The Competence-Competence Doctrine and the Enforcement of Arbitral Awards

In our January 2009 newsletter, we reported on the English High Court judgment in Dallah Real Estate & Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan.¹ The focus of that newsletter was on the English courts’ refusal to enforce an ICC arbitral award on the ground that there was no valid arbitration agreement.

Since that newsletter, the English High Court judgment has been subject to appeal and, on 4 November 2010, the highest of the English appeal courts, the Supreme Court, handed down its decision. The decision clarifies the scope of the doctrine of "competence-competence" in England - that is, the power of an arbitral tribunal to determine its own jurisdiction. This was described by Lord Collins, who gave one of the leading judgments, as "an issue of international importance".

In this newsletter, we consider the judgment of the Supreme Court and also take the opportunity to examine how the arbitral tribunal had originally approached the issue of its jurisdiction and the validity of the arbitration agreement under the "competence-competence" doctrine.

Background

In summary, Dallah is a Saudi Arabian company which provides services for Muslims performing the Hajj pilgrimage to Mecca. In 1994, Dallah and the Government of Pakistan ("Pakistan") entered into a Memorandum of Understanding (the "MOU") by which Dallah was to acquire land in Mecca and contract for the use of the land. Subsequently, Dallah entered into contracts for the development of housing on its plot with a trust set up by Pakistan (the "Trust"). The contracts referred disputes to ICC arbitration in Paris.

A dispute arose under the contracts between Dallah and the Trust. However, the Trust was established on the basis of temporary ordinance only, and had ceased to exist by the time Dallah sought to bring its arbitration claim. In the absence of the Trust, Dallah sought to bring its claims against Pakistan on the grounds that it was the successor party to the Trust and therefore party to the arbitration agreement.

Throughout the Paris-based ICC proceedings, Pakistan denied being a party to the arbitration agreement, refused to submit to the jurisdiction of the tribunal and did not do anything to waive its sovereign immunity. Accordingly, the tribunal was required to determine whether Pakistan was in fact a party to the arbitration agreement.

The "Competence-Competence" Doctrine

It is a general principle of international commercial arbitration that a tribunal is empowered to make a determination as to its own jurisdiction to deal with the substantive claims in dispute. This is known as the "competence-competence" doctrine. However, the fact that a tribunal can determine its own jurisdiction does not give it exclusive power to do so and certainly does not prevent an enforcing court that is not at the seat of the arbitration from re-examining the tribunal's jurisdiction. As a leading textbook on international arbitration states:

"[arbitrators cannot be] sole judges of their jurisdiction. That would be neither logical nor acceptable. In fact, the real purpose of the competence-competence rule is in no way to leave the question of the arbitrators' jurisdiction in the hands of the arbitrators alone. Their jurisdiction must instead be reviewed by the courts if

¹ [2008] EWHC 1901 (Comm).
If a national court later determines that the tribunal lacked competent jurisdiction, then it may, as discussed further below in the context of the English courts’ re-examination of the tribunal's jurisdiction in the Dallah case, deem the award to be invalid and therefore unenforceable.

The Dallah Decisions

The Tribunal's Decisions

When determining whether Pakistan was in fact a party to the arbitration agreement and hence subject to its jurisdiction, the tribunal first sought to identify the governing law of the arbitration agreement. Upon finding no express governing law, the tribunal applied principles described as deriving from "transnational law". Based upon these principles, the tribunal found that Pakistan was a party to the arbitration agreement and that it had jurisdiction to deal with the substantive claims in dispute. The proceedings therefore moved forward and the tribunal ultimately rendered an award on the substantive issues against Pakistan.

The Supreme Court Decision

When Dallah sought to enforce the arbitral award in the English courts, Pakistan again objected to the tribunal's jurisdiction. Dallah countered that the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") did not contemplate a rehearing of the merits of the case at the enforcement stage, and that this would undermine the finality and efficiency of the enforcement system under the New York Convention.

Having been considered by the English High Court and Court of Appeal, the issue of the tribunal's jurisdiction was appealed to the English Supreme Court. Although the Supreme Court acknowledged the doctrine of "competence-competence", it stressed that this did not necessarily mean that arbitrators are the sole judges of their jurisdiction.

The Supreme Court accepted that the international trend was to limit reconsiderations of the findings of the tribunal and noted the pro-enforcement policy of the New York Convention. Nonetheless, the court ultimately concluded that if an action is brought to set an award aside, a court is not only entitled to review the tribunal's jurisdiction, but also has wide powers to re-open issues of fact in order to determine independently whether a valid arbitration agreement exists.

In reviewing the jurisdiction of the tribunal, the Supreme Court first considered whether transnational law was the appropriate body of law to resolve this preliminary question of jurisdiction. In reaching its determination on this point, the Supreme Court relied on Section 103(2)(b) of the Arbitration Act 1996 (reflecting Article 5(1)(a) of the New York Convention) which provides that:

"[r]ecognition and enforcement of the award may be refused … if… the arbitration 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."

The Supreme Court concluded that that French law should have been applied to the arbitration proceedings, rather than the transitional law adopted by the tribunal. The Supreme Court then held that:

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3 See www.unctad.org/unctad/en/unctad_texts/arbitration/NYConvention.html. The New York Convention provides for the recognition and enforcement of foreign arbitral awards in member countries, of which there are currently 145 (including Japan).
4 The English High Court decision is considered in detail in our January 2009 newsletter. The English Court of Appeal case reference is [2010] UKSC 46.
5 The Supreme Court also held that an award could be challenged in the courts of the country where enforcement was being sought without having first being challenged in the courts of the country of the seat of the arbitration (namely France).
(a) a French court would take account of the whole history and objective conduct of the parties in order to ascertain whether there was a joint intention shared by both Dallah and Pakistan to be bound by the arbitration agreement;

(b) particular facts in the case indicated that Pakistan did not intend to be bound by the commercial agreement between Dallah and the Trust and, as a result, there was no valid arbitration agreement between Dallah and Pakistan; and

(c) in the absence of a valid arbitration agreement between Dallah and Pakistan, enforcement of the arbitral award should be refused pursuant to section 103(2)(b) of the Arbitration Act 1996.

Conclusion

This Supreme Court decision clarifies the extent to which an English court can use its discretion under Section 103 of the Arbitration Act 1996 to reopen issues of fact and law in order to determine whether a valid arbitration agreement exists between the parties to a dispute. This means that the last word may not rest with a tribunal; as a result, cases could be protracted while the courts address such issues. The decision also confirms that a party is not required to challenge or appeal an award in the courts of the seat of arbitration before resisting enforcement elsewhere.

However, the fact that the issue of jurisdiction would be fully explored in the English courts may provide a degree of comfort in some circumstances. Although other jurisdictions will doubtless wish to highlight the comparatively less interventionist approach of their courts, the Supreme Court’s decision suggests that the position should be similar under the implementing national laws of all other 144 signatories of the New York Convention.

As to the issue of who is a party to an arbitration agreement, parties should ensure that all of the parties with which they are negotiating are considered to be contracting parties. Where possible, all such parties should be signatories to the agreement, particularly where states are involved.