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

Date: 20 July 2009

Before :

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**

- -

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

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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

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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] Q.B. 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 A.C. 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.

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