Absolute power

Do English courts have too much power in arbitration proceedings? asks **Khawar Qureshi QC**

IN BRIEF

- *Dallah Estate v The Ministry of Religious Affairs Government of Pakistan*: has provided an opportunity to consider whether it is right to contend that the English courts still retain excessive power to intervene and thus disrupt the arbitral process.

Since the Arbitration Act 1996 (AA 1996) came into force more than 10 years ago, the English courts are generally viewed by practitioners and users alike as having adopted a strong supportive, and non-interventionist approach to the arbitral process.

While there are some commentators who suggest that the English courts have been too concerned to protectively "ring-fence" the arbitral process (not least with regard to sparsity of appeals on points of law pursuant to AA 1996, s 69), a recent decision of the Court of Appeal in the case of *Dallah Estate v The Ministry of Religious Affairs Government of Pakistan* [2009] EWCA Civ 755, [2009] All ER (D) 199 (Jul) (*Dallah*) has provided an opportunity to consider whether other commentators are right to contend that the English courts still retain excessive power to intervene, and thus disrupt the arbitral process.

> "*Dallah* has provided an opportunity to consider whether commentators are right to contend that English courts still retain excessive power"

State-ment of intent

More than 140 states have signed up to and—in theory—are required to give effect to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (often referred to as the New York Convention (NYC)) pursuant to their domestic laws.

The NYC, Art V is intended to severely curtail the scope for review of an international arbitral award by domestic courts in a jurisdiction where enforcement and execution of the award is sought (the enforcing court). There are compelling reasons to observe that if domestic courts are able to act as a court of appeal or review of the substance of an arbitral award, the rationale for arbitration—expeditious and effective dispute resolution—is seriously undermined.

The New York Convention (NYC)

The NYC, Art V confers a discretion upon domestic courts to refuse enforcement of an arbitration award if any of the following matters are proven:

"1 Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) the parties to the agreement referred to in Art 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 recognised and enforced; or

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

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

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

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

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

The most troublesome provision of the NYC in terms of the approach adopted by courts in some jurisdictions is Art V(2)(b)—the so called "public policy" exception—which has been interpreted as conferring an almost open–ended authority for review in certain jurisdictions. The AA 1996, s 103 broadly follows the structure and content of NYC, Art V and AA 1996, s 103(2)(b) was the subject of detailed consideration in the *Dallah* case.

Dallah

A Saudi Company (Dallah) offered to provide services for Pakistani pilgrims to Mecca, and entered into a memorandum of understanding with the Pakistan government in July 1995. Thereafter, in January 1996 the Pakistan government created a trust entity, and the trust then entered into an agreement with Dallah dated 10 September 1996 (the agreement).

The agreement contained an ICC arbitration clause. A dispute arose and Dallah commenced an arbitration on 19 May 1998 whereby it named the Ministry of Religious Affairs of the Pakistan government as the respondent.

The Pakistan government did not accept that it was a party to the agreement and challenged the jurisdiction of the arbitral tribunal (which sat in Paris).

The agreement contained no choice of law clause. In determining the question whether the Pakistan government was bound by the agreement, the arbitral tribunal had applied "those transnational general principles and usages which reflect the fundamental requirements of justice in international trade and the concept of good faith in business".

Aikens J had accepted the Pakistan government's arguments that, pursuant to Section 103(2)(b) this issue needed to be considered with reference to the law of the country where the award was made, namely French Law, at the stage of enforcement of the arbitral award. Aikens J heard evidence from French Law experts and carried out an extensive review of the documents before concluding that, as a matter of French Law, the Pakistan government could not be considered as being bound by the agreement.

> **"The court was unlikely to allow enforcement of an award if it was satisfied that its integrity was fundamentally unsound"**

On 26 June 2001 the arbitral tribunal issued a partial award determining that the Pakistan government was bound by the agreement. On 23 June 2006 the arbitral tribunal awarded Dallah damages and costs totaling around USD$20m (the award).

On 9 October 2006 Clarke J gave Dallah leave to enforce the award pursuant to AA 1996, 101. Aikens J set aside leave to enforce on 1 August 2008. 11 months later the Court of Appeal upheld Aiken J's decision.

The issue

The Pakistan government invoked AA 1996, s 103(2)(b) (s 103(2)(b)) to resist enforcement of the award. Section 103 (2)(b) provides as follows:

"103 Refusal of recognition or enforcement

(1) Recognition or enforcement of a New York Convention award shall not be refused expect 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."

Before the Court of Appeal, Dallah, inter-alia, argued that it would be wrong for the English Court to re-open the question as to whether the Pakistan government was bound by the agreement.

Dallah's arguments were essentially as follows—the tribunal had decided this issue, the Pakistan government had not sought to challenge the award before the French courts, and, moreover, for the English court to permit the Pakistan government to adduce expert evidence as to whether, as a matter of French Law, the Pakistan government was indeed bound by the agreement would generate uncertainty and conflict with the rationale for enforcement of international arbitral awards.

Considerations

However, the Court of Appeal considered the NYC and AA 1996, s 103(2) with reference to two previous cases which had considered the nature and extent of the discretion provided to the enforcing court *(Dardana Ltd v Yukos Oil Co* [2002] EWCA Civ 543, [2002] 1 All ER (Comm) 819 and *Kanoria v Guinness* [2006] EWCA Civ 222, [2006] 2 All ER (Comm) 413).

At para 58 of the judgment, Lord Justice Moore-Bick observed that AA 1996, s 103(2) is concerned with "the fundamental structural integrity of the arbitration proceedings"—which meant in turn that the court was unlikely to allow enforcement of an award if it was satisfied that its integrity was fundamentally unsound.

As Lord Justice Rix observed (at para 87 of the judgment) "there could hardly be a more fundamental defect than an award against someone who was never party to the relevant contract or agreement to arbitrate."

The Court of Appeal confirmed that it was not necessary for the Pakistan government to have challenged the award before the French courts. Section 103(2) provided a free-standing right to raise the points of principle enshrined in NYC, Art V before the English courts.

While expeditious and effective enforcement of international arbitration awards was necessary, NYC, Art V reflected core safeguards to ensure that an enforcing court was able to deal with points of fundamental principle.

Indeed, the Court of Appeal left open the question as to whether there might be circumstances where an English court would enable enforcement of an arbitral award even though the courts in the seat of an arbitration had set aside an arbitral award.

Integrity

The NYC marks a considerable concession on the part of states whereby they have agreed to provide a "passport" to an international arbitration award, which would enable its enforcement far more quickly and effectively than decisions of many foreign courts.

Essential safeguards

As such, NYC, Art V contains essential safeguards to ensure that parties are not subject to enforcement/execution measures in circumstances where there is a manifest and fundamental defect in the underlying arbitral proceedings.

The *Dallah* decision confirms the importance of those safeguards, and reflects consistently strong English court support for the arbitral process. NLJ

Khawar Qureshi QC specialises in commercial litigation and international arbitration