While 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" . In paragraph 14, the tribunal recorded a further divergence of view, with Dr Mahmassani believing that " the general principle of good faith" " comforts the conclusion that the Trust is the alter ego of the Defendant" , but Dr Shah and Lord Mustill " not convinced that in matters not concerning the conduct of proceedings but rather the identification of those who should be participants in them, 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 " .'*

(i) On 26 June 2001 the tribunal published its First Partial Award in Paris in which it held that Pakistan 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;

(ii) in a Second Partial Award published on 19 January 2004 the tribunal held that Pakistan had repudiated the Agreement and directed that damages should be assessed, and issues relating to interest and costs determined at a later hearing;

(iii) by a Final Award dated 23 June 2006 the tribunal awarded Dallah damages in the sum of US$ 18,907,603 and costs of US$ 1,680,437.

ENGLISH DECISION NOT TO PERMIT ENFORCEMENT

The present English challenge was brought under section 103,[9] Arbitration Act 1996 (English enactment[10] of the New York Convention, 1958).[11] This required a rehearing of the

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[9] s 103, Arbitration Act 1996 provides: 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;
(c) that he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case;
(d) that the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration (but see subsection 4);
(e) that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, with the law of the country in which the arbitration took place;
(f) 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.
(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 recognise or enforce the award.
(4) An award which contains decisions on matters not submitted to arbitration may be recognised 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.

[10] At [16] the Court of Appeal in the *Dallah* case [2009] EWCA Civ 755; [2010] 1 All ER 592; [2009] 2 CLC 84 had noted: *`[section 103, 1996 Act] follows very closely that of Article V.1 of the Convention, although in some respects its structure is slightly different…. As is apparent, therefore, [Article V.1] 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*

whole legal/factual question whether the Pakistan was indeed a party to the arbitration agreement. The Supreme Court (affirming Aikens J[12] and the Court of Appeal)[13] held that the Pakistan had not been, or become, a party to the arbitration clause. And so there was no `valid' `arbitration agreement' affecting it. This English decision was an application of section 103(2)(b), Arbitration Act 1996: `*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*'. On this aspect, Lord Collins explained:[14]

> *`Although Article V(1)(a) [New York Convention, 1958]...deals expressly only with the case where the arbitration agreement is not valid, the consistent international practice shows that there is no doubt that it also covers the case where a party claims that the agreement is not binding on it because that party was never a party to the arbitration agreement.* [He then cited various cases, English and American, and finally cited G Born, *International Commercial Arbitration* (2009), pp 2778– 9.]'

THE STEPS IN THIS ANALYSIS

There were five steps in the United Kingdom Supreme Court's reasoning.

(i) *Was the enforcing court entitled to conduct a de novo examination of the issue whether Pakistan was in fact a party to the arbitration clause?* Answer: yes, because it was a fundamental feature of the New York Convention (1958)

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parties as expressed in the arbitration agreement.

[11] Article V.1, NYC (1958): '*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.'

[12] [2008] EWHC 1901 (Comm); [2009] 1 All ER (Comm) 505.

[13] [2009] EWCA Civ 755; [2010] 1 All ER 592; [2009] 2 CLC 84; noted Litigator No 129.

[14] *Dallah* case [2010] UKSC 46; [2010] 3 WLR 1472, at [77].

that the arbitration tribunal's decision on its jurisdiction would not be final. Instead, if the person subject to the relevant award challenges enforcement on this basis, the enforcing court is entitled and required (as Lord Collins noted)[15] to conduct a full investigation of the matter;

(ii) *Which law governed the arbitration clause and the question whether the Pakistan was a party to it*? Answer: French law (the law of the place where the award was made, in the absence of a choice of law different from this);

(iii) *What was the test under French law to determine whether Pakistan was a party to the arbitration agreement?* Answer: an investigation of the objective evidence to discern whether the subjective intentions of all three relevant entities and persons (the named parties and the extraneous entity) that it was mutually agreed that Pakistan, although an unnamed party and a non-signatory of the arbitration agreement, was in fact party to the arbitration agreement;

(iv) *In the light of (i) to (iii), could the enforcing court [here the UK courts] uphold the arbitration panel's decision to treat Pakistan as party to the arbitration agreement?* Answer: the arbitration tribunal had predominantly selected the wrong question, whether Pakistan should be regarded as a party on the basis of the `alter ego theory'. To the extent that the arbitration panel had focused on the true criterion of common intention (as formulated at (iii) above), that tribunal had (a) adopted a defective formulation of the common intention test and (b) its finding that there was such an intention was unsafe, because no safe inference of such a common intention could be satisfactorily drawn from that conduct.

(v) *Did the enforcing court have a residual discretion to uphold the award even though Pakistan had not been shown to be a true party to the arbitration agreement?* Answer: not here.

These steps were more fully explained in the three reasoned judgments (Lords Mance,

[15] [2010] UKSC 46; [2010] 3 WLR 1472, at [104].

Collins, and Saville). But for the sake of economy further details will be confined to steps (iii) and (iv) here.

THE TEST CONCERNING IDENTIFICATION OF `PARTIES TO THE ARBITRATION AGREEMENT' UNDER FRENCH LAW:

A COMMON INTENTION TEST

As Lord Mance said,[16] the correct test requires the arbitration tribunal to determine whether the putative non-signatory party and the named parties consensually agreed to the non-signatory's accession to the agreement. This is a search for subjective common intention (`express or implied') of all the potential parties to the arbitration agreement, assessed by reference to their objective conduct. The relevant conduct embraces all stages of the relevant series of dealings.

Aikens J had (correctly) formulated that test as follows: [17]

` whether all the parties to the arbitration proceedings, including [the relevant non-signatory], 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.'

And Lord Mance noted[18] a similar French formulation (endorsed by both parties' experts) which provided:

`The experts' agreement summarises a jurisprudence constante in the French courts. In translation: "According to the customary practices of international trade, the arbitration clause inserted into an international contract has its own validity and effectiveness which require that its application be extended to the parties directly involved in the performance of the contract and any disputes which may result therefrom, provided that it is established that their contractual situation, their activities and the normal commercial relations existing between the parties allow it to be presumed that they have accepted the arbitration clause of which they knew the existence and scope, even though they were not

[16] *Dallah* case [2010] UKSC 46; [2010] 3 WLR 1472, at [17] to [19].
[17] Quoted at [17] by Lord Mance in *Dallah* case, ibid.
[18] *Dallah* case [2010] UKSC 46; [2010] 3 WLR 1472, at [18].

signatories of the contract containing it. "'

HAD THE ARBITRATION PANEL REACHED A SATISFACTORY CONCLUSION CONCERNING THE PARTIES TO THE ARBITRATION AGREEMENT?

*The `Alter Ego' Test: here the Arbitrators had Applied the Wrong Test:* The Paris Arbitration Tribunal contained two strands of reasoning. Its predominant line of inquiry had involved application of the following (`alter ego theory') erroneous test. Lord Mance explained:[19]

> *`[The arbitration tribunal] considered that it was "clearly established" that the Trust was organically and operationally under the Government's strict control, that its financial and administrative independence was largely theoretical, and that everything concerning the Agreement was at all times "performed by the [Government] concurrently with the Trust" and that "the Trust functions …. reverted back logically to" the Government, after the Trust ceased to exist...The tribunal's examination led it to conclude (para 12-1) that:*
>
> > *"...the Trust appears as having been no more than the alter ego of the Defendant which appears, in substance, as the real party in interest, and therefore as the proper party to the Agreement and to the Arbitration with the Claimant. "'*

Misapplication of the Common Intention Test to the Present Facts by the Arbitration Tribunal: It is true that the arbitration panel had also purported to apply the true test of a common intention, but it had failed to apply that test accurately and convincingly to the facts of this case. Lord Mance explained:[20]

> *`More fundamentally, if and so far as the tribunal was applying a test of common intention, the test which it expressed...differs, potentially significantly, from the principle recognised by the relevant French case-law on international arbitration... In contrast, under the test stated by the [arbitration] tribunal...], direct involvement in the negotiation and performance of the contract is by itself said to raise the presumption of a common intention that the non-signatory should be bound. The tribunal's test represents, on its face, a low threshold, which, if correct, would raise a presumption that many third persons were party to contracts deliberately structured so that they were not party...I consider that Aikens J was therefore correct to doubt... whether the tribunal had applied a test which accords with that recognised under French law.'*

[19] *Dallah* case [2010] UKSC 46; [2010] 3 WLR 1472, at [37].
[20] Ibid, at [40].

As for the `hesitation'[21] (two of the arbitration panels having expressed their sense of the `borderline' nature of the relevant finding), Lord Collins said:[22]

> *`The weakness of the conclusion of the tribunal is underlined by this passage in the Award:*
>
> > *"...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 ...*
> >
> > *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."'*

No Support on Facts for Conclusion that Pakistan had become a Party to the Arbitration Agreement: On the factual question whether there was here a common intention that Pakistan should be regarded as party to the arbitration agreement, Lord Mance concluded that there was no such support: [23]

> *`it is far from clear that the [arbitration] tribunal was directing its mind to common intention and, if it was, it approached the issue of common intention in terms differing significantly from those which a French court would adopt. In any event, as to the facts, there are a number of important respects in which the tribunal's analysis of the Government's conduct and the course of events cannot be accepted.'*

CONCLUSION

The English decision shows the extensive scope during foreign enforcement proceedings under the New York Convention (1958) for the recognition/enforcement court to rehear the question concerning the validity of the arbitration agreement. On that question, that court is required to investigate fully (a) whether the arbitration panel has correctly ascertained the applicable law governing the arbitration award's existence, validity, and effectiveness; (b) the enforcing court must determine whether the test derived from that applicable law has been correctly formulated; (c) the enforcing court must then decide for itself whether that test, when meticulously applied to the facts of the case, establishes that the relevant putative party was truly a party to the arbitration agreement. At this third stage it is not enough merely to rubber-stamp the arbitration tribunal's analysis. Instead it is possible for the party resisting enforcement to show

[21] A feature noted by Lord Collins, ibid, at [39].
[22] *Dallah* case [2010] UKSC 46; [2010] 3 WLR 1472, at [146].
[23] *Dallah* case, ibid, at [66].

that there was in fact no proper factual support for the conclusion drawn by the arbitral panel.

Furthermore, the present case shows the opportunity for successive appeals within the enforcing state's hierarchy of courts. Indeed the Supreme Court carried out a full review itself of the relevant evidence in this matter, rather than merely deferring to the first instance decision on this point by Aikens J in the Commercial Court.

The result is that delay and costs generated by this process of review by the recognition/enforcement court can be considerable. This episode shows that the New York Convention (1958) is not always the fast route to foreign recognition and enforcement which its architects had hoped to create.

On the other hand, it is pleasing that the English courts have shown that an arbitration tribunal's jurisdictional determination that an entity is (in its view) a party to an arbitration agreement should not be lightly ratified by the enforcing court under the NYC 1958, if enforcement of the award is resisted on this basis.

However, if jurisdictional wrangles of this scale become more common, it will be necessary to consider whether the New York Convention (1958) should be modified to secure a `lighter touch' style of recognition and enforcement. Even if consensus among interested states were to emerge, the process of implementing such a revision of this international instrument (to which so many countries have acceded) will be long and difficult.

POSTSCRIPT

It is right that there should be opportunity for such a `final check' before the relevant enforcing courts authorize enforcement against the award-debtor's assets. But it is somewhat embarrassing for the UK Supreme Court that a French court (Paris Cour d'appel) has recently reached the opposite conclusion: that this award was satisfactory, according to French arbitration principles.[24] This decision was made pursuant to Article 1502(1) of the French Code of Civil Procedure. This permits the court to refuse to enforce an award `if the arbitrator has ruled upon the matter without an arbitration agreement or [the putative arbitration agreement is in face] a void and lapsed agreement'. It has also been suggested that the French court's perspective involved posing different criteria (independent of French national law) compared with the criteria adopted by the English courts when purporting to apply French law to the relevant arbitration agreement.[25] The Paris Cour d'appel decision in the *Dallah* case (2011) follows the *Dalico* doctrine[26] which involves a loosening of conflicts rules in the case of international arbitration. The French court then focused on the parties' dealings between the parties. It noted that the Pakistan Government negotiated the contract, and that the Trust created by the Government was merely a signatory. The Paris Cour d'appel also noted that the Government was involved in the performance of the contract, and that it effectively controlled the same transactions' termination. It concluded that the Trust was `purely formal' and that the Government was the true Pakistani party to the transaction. By contrast the English courts had given very considerable weight to the legal separateness of the Trust and had endeavoured to reflect its perception that the arbitration agreement had not merely been signed by the Trust, and made no mention of the Government as an additional party, but that there was no true consensus between the members of this triangle that the Government should be treated as a party to the arbitration agreement. How does this

[24] *Gouvernement du Pakistan v Société Dallah Real Estate & Tourism Holding Co, Cour d'appel de Paris, Pôle 1 – Ch. 1, n° 09/28533 (17 February 2011) (www.practicallaw.com/8-505-0043).*On which see both the next note and the comment by White & Case: http://www.whitecase.com/insight-03022011/

James Clark, *http://www.practicallaw.com/4-504-9971?q=&qp=&qo=&qe=*: `By contrast, the French court did not focus on French law principles and proceeded to a factual enquiry to determine whether the parties had actually consented to go to arbitration. This very practical approach is consistent with French case law. This solution is inspired by the recognised desire of French courts to develop substantive rules for international arbitration that ensure that the outcome of a dispute does not depend on the particularities of a national law. This solution is also consistent with French case law on the extension of arbitration agreements to parties that are non-signatories but have participated in its negotiation and performance.'

[26] Cour de Cassation, First Civil Chamber, *Municipalité de Khoms El Mergeb v Dalico*, 20 December 1993, JDI 1994, 432, note E. Gaillard.

difference of analysis and result leave the relevant award? If a third jurisdiction were to be asked to enforce the Dallah award (made by the arbitration tribunal in Paris), it seems highly likely that it would defer to the French court's decision, rather than be guided by the UK Supreme Court's conflicting decision. This is because (a) the French court is situated in the seat of the relevant arbitration and (b) it seems likely that the French court's flexible and transnational reasoning in this matter would be regarded as more attractive. At any rate, the *Dallah* sage reveals that the New York Convention (1958) is not the fast-route to cross-border enforcement that enthusiasts for commercial arbitration had expected.