Neutral Citation Number: [2008] EWHC 1901 (Comm)

Case No: 2006-686

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/08/2008

Before :

THE HONOURABLE MR JUSTICE AIKENS

- -

Between :

DALLAH REAL ESTATE AND TOURISM HOLDING COMPANY	**Claimant**
- and -	
THE MINISTRY OF RELIGIOUS AFFAIRS, GOVERNMENT OF PAKISTAN	**Defendant**

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Hilary Heilbron QC and Klaus Reichert (instructed by **Kearns & Co, Solicitors, London**) for the **Claimant**
Toby Landau QC and Patrick Angénieux (instructed by **Watson Farley & Williams, Solicitors, London**) for the **Defendant**

Hearing dates: 8th, 9th and 10th July 2008

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Judgment

Mr Justice Aikens:

1. On 9 October 2006, Christopher Clarke J made an *ex parte* order, pursuant to ***section 101*** of the ***Arbitration Act 1996*** ("the Act") and ***CPR Part 62.18,*** giving the Claimant ("Dallah") leave to enforce an ICC arbitration award made in Paris, France, and dated 23 June 2006 ("the Final Award") in the same manner as a judgment of the court. This Final Award of a distinguished tribunal consisting of Lord Mustill, Mr Justice Dr Nassim Shah and Dr Ghaleb Mahmassani, ruled that the Respondent ("the GoP"), must pay compensation to Dallah of US$18,907,603 and costs, making a total of US$ 20,588,040. The order of Christopher Clarke J. gave the GoP a period of 2 months and 23 days after service of the order to apply to the court to set the order aside.

2. On 23 March 2008,[1] the GoP issued an Arbitration Application to set aside Christopher Clarke J's order on two grounds. First, that the GoP, as a State entity, is immune from the enforcement proceedings. Secondly, that enforcement of the Final Award should be refused because the arbitration agreement on which it was

[1] The reason for the delay is explained below.

based 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",* pursuant to ***section 103(2)(b)*** of the Act.

3. The hearing of this application took place before me on 8, 9 and 10 July 2008. The first ground was not specifically argued, but Mr Landau QC, appearing for the GoP, made it clear that his client is a state entity and it reserved all its arguments that it was entitled to plead state immunity and strike out Dallah's action on that basis. On the second ground, the argument of the GoP was that it was not a party to the arbitration agreement and so, as between the GoP and Dallah, there was no valid arbitration agreement that could found the tribunal's jurisdiction to make the Final Award. It was common ground at the hearing that, for the purposes of ***section 103(2)(b)*** of the Act, there was no clear "*indication*" as to which law the parties had "*subjected the arbitration agreement".* Therefore the issue of the "*validity*" of the arbitration agreement had to be determined according to French law, that being the law of the country where the Final Award was made.

4. At the hearing there was no oral evidence from witnesses of fact. There were three witness statements in evidence, however. First, I had two witness statements of Mr Patrick Angénieux, a solicitor with Watson, Farley and Williams, ("WFW"), solicitors for the GoP. They were largely formal. Secondly, there was a witness statement that had been adduced as evidence in the course of the ICC arbitration proceedings. This is an undated witness statement from Mr Shezi Nackvi, a director of a company related to Dallah.

5. I heard oral evidence from two experts in French law, M. Le Bâtonnier Bernard Vatier, on behalf of the GoP, and M. Yves Derains on behalf of Dallah. The arguments of the parties also raised issues on the law of Pakistan. I heard evidence from two experts on Pakistani laws: Mr Mehmood Mandviwalla, on behalf of the GoP; and Dr Abdul Hafeez Pirzada on behalf of Dallah. Prior to the hearing all the experts had served reports and each pair of experts had prepared a Joint Memorandum on agreed and contested issues. All the expert witnesses were very helpful in dealing with the issues put to them by counsel and by me.

6. Mr Landau QC, for the GoP, and Miss Heilbron QC, for Dallah, had submitted comprehensive Outline Submissions before the start of the hearing. Miss Heilbron also very helpfully produced a written summary of her submissions on various documents and an Outline of her submissions on the evidence. I was much assisted by both the written and the oral submissions of both counsel. I reserved judgment.

A. The parties and the background to the relevant contracts

7. Dallah is a Saudi Arabian company, which is engaged in the provision of services to Muslims who perform Hajj at Mecca. Dallah is one of a number of companies in the Dallah Group of Companies, which are ultimately owned by Albaraka Investment and Development Trading ("Albaraka"). That is the trading name of a Saudi Arabian partnership between the Chairman of the Dallah Group, Sheikh Salleh Al Kamel, and his family members. Albaraka is based in Jeddah. The Dallah Group as a whole is involved in the provision of services, such as accommodation, transportation and medical facilities, for pilgrims visiting Mecca. It is the largest provider of such services in Saudi Arabia.

8. The Ministry of Religious Affairs, Government of Pakistan, ("the MORA") is one of the ministries of the Federal Government of Pakistan, as defined by the Rules of Business 1973. Those Rules were promulgated under Articles 90 and 99 of the Constitution of the Islamic Republic of Pakistan of 1973.[2] The full name of the ministry is "Ministry of Religious Affairs and Zakat and Ushr". The ministry is divided into two divisions, one of which is the Religious Affairs Division. Amongst the subjects that are within the work of the ministry are "pilgrimage beyond Pakistan", "the welfare and safety of pilgrims" and "donations for religious purposes".

9. **The start of the project:** In December 1994, the Pakistani cabinet approved in principle a proposal to establish the "Awami Hajj Trust" ("the Trust") for the purpose of mobilising savings from intending Hajj pilgrims and for the investment of those savings in Shariah approved schemes. A cabinet committee was set up under the chairmanship of the Minister of State for Finance to work out the details. It was decided that the Trust should take the form of a corporate body which would have four principal objectives. These were: (i) to mobilise savings from intended pilgrims; (ii) to invest such savings in Shariah approved modes of investment; (iii) to meet the cost of performance of Hajj by members out of the balances in their accounts; and (iv) to take steps to facilitate the performance of Hajj by members.[3]

10. In 1995, Mr Shezi Nackvi, a director of Samaha Holdings Limited, which is also ultimately owned by Albaraka, proposed to the MORA that the Dallah Group be permitted to provide to the GoP a housing complex in Mecca or Medina on a long term lease for use by Pakistani pilgrims. Discussions with the MORA followed in March and April 1995. An announcement was made by the GoP in May 1995.

11. **The Memorandum of Understanding:** On 24 July 1995 a Memorandum of Understanding (the "MOU") was concluded between Dallah and the President of the Islamic Republic of Pakistan "through the Ministry of Religious Affairs". The relevant terms of the MOU are set out in Annex 1 to this judgment. I will only summarise the effects of its terms here. Under clause 1, Dallah agreed to acquire land within Mecca for the construction of housing facilities for Pakistani pilgrims "*whilst performing Hajj and Umra". * Dallah would construct the housing on that land. The total cost of the land and housing would not exceed US$ 242 million: clause 2. Under clause 3, the parties agreed that Dallah would lease the houses and the land to the GoP on a 99 year lease, "*subject to Dallah arranging the necessary Financing for [the GoP] on terms approved by [the GoP] in accordance with the provisions of this Agreement".* Clause 4 stipulated that Dallah must, within 30 days of the execution of the MOU, prepare and submit to the GoP the terms and conditions of the proposed lease. By clause 6, within 60 days of the approval of the lease by the GoP, Dallah must prepare and submit to the GoP detailed specifications and drawings for the housing.

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[2] The 1973 Constitution has been modified from time to time since then. I was shown the details of the Constitution as amended up to 31 December 2003.

[3] Letter of Mr Lutfullah Mufti, Secretary of the MORA, to Mr Hussain Luwai, President of the Muslim Commercial Bank Ltd in Karachi, dated 18 July 1995. It is clear from the context of the letter that "members" means members of the proposed Trust.

12. Clause 23 states that the MOU will be governed by Saudi Arabian law. By clause 24, disputes would be resolved by arbitration under Saudi laws and regulations, with any arbitration taking place in Jeddah. The wording of clause 25 appears to be mangled. (I suspect there was a word – processing error or proof – reading failure). It is attempting to deal with the issue of immunity of the GoP, but it seems that part of the paragraph is missing, so it is impossible to determine its meaning. However, clause 27 states that the GoP consents to proceedings arising in connection with the MOU, including those concerning the *"making, enforcement or execution against any award, order or judgment which ma be made or given in such proceedings"*. Although, strictly speaking, the correct interpretation of that clause is a matter of Saudi Arabian law, it appears to me to be a waiver by the GoP of immunity from suit and execution.

13. On 17 August 1995, (ie. within 30 days of the MOU), Mr Nackvi, on behalf of Dallah, sent to Mr Lutfallah Mufti Dallah's proposals in respect of the lease and financing of the project. On 18 November 1995, Dallah acquired 43,000 square metres of land in Mecca.[4] However, the GoP did not approve the financing and lease proposals within the period of 90 days after they were sent to the GoP on 17 August 1995.

14. **The Ordinance:** On 31 January 1996, the President of Pakistan promulgated Ordinance No. VII of 1996, under powers conferred by Article 89(1) of the Constitution of Pakistan. The Ordinance is entitled: "*An Ordinance to provide for the establishment of an Awami Hajj Trust"* ("the Trust"). The relevant articles of the Ordinance are reproduced in Annex 2 to this judgment. In summary, it provides as follows: first, the preamble states that it is "*expedient to provide for the establishment of an Awami Hajj Trust to mobilize savings from the pilgrims desirous of performing Hajj and investment thereof in the Islamic modes of investment and for facilitating Hajj operations and matters connected therewith and incidental thereto"*. Article 2 sets out various definitions, including a "member", who is defined as an intending Haji who wishes to save and finance the Hajj expenses by becoming a member of the Trust. Article 3(1) stipulated that the Trust would be established by Notification in the Official Gazette "*by the Federal Government"*. Article 3(2) stipulates that the Trust will be a "*body corporate having perpetual succession and a common seal with power to acquire, hold and dispose of property, and may by its name, sue and be sued"*. Article 3(3) provides for the Trust's headquarters to be in Islamabad and it may establish regional offices at other places "*as the Federal Government shall determine"*. Article 4 sets out the purposes of the Trust. Article 5 provides that the general direction and administration of the Trust will vest in a board of trustees. The Chairman of the board is to be the Minister of Religious Affairs. The Secretary of the Religious Affairs Division of the MORA, if he is not appointed the Managing Trustee, is to be a member of the board and also is to act as its Secretary. Article 6 sets out the powers and functions of the board. Article 7 sets out the powers and functions of the Managing Trustee. Article 12 stipulates that the board of the Trust may, *"with the prior approval of the Federal Government, make rules for carrying out the purposes of this Ordinance"*.

15. On 14 February 1996, a Notification of the establishment of the Trust was made by the MORA. Dallah was fully aware of this. Discussions between Dallah and

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[4] This was, in fact, much larger than the area contemplated in the MOU.

officials of the MORA continued. In a letter dated 14 April 1996, from Mr Nackvi to Mr Lutfallah Mufti, addressed to him as Secretary of the MORA, the Dallah Group proposed that the Al Towfeek Investment Bank be appointed as Managing Trustee of the Trust. The Board of Trustees of the Trust resolved to adopt this proposal at a meeting on 30 July 1996.

16. At the same meeting the Board of Trustees also agreed to the proposal of the Dallah Group that it should raise a loan of US$100 million, to be granted to the GoP to pay for the cost of the development of the housing facilities. The Trust was to give a guarantee to repay it, with a counter – guarantee by the GoP itself.

17. Under the provisions of Article 89(2) of the Constitution of Pakistan, an Ordinance "*shall stand repealed"* at the expiration of four months from its promulgation if it is not laid before Parliament. However, under the Constitution of Pakistan, Ordinances can be renewed. In this case, Ordinance VII of 1996 was renewed on 2 May 1996 (as Ordinance XLIX of 1996), then again on 12 August 1996, as Ordinance LXXXI of 1996.

18. No further renewals of this Ordinance were promulgated thereafter. The parties' Pakistani law experts agree that this meant that the Ordinance lapsed at midnight on 11/12 December 1996. The precise consequences of that was a matter of dispute between the Pakistani law experts. However, they do agree that once the Ordinance lapsed, the Trust ceased to exist as a legal entity.[5]

19. **The Agreement between Dallah and The Trust:** On 10 September 1996, that is whilst the last renewal Ordinance was still in force, Dallah and the Trust entered into an agreement ("the Agreement"). The preamble states that the Agreement is between "*the Awami Hajj Trust established under section 3 of the Awami Trust Ordinance 1996 (No VII of 1996)….and Dallah Real Estate and Tourism Holding Company"*. I have set out the relevant provisions in Annex 3 to this judgment. I will summarise the main terms here.

20. By clause 1, Dallah undertook to develop and construct housing for 45,000 Pakistani pilgrims whilst performing Hajj and Umra, on a plot of land in the Al – Misfalah district of Mecca. By clause 2, the Trust agreed to pay to Dallah a lump sum of US$ 100 million, by way of an "Advance Lease Payment", within 30 days of the date of execution of the Agreement. This was subject to Dallah arranging, through one of its affiliates, a financing facility in the same amount, against a guarantee of the GoP. Dallah also had to provide within that time a Performance Bond covering the amount of the Advance Lease Payment. The Trust and the Trustee Bank had to provide a counter – guarantee in favour of the GoP. By clause 3, the Agreement

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5 I made it clear to counsel for the parties at an early stage in the hearing that I found this a puzzling conclusion, given the wording of the Ordinance (particularly article 3(2)) and the fact that the Trust had been created long before the last Ordinance "stood repealed". I put the point to both experts on Pakistani law, but they both insisted that, as a matter of Pakistani law, once the Ordinance "stood repealed" because it had not been presented to Parliament in time, the statutory corporation that had been created by the Ordinance, as notified on 14 February 1996, then automatically ceased to exist. It was also the conclusion of the Civil Judge First Class in the first set of proceedings in Pakistan, to which I refer below. As this is an issue of Pakistani law, which I have to receive as a fact, it is therefore effectively an agreed fact, which it seems to me I have to accept.

"*shall come into effect"* on the date that Dallah received the Advance Lease Payment and it, in turn, submitted the Performance Guarantee to the Trust.

21. By clause 4, Dallah agreed to develop, construct and complete the Housing in accordance with "*such detailed specifications and drawings that shall be approved by the Trust within 90 days from the date of execution…"* of the Agreement. When signed by the parties, those would become the "Approved Specifications". Under clause 5(a), the Trust agreed irrevocably and unconditionally to take on a lease of the housing to be developed by Dallah.

22. By clause 19, the Agreement would be binding upon and would "*enure to the benefit of"* the parties and to "*the benefit of their successors and permitted assigns",* to the extent permitted by the Agreement and by applicable law.

23. Clause 24 provides that the Trust would not claim and would irrevocably waive immunity from "*suit, award, execution, [and] attachment…"* or other legal process, to the extent that in any jurisdiction there may be attributed such immunity to the Trust. Clause 27 permits the Trust to assign or transfer its rights and obligations under the Agreement to the GoP, without the prior consent in writing of Dallah.

24. Clause 23 is the arbitration clause. As it is at the centre of the present application, I will set it out in full here:

> *"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".*

B. The Dispute, the subsequent litigation in Pakistan and the ICC arbitration

25. On 19 January 1997, Mr Lutfullah Mufti wrote to Dr Muhammad Saad Yamani, the chairman of Dallah. The letter was under a letterhead which stated "*Government of Pakistan, Ministry of Religious Affairs, Zakat & Ushr and Minorities Affairs".* Mr Lutfallah Mufti signed it as "Secretary", but the organisation of which he was secretary is not identified.[6] Logically, as the Trust had ceased to exist at that stage as a matter of law, he could not have been writing the letter in his capacity as Secretary to the Board of Trustees of the Trust, which must have evaporated with the Trust itself.

26. The letter is headed: "*Agreement dated 10.9.1996 – Makkah Housing Project, Makkah Mukarramah".* The letter stated that, under the terms of the Agreement, Dallah was required within 90 days of its execution to "*get the detailed specifications and drawings approved by the Trust".* The letter 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*

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[6] It will be recalled that he was Secretary of the MORA and Secretary of the Board of Trustees of the Trust. He was also, by this time, Secretary of the Managing Trustee, the Al – Baraka Islamic Investment Bank.

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 US$ 100,000,000,00 within 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".

27. On 20 January 1997, the Trust, as plaintiff, purported[7] to begin proceedings against Dallah, as defendant, in the Court of the Senior Civil Judge, Islamabad. This suit was entitled a "*Suit for [a] Declaration to the effect that [the] Agreement dated 10.09.1996 stood repudiated on account of [the] default of the Defendant…*". The claim also sought a permanent injunction restraining Dallah from claiming any right against the Trust under the Agreement or representing or holding out that the Trust had any contractual relations with Dallah. The pleading has at its foot a "Verification" of truth, which is signed by Mr Lutfallah Mufti as "Plaintiff". Mr Lutfallah Mufti also swore an affidavit, stated to be in his capacity as "Secretary Board of Trustees of the Trust", in which he confirmed the facts set out in the plaint, ie. that the Agreement was between Dallah and the Trust.

28. At the same time, the Trust sought an interim injunction against Dallah from the same court and in the same terms as the permanent injunction. That application document was also signed by Mr Lutfallah Mufti.

29. On about 6 March 1997, Dallah applied to the court to stay those proceedings, under section 34 of the Arbitration Act 1940.[8] The application form is not in the bundles for the hearing. I assume that Dallah applied on the footing that there is an arbitration clause, clause 23, in the Agreement. The application was resisted by the Trust and Mr Lutfallah Mufti swore two "counter affidavits" in opposition to the application.

30. This set of proceedings terminated when a court order was made on 21 February 1998. The order of the Civil Judge First Class of Islamabad states that at the time the proceedings were started, the Trust had ceased to exist and so could not bring any proceedings in its name. The order continues, in paragraph 2:

> *"Moreover the things done during the Ordinance can be sued and can sue by the parent department for whom this Ordinance was issued by the government and that was ministry for religious affairs. Suit should have been filed by the Ministry of religious affairs…..*
>
> *But before parting with this Order, I observe that the liabilities and duties against the present defendant can be agitated by the Ministry of Religious affairs government of Pakistan if any. Since the suit has not been filed by*

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7 I say "purported" because it is agreed by the Pakistani law experts that by this time the Trust had ceased to exist as a legal entity under Pakistani law.

8 When passed, that Act would have applied to both what is now India and Pakistan.

the legal person, the present plaintiff is no more a plaintiff in the eye of [the] law. Suit is dismissed. File be consigned to the record room".

31. The spotlight then moves to the ICC. On 19 May 1998, Kearns & Co., solicitors for Dallah, wrote to the ICC and requested arbitration against the MORA, Government of Pakistan. Dallah nominated Lord Mustill as its arbitrator. The letter of 19 May enclosed Points of Claim on behalf of Dallah, naming Dallah as Claimant and the GoP as Respondent. Paragraphs 18 and 19 of the Points of Claim state:

> "*18. On 19.01.97 the Secretary, Ministry of Religious Affairs of the Respondent [ie. the MORA], acting on behalf of itself as principal and on behalf of the Trust, purported to repudiate the Agreement….*
>
> *19. The letter of 19.01.97 amounted to an unlawful repudiation of the Agreement and evinced an intention on the part of the Respondent [ie. the MORA] not to be bound by its terms. The Respondent continues to refuse to implement the Agreement. Accordingly the Claimant has accepted the Respondent's repudiation".*

32. Paragraph 23 of the Points of Claim sets out the arbitration clause in the Agreement, ie. clause 23. It asserts that the "*Respondent was at all material times a party to the Agreement and the Arbitration Agreement".*

33. The ICC notified the GoP of Dallah's request for arbitration. On 5 June 1998, Messrs Walker Martineau Saleem, advocates and legal consultants in Islamabad ("WMS"), replied to the ICC on behalf of the MORA. The letter stated that the MORA had filed legal proceedings before the Court of the Civil Judge First Class, Islamabad and a hearing had been fixed for 13 June 1998. The letter referred to section 35 of the Arbitration Act 1940, which provides (broadly) that once legal proceedings concerning the whole of the subject matter of the reference have been started, then all further proceedings in the reference will be invalid, unless a stay of legal proceedings has been granted under section 34 of that Act. The letter also quoted section 35(2) of that Act, which provides: "*In this section the expression "parties to the reference" includes any person claiming under any of the parties and litigating under the same title".* The letter concluded "*…in view of the above legal provision the arbitration proceedings cannot proceed".* It also included a copy of an order that had been made by the judge in the proceedings to which the letter referred.

34. The MORA had indeed started new proceedings before the Court of the Senior Civil Judge, Islamabad, on 2 June 1998. The plaintiff was named as the "*Islamic Republic of Pakistan through Secretary, Ministry of Religious Affairs, Government of Pakistan, Islamabad".* Dallah was named as the defendant. The terms of the claim are identical to those that had been dismissed by the judge in the previous proceedings brought by the Trust, including the claim for a permanent injunction in the same terms. The new claim explains (in paragraph 2) that because Ordinance LXXXI of 1996 dated 12 August 1996 "*stood repealed,"* then the Trust established under the Ordinance "*no longer remained in field",* so that the "*…present suit is, therefore, being filed by Pakistan who issued the said Ordinance".* Paragraph 14 refers to the terms of the order of the judge in the previous proceedings. Paragraph 15 then states:

> "*That the cause of action accrued to the plaintiff against the defendant at Islamabad firstly when the defendant entered into the Agreement and thereafter when it defaulted in fulfilling the pre-conditions of the Agreement and the same was repudiated and finally in January 1997 when it refused to treat the Agreement as repudiated*".

The claim was verified by Mr Lutfallah Mufti, this time in his capacity as Secretary, MORA.

35. The Civil Judge ordered that a notice should be sent to Dallah, inviting it to appear at a hearing on 13 June 1998. In the meantime Dallah was restrained from representing or holding itself out as having contractual relations with the GoP on the basis of the Agreement. This was the order that accompanied the letter of WMS to the ICC dated 5 June 1998, which I mentioned above.

36. On 12 June 1998 Dallah applied for a stay of those proceedings, pursuant to section 3 of the Arbitration (Protocol and Convention) Act 1937 and section 34 of the Arbitration Act 1940. Dallah relied on the arbitration provision in clause 23 of the Agreement, to which it was said that the MORA was a party. The MORA replied that there was no valid and effective Agreement between the parties because it had never become effective. It is implied, therefore, that there was no valid arbitration agreement between the parties. However, the GoP did not specifically deny that it was a party to the Agreement or the arbitration clause: only that it had not come into effect. The GoP also took the point that, in the ICC proceedings, Dallah had made a claim against the MORA, which the GoP said was not a juristic person and so those proceedings were "*not tenable in law*".

37. On 18 September 1998, the Civil Judge First Class dismissed Dallah's application for a stay. He did so on various grounds. He concluded that the GoP was not a signatory to the Agreement and that the MORA was not a juristic person. He also held that Dallah had not put forward any evidence of a transfer of rights and obligations of the Trust. He held that there could only be a stay if there was a reference or submission by both parties before the court. He also held that the relevant Arbitration Act did not apply to foreign arbitrations.

38. Dallah appealed to the District Court against that ruling. Whilst the appeal was pending, counsel for the MORA applied to withdraw the proceedings on the ground that it suffered from a *"formal defect"*. On 14 January 1999 the District Judge ruled that the MORA was entitled to withdraw its suit and he permitted it be done. He also ruled that "*after withdrawal of the suit, the instant appeal has become infructuous and is disposed of…*".

39. Meanwhile, the GoP took only a very limited part in the ICC arbitration proceedings. A letter from WMS dated 15 August 1998 to the ICC Secretariat stated that it would not submit to the jurisdiction of the International Court of Arbitration because there was no contract or arbitration agreement between the GoP and Dallah. On 16 September 1998 the Court of Arbitration appointed Mr Justice Dr Shah as the arbitrator for the GoP, because it had not nominated one itself. On 21 October 1998, the Court of Arbitration nominated Dr Ghaleb Mahmassani as chairman of the tribunal.

40. The next series of steps, which I will deal with together, concern further proceedings in Pakistan. On 12 January 1999, the GoP filed a further suit against Dallah in the Court of the Senior Civil Judge, Islamabad. This was an application under section 33 of the Arbitration Act 1940.[9] The suit sought six declarations in particular. The first was that Pakistan was not the legal representative, successor or assignee of the "*defunct*" Trust. The second was that Pakistan had not taken on the responsibilities of the defunct Trust. The third was that there was no privity of contract between Pakistan and Dallah and that Pakistan was not a signatory to any arbitration agreement. The fourth was that the Agreement was invalid and so could not form the basis of any arbitral reference to the ICC. The fifth was that the arbitral proceedings of Dallah, "*being against a non – juristic person, ie. MORA, Islamabad, are incompetent"*. The last was that the Agreement was contrary to the public interest and void. At the same time the GoP applied for a stay of the arbitration, pending disposal of its main claims. These applications were verified by the then Secretary of the Ministry of Religious Affairs, Mr Saiyed Siddiqui.

41. Dallah objected to these applications on the ground that the GoP did not have *locus standi* to make an application under section 33 of the Arbitration Act 1940 of Pakistan, because the GoP denied being a party to the arbitration agreement in clause 23 of the Agreement and also disclaimed any relationship with the Trust. On 19 June 1999, the Civil Judge First Class, Islamabad, ruled in favour of Dallah's arguments and so dismissed all the applications of the GoP.

42. The GoP filed a "Revision Petition" in the Court of the District Judge, Islamabad, in which it maintained its applications that had been dismissed by the Civil Judge First Class. The Court of the District Judge dismissed the Revision Petition on 25 October 2000 on the same grounds as the Civil Judge First Class.[10]

43. The GoP then filed a second Revision Petition in the Lahore High Court. This was also dismissed. In doing so, the judge in the High Court made observations on whether the GoP was a party to the Agreement or clause 23 of it. He said:

> *"I therefore do find that the learned trial judge has very correctly found that the petitioner GoP is neither a party to the said agreement nor it claims under any of the parties to the same. This being so the petitioner cannot be proceeded against under the said arbitration agreement which forms part of the said agreement dated 10.9.1996".*

44. On 6 June 2003 Dallah filed an appeal in the Supreme Court of Pakistan. On 17 July 2006 (*sic)* the Supreme Court gave leave to consider a number of points. One of the points taken in the Petition concerns the effect of Article 264 of the Constitution of Pakistan when, as here, an Ordinance lapses and, as a result, a statutory corporation ceases to exist. This issue is relevant in the present application, as I explain below.

45. Meanwhile in the ICC arbitration the Terms of Reference were signed by the arbitrators and Dallah at a hearing on 26 March 1999. Those were approved by the ICC on 17 April. The seat of the arbitration was determined to be Paris, France. The

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[9] This provides that "*Any party to an arbitration agreement or any person claiming under him desiring to challenge the existence or validity of an arbitration agreement or an award or to have the effect of either determined shall apply to the Court and the Court shall decide the question on affidavit…".*

[10] See in particular para 17 of the judgment.

GoP refused to participate in the arbitration proceedings or sign the Terms of Reference.[11]

46. The tribunal decided that it should deal with the issue of its jurisdiction first. It posed the following question for answer:

> *"Does an agreement to arbitrate under the ICC Rules exist between the Claimant [ie. Dallah] and the Defendant [ie. the GoP] and does the Arbitral Tribunal have jurisdiction in respect to the Defendant over the claims submitted by the claimant in the present case?".*

47. On 23 July 1999 Dallah served its submissions and documents on that issue. On 11 September 1999 the GoP submitted, without prejudice, its written observations with attachments. An oral hearing took place on 17 September 1999, which was attended by representatives of Dallah but not the GoP. In a letter dated 15 October 1999, the tribunal asked for further assistance from the parties. On 17 November 1999 the GoP served, without prejudice, a "Memorial" addressing the matters raised by the tribunal. Dallah served a response on 19 November 1999. A further oral hearing took place on 27 March 2000 in Paris. The GoP did not attend and was not represented. Dallah made further submissions and produced more documents both then and subsequently.

C. The ICC First and Second Partial Awards and the Final Award

48. The First Partial Award ("FPA") was rendered in Paris on 26 June 2001. It dealt solely with the issue of jurisdiction. The conclusion of the tribunal was unanimous, although the arbitrators did not agree on all points in their reasoning. The tribunal held that "*the Ministry of Religious Affairs, Government of Pakistan",* which was named as Defendant, was bound by the arbitration agreement in clause 23 of "*…the Agreement with the Claimant dated 10 September 1996".* Therefore "*an agreement to arbitrate under the ICC Rules exists between the Claimant and the Defendant, and such Defendant is the proper Defendant party to the Arbitration".* The tribunal also held that the dispute submitted to arbitration by Dallah fell within clause 23 of the Agreement "*…as it is a dispute arising out of such Agreement between the Claimant and the party determined to be a contracting party to such Agreement by the Arbitral Tribunal".* Accordingly, the tribunal held it had jurisdiction in respect of the GoP over the claims submitted by Dallah in the reference.

49. I will have to consider the findings and reasoning of the tribunal in more detail later in this judgment, but there are several points to note at this stage. First, the tribunal characterised the question it had to answer as "*…whether or not an agreement to arbitrate the present dispute exists between [Dallah] and [the GoP]".*[12] Secondly, the tribunal decided that, given the internationally accepted rule that an arbitration agreement is autonomous from the "main agreement" between parties, it was not necessary to decide on the applicable law to the main agreement. As far as the "*Arbitration Agreement"* is concerned, the tribunal concluded that "*such Agreement is not to be assessed, as to its existence, validity and scope, either under the laws of Saudi Arabia or under those of Pakistan, nor under the rules of any other specific*

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11 See para 17 of the tribunal's First Partial Award.
12 FPA: Section III first para, page 19.

local law, connected or not, to the present dispute". As I read the FPA, this reference to the *"Arbitration Agreement"* is a reference to clause 23 of the Agreement, not a reference to any further agreement to refer the particular dispute that had arisen to arbitration.[13] Instead, the tribunal held it should decide the issue of its jurisdiction and all matters relating to the validity and scope of the arbitration agreement (ie. clause 23 of the Agreement) and therefore whether the GoP is a party to it and to the arbitration, "*…by reference to those transnational general principles and usages reflecting the fundamental requirements of justice in international trade and the concept of good faith in business".*[14] Thirdly, the tribunal characterised the test to be applied to see if the GoP was bound by the arbitration clause in the following terms:

> *"Arbitral as well as judicial case-law has widely recognised that, in international arbitration, the effects of the arbitration clause may extend to parties that did not actually sign the main contract but were directly involved in the negotiation and performance of such contract, such involvement raising the presumption that the common intention of all parties was that the non – signatory party would be a true party to such contract and would be bound by the arbitration agreement".*[15]

50. Using that test, the tribunal analysed the whole history of the venture between Dallah, the GoP and the Trust from the outset of negotiations to the letter of WMS to the ICC on 5 June 1998. Having done so it concluded:

> *"13. Certainly, many of the above mentioned factual elements, if isolated and taken into a fragmented way, may not be construed as sufficiently conclusive for the purpose of this section.*
>
> *However, Dr Mahmassani believes that when all the relevant factual elements are looked into globally as a whole, such elements constitute a comprehensive set of evidence that may be relied upon to conclude that the Defendant is a true party to the Agreement with the Claimant and therefore a proper party to the dispute that has arisen with the Claimant under the present arbitration proceedings.*
>
> *Whilst joining in this conclusion Dr Shah and Lord Mustill note that they do so with some hesitation, considering that the case lies very close to the line."*

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[13] In English law, although perhaps not in other laws, a distinction must be drawn between two arbitration agreements. The first is an agreement of parties to submit future disputes to arbitration; the second is the reference, ie. the agreement to refer a particular dispute to arbitration: see: ***Black Clawson International Ltd v Papierwerk Waldhof-Aschaffenburg AG*** [1981] 2 Lloyd's Rep 446; ***Mustill & Boyd on Commercial Arbitration (2nd Ed. 1989 page 61).*** The definition of "*arbitration agreement*" in ***section 6*** of the Act covers both. I will have to consider this question further: see below.

[14] FPA: Section III, para 4 (bis), page 20. Lord Mustill and Dr Justice Shah expressed doubts as to whether there could be a "*transnational procedural law independent of all national laws",* in an arbitration, but appear to have accepted that the applicable law for the purposes of deciding the issue of who was bound by the "Arbitration Agreement" was not the procedural or "curial" law, but the applicable law of the "Arbitration Agreement", viz. clause 23 of the Agreement.

[15] FPA: Section III, para 6, page 26.

51. Dr Mahamassini also concluded that "*the requirements of good faith and morality*" demanded that the GoP be bound by both the Agreement and the arbitration agreement. However, the FPA records that Dr Justice Shah and Lord Mustill were "*not convinced*" that a duty of good faith could operate "*to make someone a party to an arbitration who on other grounds could not be regarded as such*". Nonetheless the three arbitrators agreed on the result, which they regarded as conforming with "*the general justice of the case*".[16]

52. The GoP asked the tribunal to adjourn the hearing of the merits of Dallah's case pending resolution of the proceedings in Pakistan. The tribunal rejected that application after a hearing in April 2003. The Second Partial Award was rendered in Paris on 19 January 2004. In this award the tribunal made the following determinations on the merits of Dallah's claim: (i) the law applicable to the merits of the case was that of Saudi Arabia; (ii) the MORA was a "*true party to the Agreement*" and so was bound by it; (iii) the Agreement was valid; (iv) the letter of 19 January 1997 addressed to Dallah "*by the defendant [ie. the MORA]*" constituted an unlawful repudiation of the Agreement "…*entailing the liability of the Defendant for such repudiation*"; (v) therefore Dallah was entitled to compensation for its claims for damage suffered as a result of that repudiation; (vi) damages would be assessed in a further award.

53. In the Final Award, rendered on 23 June 2006, the tribunal ordered the GoP to pay Dallah US$ 18,907,603 by way of damages for breach of the Agreement. It also ordered the GoP to pay Dallah's costs and the tribunal's fees and expenses, totalling US$ 1,680,437, making a grand total payable by the GoP of US$ 20,588,040.

D. The proceedings for recognition and enforcement of the Final Award and the application of the GoP to set them aside

54. On 10 July 2006 Dallah made an *ex parte* application to the Commercial Court pursuant to ***section 101*** of the Act for leave to enforce the Final Award as a judgment of the High Court. Gloster J granted that order on 12 July 1996. Unfortunately paragraph 2 of the order, which (in accordance with Commercial Court practice[17]) had been drawn up by the Claimants' solicitors, failed to provide properly for the time in which the GoP, as a state entity, could apply to set aside the order.[18] Therefore Dallah resubmitted its application. The order of Christopher Clarke J. dated 9 October 2006 set aside Gloster J's order and granted Dallah permission to enforce the Final Award in the same manner as a judgment or order of the High Court, giving the GoP 2 months and 23 days after service to apply to set the order aside.

55. On 19 February 2007, WFW, solicitors for the GoP, applied to the court to extend the time for applying to set aside the order of Christopher Clarke J by six weeks. The reasons for doing so were set out in a witness statement of Mr David Kavanagh, solicitor with WFW. At paragraph 5 of his statement, Mr Kavanagh records that the

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[16] FPA : Section III, para 14, page 35.

[17] See CPR Pt 62.18(7)(a).

[18] ***Section 12(2)*** of the ***State Immunity Act 1978*** provides that the time for entering an appearance to proceedings against a state shall begin to run two months after the judgment has been received at the Ministry of Foreign Affairs of the state concerned. Paragraph 2 of the order of Gloster J gave the GoP only 31 days after service of the order.

GoP had been considering with its French lawyers whether the GoP could challenge the Final Award (and possibly the Partial Awards) in the French courts.[19] The statement continues:

> *"A successful challenge to the award(s) in France would have provided the [GoP] with a ground to resist enforcement in England on the basis of section 103(2)(f)[20] of the Arbitration Act 1996. This process in itself took a substantial amount of time….Having carefully considered the advice provided by its French lawyers, [the GoP] has decided not to challenge the award(s) in France".*

56. By a Consent Order made on 23 February 2007, Langley J extended the time for the GoP to apply to set aside Christopher Clarke J's order until 23 March 2007. The application was duly issued on that day, leading to the present hearing.

E. The Provisions of the New York Convention 1958 and the Act

57. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 ("the Convention") was signed on 10 June 1958. Both the UK and France are parties to it. On the first issue that has to be considered it will be necessary to examine Articles II, III, IV and V, so I have reproduced them in Annex 4 to this judgment. Statutory effect to the Convention was first given in England and Wales (and Northern Ireland) by the ***Arbitration Act 1975.*** That Act was repealed by the 1996 Act and effect was given to the Convention by ***Part III*** of the latter Act in ***sections 99 – 104.*** I have set out ***sections 100 – 103*** in Annex 5 to this judgment. Broadly, Article V of the Convention is covered by ***section 103*** of the Act. ***Section 103(2)(a)*** and ***(b)*** deal with Article V.1(a) of the Convention. As I have already indicated, the main argument before me concerns ***section 103(2)(b)*** of the Act. This provides that recognition or enforcement of a Convention award may be refused if the person against whom it is invoked proves 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. The Issues raised on the application and the parties' positions on them.

58. Mr Landau and Miss Heilbron stated that there were a number of points of common ground and some issues which were not going to be argued at this hearing. These can be summarised as follows: (1) The GoP is not named as a party to the Agreement or the arbitration clause (clause 23), nor did it sign any part of the Agreement. (2) The Agreement named the Trust as a party and the Agreement was signed and concluded on behalf of the Trust. (3) The Trust was, under Pakistani law, established as a statutory corporation with a legal personality and the capacity to contract. (4) At all relevant times the GoP and the Trust were separate legal entities with distinct legal

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[19] As France was the "seat" of the ICC Arbitration, the French courts would be the "supervising" courts. The French law experts agreed that the Paris Cour d'appel was the court with jurisdiction over any challenge to the awards: Joint Memorandum paragraph 2.2.

[20] That provides that a New York Convention award may be refused if the person against whom it is invoked proves "*that the award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made".*

personalities as a matter of Pakistani law.[21] (5) Upon the lapse of Ordinance LXXXI of 1996 at midnight on 11/12 December 1996, the Trust ceased to exist as a legal entity. (6) The parties to the "arbitration agreement" (whoever they might be and whatever that is taken to be – see below) did not identify any particular law to which the "arbitration agreement" was *"subjected"* for the purposes of ***section 103(2)(b)*** of the Act. Therefore any question concerning the validity of the "arbitration agreement" had to be decided according to the law of the country where the Final Award was made, viz. France.[22] (7) No separate argument would be advanced by the GoP on its ability to claim state immunity from these proceedings in its capacity as a state entity, but it reserved its position on that issue both in this jurisdiction and elsewhere.

59. In the light of these agreements, I have attempted to summarise the issues for decision and the parties' positions on them.

60. **Issue One:** What is the correct construction of ***section 103(2)(b)*** of the Act? This raises three separate questions. First, what is being referred to by the phrase "*the arbitration agreement"* in that section? As I have already pointed out,[23] under English law this could mean the agreement to refer future disputes to arbitration, ie. in this case, clause 23 of the Agreement. Or it could mean an agreement between parties to refer a particular dispute to arbitration, pursuant to the first arbitration agreement.

61. The second question is: what does the phrase in ***section 103(2)(b)*** "*the arbitration agreement was not valid"* cover? Does it include an argument that the party against whom an award is invoked was not bound by the arbitration agreement on which the arbitral tribunal founded jurisdiction?

62. The third point concerns the ambit of the phrase at the end of ***section 103(2)(b) –*** *"…within the law of the country where the award was made".* Does this mean that the English court must consider only the domestic law of the country where the award was made; or does it entitle the English court to look at a third country's laws if, by virtue of the conflict of laws rules of the law of the country where the award was made - or otherwise - that law would do so in order to decide whether "*the arbitration agreement"* is valid?

63. Mr Landau and Miss Heilbron were largely agreed on the answers to these three questions. On the first question they agreed that "*arbitration agreement"* in ***section 103(2)(b)*** meant a reference to clause 23, ie. the agreement to refer future disputes to arbitration. On the second question they agreed that an argument on whether someone was a party to the arbitration agreement was covered by the phrase "*the*

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[21] There are two related issues of Pakistani law which remained in dispute, on which counsel agreed that both sides would not adduce argument in these proceedings but would reserve their position in case there were further proceedings in this or other jurisdictions. These were: (a) whether the Trust was the "*alter ego"* of the GoP; and (b) whether the corporate veil of the Trust could be lifted and, if so, what it would reveal.

[22] As I note below, there remain issues about what is meant by the "arbitration agreement" and what is comprised within the phrase "*the law of the country where the award was made",* in particular does it permit the application of that country's conflict of laws rules or any reference to "transnational" law or the laws of any other country, such as Pakistan.

[23] See footnote 13 above.

arbitration agreement was not valid". On the third issue, I have set out the agreed position below.[24] As a result I must consider Pakistani law to a limited extent.

64. Although there is no significant disagreement between counsel on these issues, they call for some explanation.[25] I have set out my analysis on the first and third questions later on in this judgment. However, because the explanation on the second question is more extended, I have decided to make it Annex 6 of this judgment.

65. **Issue Two:** When a party challenges the recognition and enforcement of a Convention award under ***section 103(2)(b),*** what is the scope of the enquiry that the court has to undertake? Is it in the nature of a full hearing of all the relevant evidence, as Mr Landau submits, or, at least in this case, is it more in the nature of a review of the decision of the arbitrators on the issue of jurisdiction, as Miss Heilbron argues?

66. **Issue Three:** Given that questions of the validity of the arbitration clause have to be decided by principles according to French law, what are the French law principles by which to decide whether the GoP was and is bound by the arbitration agreement in clause 23 of the Agreement between Dallah and the Trust? The parties and the French law experts were largely agreed on these although there were differences of emphasis between the witnesses, in particular over two questions. The first is the extent to which French law will apply principles of "transnational law" to this issue. The second is the extent to which French law demands that a court is more cautious before concluding that a state is bound by an arbitration agreement. I will set out the areas of agreement and disagreement of the French law experts in more detail when I consider this issue.

67. **Issue Four:** If the English court is entitled to take account of Pakistani law for the purposes of determining whether the GoP is bound by the arbitration clause,[26] then the next issue concerns Article 173 of the Pakistan Constitution. The issue is: does Article 173 of the Constitution state a mandatory rule that the State of Pakistan can only validly enter into and be bound by an agreement provided that such agreement is made in the name of the President of Pakistan and is executed on his behalf by such person and in such manner as the President may direct or authorise?[27] Mr Landau submits that it so provides. Miss Heilbron argues that Article 173 is only directory and if a contract is concluded in the name of "the Ministry of Religious Affairs" or some other government title other than the President, the contract will not be void and would bind the GoP.

68. **Issue Five:** Applying the relevant principles of French law (and taking account of any "transnational law" and Pakistani law principles that may be relevant according to French law), what is the answer to the question of whether the GoP is bound by the

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[24] See paragraphs 78 – 79.

[25] I confess that all these points were raised by me in the course of argument.

[26] That is not because, as a matter of construction of ***section 103(2)(b),*** the English court should take account of the conflicts of law rules of the law of the country where the award was made, but because the French courts would engage in a "broad factual enquiry", including issues of foreign law.

[27] Mr Landau was prepared to accept for this application that Article 173 does not stipulate that the agreement must be in writing, in the narrow sense of that phrase. (Compare the definition of "agreement in writing" in ***section 5(2)*** of the Act).

arbitration agreement? Mr Landau submits that the GoP is not bound by it. Miss Heilbron submits the opposite.

69. **Issue Six:** Assuming that, applying French law principles, the GoP is not bound by the Agreement and the arbitration clause, has the GoP satisfied the burden of proving, for the purposes of ***section 103(2)(b),*** that the arbitration agreement in clause 23 is not valid? Given that the burden of proof under ***section 103(2)*** is upon the party that wishes a court to refuse recognition and enforcement of the Convention Award, logically there is a further step between a conclusion, under French law, that the GoP is not bound and a conclusion that the GoP has proved, to the relevant English law standard of proof, the issues that have to be demonstrated to satisfy ***section 103(2)(b).*** This may involve no extra considerations, on the facts of particular cases, but I think that, formally, this is a separate issue.

70. **Issue Seven:** Assuming that the court is satisfied, for the purposes of ***section 103(2)(b)*** of the Act, that the GoP has proved that the arbitration agreement is not valid because the GoP is *not* bound by the arbitration agreement in clause 23 of the Agreement, is the GoP nonetheless prevented, by virtue of an issue estoppel arising out of the tribunal's First Partial Award on jurisdiction, from asserting that it is not so bound? Miss Heilbron, relying on the decision of the Court of Appeal in ***Svenska Petroleum Exploration AB v Government of the Republic of Lithuania and another (No 2),***[28] submits that there can be and is such an issue estoppel, thus preventing the GoP from relying on ***section 103(2)(b)*** to set aside the *ex parte* order for recognition and enforcement of the Final Award. Mr Landau accepts that issue estoppel could arise in theory. But he submits that in this case there is no issue estoppel because no tribunal of competent jurisdiction has decided the relevant issue that arises as between Dallah and the GoP, under ***section 103(2)(b)*** of the Act, in accordance with the relevant law, ie. French law. He reserved any points that he might have to make on State Immunity in relation to this issue.

71. **Issue Eight:** Even if the court concludes the GoP has proved that it was not bound by the arbitration agreement and it also concludes that the GoP is not bound by an issue estoppel as to the validity of the arbitration clause, should the court exercise a discretion, under ***section 103(2)*** of the Act, to recognise and enforce the Final Award against the GoP? Miss Heilbron submits that there is a residuary discretion to do so that should be exercised in this case. Mr Landau submits that, on the proper construction of ***section 103(2),*** there is no such residuary discretion and even if there is, it should not be exercised in this instance.

72. **Issue no longer being pursued:** If, on principles of French law (and any other laws it is legitimate to consider), it was not the common subjective intention of the parties that the GoP be bound by the arbitration clause directly, then a further issue of French and Pakistani law might have arisen. The French law experts agree that, as a matter of French conflict of laws rules, Pakistani law would govern issues concerning the effect of the lapse of the Ordinances and whether the GoP thereupon became the successor to the non - existent Trust.[29] The only argument that was originally raised in these proceedings on this aspect of Pakistani law was whether the GoP became the successor to the rights and obligations of the Trust, including the

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[28] [2007] QB 886.
[29] Joint Memorandum of French Law Experts: paragraph 2.4.

obligation to arbitrate, (so that the GoP would become bound by the arbitration agreement) by virtue of Article 264[30] of the Constitution of Pakistan,

73. However, the position has changed as a result of the evidence in the hearing. During the cross – examination of Dallah's Pakistani law expert, Dr Pirzada, I asked him a question about the effect of Article 264.[31] Dr Pirzada accepted that Article 264 would not, of itself, make the GoP the successor to the Trust once the latter ceased to exist. Mr Landau submitted that there is no evidence of any other mechanism, under Pakistani law, whereby the GoP could become the successor of the Trust upon its demise. Miss Heilbron accepts, (for the purposes of this application only),[32] that there is now no evidence before the court to establish that it would be possible in a Pakistani court for Dallah to bring a claim against the GoP, based on a case that, by virtue of Article 264, the Agreement and the arbitration agreement were transferred to the GoP from the Trust upon its demise. Miss Heilbron also accepts that there is no evidence before this court of any other mechanism to do so by Pakistani law. However, Miss Heilbron maintains her submission that the effect of Article 264 is to preserve rights that have arisen under the Agreement at the time the Trust ceased to exist. She submits that this is relevant to the overall factual enquiry that the French court would undertake. Miss Heilbron also submits that it is relevant to questions of "good faith" which a French court would take into account in deciding whether the GoP is a party to the arbitration agreement.

G. Issue One: The correct construction of *section 103(2)(b)* of the Act.

74. **Question (1) Which "*arbitration agreement*" is being referred to in *section 103(2)(b)* of the Act?**

As I have already pointed out, under English law, if parties have agreed to submit future disputes to arbitration, then when a dispute arises and they submit that particular dispute to specific arbitrators, it gives rise to a further arbitration agreement, commonly called "the reference to arbitration".[33] This is sometimes called the doctrine of "double separability". Although other systems of law draw a distinction between the underlying arbitration agreement and the individual reference, unlike English law they do not analyse it in terms of separate contracts which might have distinct governing laws. Article V of the Convention expressly distinguishes between the underlying arbitration agreement and the individual reference. Article V(a) speaks of "*the agreement referred to in Article II*" and "*the said agreement is not valid*". The cross – reference to Article II indicates clearly that the "arbitration agreement" being referred to in Article V(a) is the underlying arbitration agreement. In contrast, Article V(c) refers to "*the submission to arbitration*", which is clearly intended to point to the individual reference of the present dispute between the parties. This

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[30] The relevant part of Article 264 of the Constitution provides: "*Where a law is repealed, or is deemed to have been repealed, by, under, or by virtue of the Constitution, the repeal shall not, except as otherwise provided in the Constitution – (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under the law*".

[31] See Transcript for Day 3/page 36 line 19 to page 37 line 22.

[32] Miss Heilbron reserves her position on any arguments on this point that might be made in any other action in this or any other jurisdiction.

[33] See the references given at footnote 13 above.

analysis of the Convention is supported by the authoritative commentary on the Convention by Van den Berg, published in 1981.[34]

75. This distinction is reflected in the structure of ***section 103(2)*** of the Act. The phrase "*arbitration agreement"* is defined for the purposes of Part III of the Act (in ***section 100(2)(a))*** as being an "*arbitration agreement in writing",* and that is given the same definition for Part III as it has for Part I of the Act. Although the phrase "*arbitration agreement"* as defined in ***section 6(1)*** of the Act (in Part I) covers an agreement to submit both present or future disputes to arbitration, the sense of "*arbitration agreement"* in ***section 103(2)(a)*** must be taken from the rest of that section and the meaning given to it in the Convention. Thus it is to be contrasted with the phrase "*submission to arbitration"* in ***section 103(2)(d),*** which clearly encompasses the individual reference of a present dispute.[35]

76. The consequence of this analysis is that, assuming that ***section 103(2)(b)*** covers issues of whether an entity is bound by "*an arbitration agreement*", the focus has to be on the agreement to refer future disputes to arbitration, not the individual reference. In this case, therefore, that means focusing on the issue: was the GoP bound by clause 23 of the Agreement?

77. **Issue One: Question (2) Does the phrase "*..the arbitration agreement was not valid"* in *section 103(2)(b)* of the Act cover the case where the party against whom the award is invoked (party A) wishes to prove that he is not a party to or otherwise bound by the arbitration agreement that gives the arbitral tribunal jurisdiction to make the award that is sought to be enforced**?

Imagine party A is the party against whom an award is invoked. The question is: if party A succeeds in the argument that it is not bound by the arbitration agreement, then does it follow that, for the purposes of ***section 103(2)(b),*** the relevant arbitration agreement is therefore "*not valid*" as between the party wishing to enforce the award and party A? I was initially a little sceptical of Mr Landau's submission that this type of argument was covered by ***section 103(2)(b).*** My first reaction would be to interpret the phrase "*the arbitration agreement is not valid"* as giving rise, not to questions of who is bound by it, but to issues concerning formal validity, such as whether, under the applicable law of the arbitration agreement, it had to be in a certain form, or signed by the parties and such like matters.[36] However, once Mr Landau referred me to the analysis of Mance LJ in ***Dardana Ltd v Yukos Oil Co and Petroalliance Services Co Ltd,***[37] I accepted that I must be wrong and was, in any case, bound by Court of Appeal authority. I will not therefore set out here my own analysis. I have done so in Annex 6 to this judgment for anyone who is interested.

78. **Issue One: Question (3): Does the phrase *"within the law of the country where the award was made"* in *section 103(2)(b)* include a reference to the conflict of laws rules of that country?**

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[34] ***Albert Jan van den Berg "The New York Arbitration Convention 1958"*** at pages 295 – 6 and 314 – 6.
[35] See also ***section 103(2)(e),*** which refers to "*the agreement of the parties",* which must refer to the individual reference.
[36] Compare, eg. ***Dallal v Bank Mellat*** [1986] 1 QB 441 at 455 – 6 per Hobhouse J.
[37] [2002] 2 Lloyd's Rep 326 at paragraphs 8 – 15.

On this issue, counsel agree that the part of Article V(1)(a) of the Convention which is dealing with the validity of the arbitration agreement establishes two conflict of laws rules. The first is the primary rule of party autonomy; the parties can choose the law that governs the validity of the arbitration agreement. In default of that agreement, the law by which to test validity is that of the country where the award to be enforced was made. Van den Berg, in his authoritative commentary on the Convention[38] states that it has never been questioned that these are to be treated as "uniform" conflict of laws rules. Therefore, logically, the reference to *"the law of the country where the award was made"* in Article V(1)(a) of the Convention and the same words in ***section 103(2)(b)*** of the Act, must be directed at that country's substantive law rules, rather than its conflicts of law rules.[39] In this case, it means I must have regard to French substantive law and not its conflict of laws rules. In this regard, I note that paragraph 2.6 of the Joint Memorandum of the French Law experts states the following:

> "*Where a French court is called upon to decide the challenge of an arbitral award rendered by a tribunal seated in France, it has not to apply French conflict of laws in order to determine whether the arbitral tribunal has jurisdiction".*

79. However, counsel also point out that, on the question of whether a party is bound by an arbitration clause, the approach of substantive French law is to have a broad factual enquiry into the issue. This allows for consideration of all the circumstances of the case. In their evidence, despite this statement in the Joint Memorandum, the French law experts agree that this factual enquiry can extend to the consideration of issues of foreign law in specific circumstances. I think that the rationale for this approach, at least in the present case which involves the question of whether a state entity is bound, is that a State's activities and its intentions in doing various things must be viewed against the background of the legislation of that State and any other applicable laws. Thus the position of the GoP, its power to contract and whether it intended to be bound by contractual terms must all be judged against the constitutional, legislative and general legal background of Pakistan at the time. This was certainly the approach of the Cour d'appel, Paris, in its decision of ***12 July 1984,*** the so – called "***Pyramides"*** case.[40] That is a leading case in French law on the question of whether a state is bound by an arbitration clause. I accept the rationale set out in that case for the purposes of deciding whether, in this case, the GoP is bound by the arbitration clause.

80. Therefore, it is agreed that, if I put myself in the position of a French court when considering whether the GoP is bound by the arbitration agreement in clause 23 of the Agreement, I should consider the one remaining issue of Pakistani law. This

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[38] Albert Jan van den Berg "*The New York Convention of 1958 – Towards a Uniform Judicial Interpretation"* (Kluwer 1981) page 291.

[39] So far as the Act is concerned, further support for this conclusion might be found in ***section 46(2)*** of the Act, which defines "*the law chosen by the parties"* as *"the substantive laws of that country and not its conflict of laws rules"*. That provision is, of course in Part 1 of the Act. It is said that this provision was specifically inserted to avoid the problems of *renvoi:* ***Mustill & Boyd on Commercial Arbitration (2001 Companion),*** page 328. See also ***Dicey, Morris & Collins, The Conflict of Laws (14th Ed. 2006)*** at para 4.034, in Vol 1 page 89 – 90. But it must be likely that the same approach is intended for ***section 103(2)(b)*** in Part III of the Act.

[40] ***Republique arabe d'Egypte/Southern Pacific Properties Ltd et Southern Pacific Properties (Middle East).***

concerns the true effect of Article 173 of the Constitution: is there a mandatory rule that the State of Pakistan can only validly enter into and be bound by an agreement provided that such agreement is made in the name of the President and it is signed by a duly authorised person? I analyse this point under Issue Four.

H. Issue Two: When a party challenges the recognition and enforcement of a Convention award under *section 103(2)(b),* what is the scope of the enquiry that the court has to undertake?

81. The suggested dichotomy is between a total re-hearing of all relevant evidence, as opposed to a review of the decision of the arbitral tribunal. In arguing for the more restricted approach of a review, Miss Heilbron pointed out that this is not an appeal from an award on jurisdiction, to which ***section 67*** of the Act would apply. Therefore the decisions[41] that hold that appeals under ***section 67*** should be by way of re-hearing are not relevant. 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).*** I accept, of course, that questions of issue estoppel may arise (as in this case), which would prevent one or other party re-fighting issues of fact that have already been specifically argued and decided, as between those parties, "on the merits" by a competent tribunal.[42] But, subject to that constraint, 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.

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[41] There are a number of decisions of the Commercial Court at first instance all to this effect, following the decision of Rix J in ***Azov Shipping Co v Baltic Shipping Co (No 1)*** [1999] 1 Lloyd's Rep 68. In ***Peterson Farms Inc v C&M Farming Ltd*** [2004] 1 Lloyd's Rep 603 at para 18, Langley J refers to the many cases that have followed Rix J's decision. Langley J states that he would follow it even if he did not agree with it, which he did.

[42] For what is required to establish an issue estoppel see Issue Seven below.

84. I have already set out the test that the arbitrators stated had to be applied to see if the GoP was a party to the arbitration clause.[43] 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.[44] 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.

I. Issue Three: What are the principles of French law by which to decide whether the GoP was and is bound by the arbitration agreement in clause 23 of the Agreement?

85. The French law experts set out in their Joint Memorandum the following principle of French law on which they are agreed: [45]

> "*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".*

86. The experts agree that those principles also apply when the issue is whether a State is bound by an arbitration agreement.[46]

87. The agreement on this area was elaborated in oral evidence. 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.[47] The court will consider all the facts of the

[43] FPA Section III, paragraph 6, quoted at para 49 above.
[44] Vatier XX: Day 2/page 53 lines 5 – 15.
[45] Joint Memorandum, paragraphs 2.9 and 2.10.
[46] Clause 2.11 of the Joint Memorandum. I have assumed that this extends to emanations of the State, such as the GoP.
[47] Transcript of M. Vatier's evidence: Day 2/page 48 line 24 to page 49 line 19. M. Derains agreed: Day 2/page 71 lines 6-7; page 77 line 13.

case, starting at the beginning of the chronology and going on to the end and looking at the facts in the round.[48]

88. In four leading cases in the Paris Cour d'appel, to which M. Derains specifically referred in his report, identical wording is used concerning the French law's approach to whether non – signatories are bound by an arbitration clause. M. Derains confirmed that this is the French *"jurisprudence constante"*. The formula is, in translation:

> *"According to international usage, an arbitration clause inserted in an international contract has a validity and an effectiveness of its own, such that the clause must be extended to parties directly implicated in the performance of the contract and in any disputes arising out of the contract, provided that it has been established that their respective contractual situations and existing usual commercial relations raise the presumption that they accepted the arbitration clause of whose existence and scope they were aware, irrespective of the fact that they did not sign the contract containing the arbitration agreement.*" [49]

89. As I read the rule as stated in those cases, the court has to decide (1) whether the non – signatory party was "implicated in the performance of the contract"; and (2) to see if it accepted the terms of the arbitration clause. In performing the latter exercise, it has to be demonstrated that the non – signatory was aware of the existence and scope of the arbitration clause. M. Derains accepted in cross – examination that this expression of the test by the Cour d'appel of Paris did not detract from the basic quest, which is to find the common will of the parties.[50]

90. The experts agreed that when a French court is considering the question of the common intention of the parties, it will take into account "good faith".[51]

91. The French law experts also agree that, under French law, a State that enters into an arbitration agreement thereby waives its immunity from both jurisdiction and execution.[52] However, there was disagreement on the weight that French law would give to this fact if a tribunal has to decide whether a State or emanation of a State had

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[48] M. Derains XX: Day 2/page 81 line 22 to page 82 line 8.

[49] I have amended very slightly the translation given by M. Derains in his report at paragraph 19, which he wrote in English. The decisions of the Paris Cour d'appel referred to are: decision of 30 November 1988 (Société Korsnas Marma/ société Durand – Auzias); decision of 14 February 1989 (Société Ofer Brothers/The Tokyo Marine and Fire Insurance Co Ltd et autres) ; decision of 28 November 1989 (Compagnie tunisienne de navigation (Cotunav)/; Société Comptoir commercial André); decision of 11 January 1990 (Orri/ Société des Lubrificant Elf Acquitaine). See also to the like effect the decision of the Paris Cour d'appel of 21 October 1983 (Société Isover Saint – Gobain/ Sociétés Dow Chemicals).

[50] Day 2/page 81 lines 5 – 7.

[51] M. Vatier XX: Day 2 page 63 lines 18 – 21; M. Derains Re – X: Day 2 page 99 line 25 to page 100 line 1.

[52] Clause 2.12 of the Joint Memorandum. Strictly speaking, as I read the leading decision of the Cour de cassation of 6 July 2000 (Société Creighton/Ministry of Finance of the State of Qatar), it decides that it is consistent with *ordre publique* for a state entity to renounce its right to immunity from execution by entering into an arbitration clause, but it depends on the intention of the party and the terms of the clause. In that case it was held that the Ministry of Finance had renounced its right to immunity from execution by virtue of agreeing to Article 24 of the ICC Rules of Arbitration.

become part of a common intention to be bound by the arbitration agreement. M. Le Bâtonnier Vatier's evidence was that the tribunal that has to decide whether a State entity is bound by an arbitration agreement will have to consider whether the state entity appreciated that it could thereby lose immunity from jurisdiction and execution under French law. M. Derains' evidence was that a tribunal would not take this into account as a separate factor. The loss of immunity was no more than a consequence of adherence to the arbitration agreement. In my view the correct analysis of French law is that when the court is ascertaining the subjective intention of the potential state party to the arbitration agreement, it will bear in mind the fact that the potential state party to the arbitration agreement would loose its state immunity if it were to become a party to the arbitration agreement. It is no more than one factor amongst many.

92. The French law experts also agree the following principle in relation to how French law will regard "transnational" law on the issue of the existence, validity and effectiveness of an arbitration agreement in an international arbitration agreement. Paragraph 2.8 of the Joint Memorandum states:

> "*Under French law, the existence, validity and effectiveness of an arbitration agreement in an international arbitration need not be assessed on the basis of national law, be it the law applicable to the main contract or any other law and can be determined according to rules of transnational law. To this extent, it is open to an international arbitral tribunal the seat of which is in Paris to find that the arbitration agreement is governed by transnational law*".

93. As I read this statement, the second sentence states a general principle of French law which permits a court to hold that an arbitration agreement is governed by a system of law other than a national law. The first sentence stipulates that, as a matter of French law, "transnational law" can be applied to issues of the specific questions of the existence, validity and effectiveness of an arbitration agreement in an international arbitration. I think that both of these principles must be regarded as French conflict of laws rules. The statement cannot, of course, identify any principles of "transnational law" by which to test the existence, validity and effectiveness of an arbitration agreement in an international arbitration. That, I suppose, is a matter for a "transnational law" expert; none gave evidence before the court.

94. The French law experts were also asked to consider whether there was a rule applicable to international arbitrations that if a person or legal entity behaves as if it were the legal successor or beneficiary of a defunct or dissolved legal entity (which had been a party to an arbitration agreement), then that second person or legal entity becomes bound by the arbitration agreement. M. Le Bâtonnier Vatier's evidence was that there was no such rule of French law. It depends on the role that the successor entity takes and whether it becomes involved in the contract in such a way as to consent to being bound by the arbitration clause.[53] M. Derains emphasised that there is a difference according to the method of succession. If an entity is a successor as a matter of law, the successor will be bound by the arbitration

[53] Vatier XX: Day 2 page 60 line 1 to page 61 line 10.

agreement. But, it does not follow that it will be bound by the principal contract. That is an issue on the merits for the arbitral tribunal itself to determine.[54]

95. However, the position is different if the basis for asserting that the "successor" entity is bound is by virtue of its behaviour. If a legal entity appeared to be behaving as if it were the successor to the previous entity, (rather than there having been a legal transfer), then the question of whether it was bound by the arbitration clause would be decided by the usual general test of subjective common intention of the parties.[55]

96. Both experts agreed that Pakistani law governed the issue of the nature and status of the Trust and the effect of the lapse of the Ordinance.[56] There is no Pakistani law evidence before the court on whether the GoP became the successor of the Trust as a matter of law. Therefore I am only concerned with behaviour. On that aspect, the two French law experts are, in my view, agreed.

J. Issue Four: Pakistani law: does Article 173 of the Pakistan Constitution state a mandatory rule that the State of Pakistan can only validly enter into and be bound by an agreement provided that such agreement is made in the name of the President of Pakistan and is executed on his behalf?

97. As I have already stated, counsel agree that because a French court considering the issue of whether the GoP is bound by the arbitration agreement in clause 23 of the Agreement is bound to engage in a broad factual enquiry, a French court could consider relevant issues of Pakistani law. The only one that is now relevant is that concerning Article 173 of the Constitution of Pakistan. On this topic it is also necessary to refer to Article 99 of the Constitution. The relevant parts of those Articles provide as follows:

"CONSTITUTION OF PAKISTAN

CHAPTER 3 – THE FEDERAL GOVERNMENT

99. (1) All executive actions of the Federal Government shall be expressed to be taken in the name of the President.

(2) The President shall by rules specify the manner in which orders and other instruments made and executed in his name shall be authenticated and the validity of any order or instrument so authenticated shall not be questioned in any court on the ground that it was not made or executed by the President.

CHAPTER 3 - PROPERTY, CONTRACTS LIABILITIES AND SUITS

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[54] Report, paragraph 23; decision of the Cour de cassation of 8 February 2000 (Société Taurus Films/Les Films de Jeudi).
[55] Derains: XX Day 2 page 90 line 1 to page 92 line 1.
[56] Joint Memorandum paragraph 2.4.

173. …….

> (3) All contracts made in the exercise of the executive authority of the Federation or of a Province shall be expressed to be made in the name of the President, or, as the case may be, the Governor of the Province, and all such contracts and all assurances of property made in the exercise of that authority shall be executed on behalf of the President or Governor by such persons and in such manner as he may direct or authorize."

98. I was told by both the Pakistani law experts that there are no rules for the construction of Articles of the Constitution of Pakistan that differ from the English law rules of statutory construction. Indeed, it is clear from the reports of the experts that ***Maxwell on Statutory Interpretation*** is still used by Pakistan's lawyers and judges.

99. The opinion of Mr Mandviwalla, called by the GoP, is that because the Agreement was signed by the Managing Trustee of the Trust, and was not expressed to be in the name of the President of Pakistan, therefore, by virtue of the wording of Article 173, it could not bind the GoP. Any contract that is intended to bind the GoP (ie. the Federal Government of Pakistan) must be made in the name of the President of Pakistan and with his authority. Article 173 is mandatory, not simply directory.

100. Mr Mandviwalla relied on the decision of ***Government of Pakistan v Shoaib Bilal Corporation,*** [57] which is a decision of a two member Division Bench of the High Court at Lahore. In that case the original contract and two "Annexures" were signed in the name of the President. The contract was then "rescinded" by an official, who did not have express authority to do so in the name of the President. At paragraph 11 of the judgment of Muhammad Muzammal Khan J. stated:

> "*Article 99 and 173(1)(3) of the Constitution require all the executive actions, including contracts made on behalf of Federal Government to be expressed in the name of the President. Any executive action, contract or rescission thereof, not so expressed in the name of the President, would be void. Appellants have neither referred to any letter by the President, equipping appellant No 2 with the authority to pass any such order nor have they produced any document of authority before the learned Single Judge in Chamber or during the course of he hearing of this appeal, as such we are unable to attach any kind of regularity or presumption as urged by learned counsel for the appellants…..This brings us to conclude that original contract having been expressed in the name of the President, could be rescinded only by the President and by no one else, below his rank, without authority from him".*

101. Dr Pirzada, the Pakistani law expert for Dallah, gave the opinion that the provision of Article 173 is directory only. He relied on two earlier decisions by two member

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[57] 2004 CLC 1104.

benches of the West Pakistan[58] High Court. These two cases held that directions in Article 135 of the 1956 Constitution were directory and not mandatory and that a contract otherwise completed would not be rendered void simply because it does not comply with the provisions of Article 135 of the 1956 Constitution.[59] Mr Pirzada stated that those two cases constitute decisions of a two member Division Bench of the High Court and such decisions are binding on a court of co-ordinate jurisdiction (such as that in the ***Shoaib case***), so that those cases should prevail. In oral evidence he said that the Supreme Court of Pakistan had laid down guidelines for dealing with a situation where a court wished to differ from a decision of a court of co-ordinate jurisdiction. The second court cannot overrule or not follow the earlier decision. Instead it must ask the Chief Justice to constitute a larger court to reconsider the matter.[60] That was not done in the case of these later decisions.

102. In response, Mr Mandviwalla relied upon the decision of ***LaClaire Pakistan Corporation v Islamic Republic of Pakistan,***[61] which had been decided before the ***Azim Khan case*** and by the same court. In the ***LaClaire case*** the court had to construe Article 175(3) of the Government of India Act 1935, which was in the same terms as Article 135(1) of the Constitution of Pakistan of 1956. The court decided that "*the word "shall" in clause (3) of section 175 of the Act renders the compliance of the provision mandatory".* However, that decision was not referred to in the subsequent ***Azim Khan case.***

103. In the light of this disagreement in both the cases and the opinions of the experts, if I had to decide the point I would do so on the basis of the materials I have, but sitting as if I were the Supreme Court of Pakistan ruling upon the issue.[62] But I do not think that I do need to decide the point, because of the way this issue arises. It does so in the context of whether a French court would conclude that there was a common, subjective, intention of all the parties (Dallah, the Trust, the GoP) that the GoP would be bound by the arbitration agreement. Plainly, if the effect of Article 173(3) of the Constitution of Pakistan made it mandatory that all contracts that were intended to bind the GoP must be expressed in the name of the President or else they would be void, then in this case, the lack of such an expression would militate strongly against there being any intention to bind the GoP to either the Agreement or the arbitration agreement. However, it seems to me that even if the correct construction of Article 173 is that it is only directory, it must also be a powerful factor against a conclusion that the common, subjective, intention of the parties was that the GoP should be bound by the Agreement. This must be so particularly when there is no reference at all to the GoP in the Agreement. But this is only one factor in many that the French court would consider before deciding finally on the common intention of the parties.

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[58] These were decided at the time when Pakistan also consisted of what was East Pakistan, now Bangladesh. Dr Pirzada explained that in those days West and East Pakistan were "provinces" of Pakistan and each had a High Court. After 1971, what had been West Pakistan became one federated state, but with four provinces, each of which had a High Court; that remains the position today: Day 3/page 22 line 3 to page 23 line 18.

[59] See: ***Azim Khan v State Bank of Pakistan*** (PLD 1957 (WP) Karichi 892); ***Pakistan v Amin Agencies Ltd*** (PLD 1962 (WP) Karichi 467).

[60] Day 3/page 24 lines 1 – 7.

[61] PLD 1957(WP) Karachi 285.

[62] See: ***In re the Duke of Wellington*** [1947] 1 Ch 506 at 520 per Wynn – Parry J.

104. Before I go onto the next issue, I should mention one further point of Pakistani law which was debated by the experts to some extent. That was the question, whether the Hajj is a personal responsibility only or a governmental one under the law of Pakistan. The argument of Dallah was, as I understood it, that it is a governmental responsibility, therefore this is a factor which goes towards a common intention that the GoP intended to be bound by the Agreement and the arbitration clause. I would be most reluctant to make any finding on the nature of the responsibility for Hajj unless forced to do so. But I do not need to do so. As Mr Landau correctly pointed out, even if it is a governmental responsibility, part of it could be delegated to a statutory corporation set up by the state, ie. in this case the Trust. So this point does not assist Dallah.

K. Issue Five: Applying the relevant principles of French law, including any relevant principles of "transnational law" and Pakistani law, what is the answer to whether the GoP is bound by the arbitration clause in the Agreement?

105. As I have already stated, it is agreed that this analysis involves going through the chronology "from beginning to end", looking at the statements and actions of all the parties and the issue of good faith, to divine their subjective common intention. The arbitrators considered the facts under the following headings and I shall do likewise: (i) Negotiations; (ii) Signature (by which I include all the terms of the Agreement); (iii) performance of the Agreement; (iv) events following the repeal of the Ordinance, including the proceedings in Pakistan. Of necessity the focus will be almost entirely on the actions and inactions of the GoP and its officers *viz a viz* Dallah.

106. **Negotiations:** Miss Heilbron points first to the fact that the GoP, in particular the MORA, was involved from the outset in the project with Dallah. I accept that this was so. It is clear from the correspondence between Mr Shezi Nackvi and the MORA.[63] The GoP's involvement in the project is evident at the time of the MOU, which was signed on 24 July 1995 and was between Dallah and the GoP, through the President of Pakistan. The MOU contemplates, by clause 3, that Dallah would lease to the GoP both the land that it was to buy and the houses to be built on it, on a 99 year lease. Dallah had to submit the proposed plans to the GoP: see clause 5.

107. The Ordinance (VII of 1996, dated 31 January 1996), indicates that the GoP contemplated creating a statutory corporation to facilitate Hajj operations and connected matters. The chairman of the Trust's board was to be the Minister of Religious Affairs and the secretary to the board could be the Secretary of the Religious Affairs Division of the MORA. Article 12 of the Ordinance makes it clear that the Federal Government would maintain control over the rules that the Trust wished to make to carry out the purposes of the Ordinance. So I would be prepared to accept, as the arbitrators found,[64] that the decree of the Ordinance was an exercise of sovereign power by the GoP; that the GoP thereby determined the objects and the scope of the powers of the proposed statutory corporation; and that the GoP would maintain control over the activities of the proposed trust by virtue of the composition of the board and control of the Trust's rule making power. The Trust was actually

63 See: **Bundle B/pp 46 – 48; 51, 73; 78.**
64 FPA Section III, paragraphs 8.3 and 8.4.

created by the exercise of the powers granted by the Ordinance when the Notification was made in the Official Gazette on 14 February 1996.

108. Thereafter the GoP continued to be involved in negotiations with Dallah. Mr Nackvi has stated that he continued to deal with the MORA and also the Prime Minister of Pakistan.[65]

109. **Signature of the Agreement and its terms:** The arbitrators pointed to three particular aspects of the Agreement which, they concluded, showed an involvement by the GoP. First, the signature of the Minister of Religious Affairs, although he signed as chairman of the board of the Trust. Secondly, the fact that the GoP was to provide a guarantee for the US$100 million financing that was to be provided by an affiliate of Dallah.[66] Thirdly, the unilateral right of the Trust to assign both its rights and obligations under the Agreement to the GoP, without the prior consent of Dallah.[67]

110. I do not regard these as powerful factors indicating that the GoP subjectively intended to be bound by the terms of the Agreement or the arbitration clause, or that this indicates a common intention to that effect. The obvious person to sign the Agreement on behalf of the Trust would be the chairman of its board. In fact it is the Managing Trustee (Mr Zubair Kidwai) who signed on behalf of the Trust. The GoP guarantee was to be a separate contract. Contracts frequently indicate that a third party is going to guarantee an obligation in the contract. That does not indicate that the third party and the parties to the contract all intended that the third party should be bound by the contract.[68]

111. In my view there are clear indications in the wording of the Agreement that the GoP did not intend to be bound by it. First, (and obviously) the GoP is not a party. Secondly, the fact that the obligations of the Trust and those of the GoP (to provide a guarantee) are kept separate. Thirdly, the assignment clause is a very strong indication that the GoP has no rights or obligations under this Agreement until such an assignment takes place.[69]

112. Perhaps most striking of all is the radical change from the position under the MOU. That had contemplated that the GoP would be a party to an agreement to implement the project. The change to the Trust being the counterparty had been noted by Mr Nackvi in a fax he sent to Dallah's lawyers, Orr Dignam & Company, dated 3 April 1996.[70] Dallah does not appear to have questioned the fact that the position in the

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[65] Statement paras 27 to 38.

[66] Clause 2 of the Agreement.

[67] Clause 27 of the Agreement.

[68] The arbitrators held (para 9.2 of Section III the FPA) that the GoP was "*bound*" by Article 2 to give its guarantee to the facility to be raised by the affiliate of Dallah. This is difficult to understand, at least as a matter of English law. If the GoP is not a party to the Agreement, it cannot therefore be contractually bound by its terms. One cannot start out with the *a priori* proposition that it is a party, therefore it is bound, therefore it is bound by the arbitration agreement. That is starting with what is to be demonstrated. The position may be different in Saudi Arabian law, but there is no evidence that this is so, nor was there before the arbitrators.

[69] Article 23 of the draft Transport and Maintenance Agreement which is at Schedule E to the Agreement also gives the Trust the right to assign or transfer its rights and obligations under that agreement to the GoP without the prior consent of Dallah.

[70] **B/page 113.** It stated: *"Dallah….will enter into an Agreement with the Awami Hajj Trust "Trust" for the following…".* The fax then set out the key matters which were later reproduced in the Agreement.

MOU was to be changed so fundamentally. Nor does it seem to have been particularly concerned with the fact that the Trust would have limited funds, which would come only from subscriptions by pilgrims and from philanthropists. Dallah seems to have been content with the arrangement that it had bought the land in advance of the Agreement and it would not be obliged to start construction of the housing until the Trust had made the advance lease payment, which was to be financed by an affiliate of Dallah.[71]

113. **Performance:** The arbitrators referred to two particular letters between the MORA and Dallah after the Agreement was signed and before the Termination Letter of 19 January 1997 in support of their conclusion that the GoP was bound by the Agreement and the arbitration clause.[72] However, the first relates to the appointment of the Trustee Bank, which had already been done by the Trustees: see clause 2 of the Agreement. The second requests Dallah to send to the MORA "*proposed rupee based saving schemes for Hajj finalised so far…*". There is no reference to the Agreement in either letter. In my view these do not exhibit any subjective intention on the part of the GoP to be bound by the Agreement, let alone a common intention.

114. The arbitrators relied upon the fact that the Trust did little after the Agreement was signed and that no funds were forthcoming.[73] This does not, in my view, assist either way. The GoP was not obliged to find funds for the Trust. They were to come from pilgrims and philanthropists. This does not indicate one way or the other whether the GoP intended to be bound by the Agreement or that Dallah or the Trust intended it should.

115. The arbitrators also relied on the fact that the GoP took a decision not to re-promulgate the Ordinance; they say this was an indication of the GoP's intention.[74] I find this difficult to follow. It is correct that a new administration took over the GoP on 6 November 1996.[75] I would be prepared to infer that the new government made a positive decision not to re-promulgate the Ordinance. But I do not see why, logically, that leads to any conclusion that the GoP intended to step into the shoes of the Trust which would cease to exist, under Pakistani law, once the Ordinance "*stood repealed*". There is no logical reason why that consequence should flow from the decision not to re-promulgate the Ordinance.

116. **Events following the repeal of the Ordinance: The Termination Letter.** The key event, on which the arbitrators placed great weight, is the Termination Letter of 19 January 1997, written by Mr Lutfallah Mufti under the letterhead of the MORA and signed by him as "Secretary". The arbitrators stated:[76]

> "*Such letter is very significant because it confirmed in the clearest way possible, that [the GoP] after the elapse of the Trust, regarded the Agreement with [Dallah] as its own and considered itself as a party to such*

71 Repayment was, of course, guaranteed by the GoP.
72 Letters of 26 September 1996 and 4 November 1996.
73 FPA Section III paragraph 10.2.
74 FPA Section III paragraph 10.3.
75 The government of the late Mrs Benazir Bhutto was replaced by that of Mr Nawaz Sharif: Nackvi witness statement para 69.
76 FPA paragraph 11.1.

Agreement, and as such, was entitled to exercise all rights and assume all responsibilities provided for under such Agreement".

117. At the time that this letter was written, the Trust had ceased to exist under Pakistani law. Therefore, the writer of the letter, Mr Lutfallah Mufti, could not have been writing it in his capacity of Secretary to the board of the Trust. He could not be Secretary to the non - existent board of a non – existent entity. I have no direct evidence from Mr Lutfallah Mufti about the capacity he thought he was exercising when he wrote this letter. However, logically, he must, in fact, have been writing the letter in his capacity of Secretary to MORA, whatever he may have thought at the time.

118. The actual wording of the letter is important, however. It refers to the alleged failures of Dallah as tantamount to a repudiation of the whole Agreement "*which repudiation is hereby accepted".* It does not identify the acceptor. The letter goes on to assert that the Agreement is not effective in law at all. It concludes by reserving rights and remedies "*which may be available to us under the law".* The identity of the entity reserving rights and remedies is not revealed. The letter is equivocal because, given the circumstances in which it was written, it is unclear.

119. However it is possible to get a clearer indication of the state of mind of the GoP at this stage if account is taken of the proceedings that were begun, by Mr Lutfallah Mufti, on the following day. These were the first Pakistani proceedings in the Court of the Senior Judge, Islamabad, in which the Trust is named as plaintiff. The proceedings sought a declaration that the Agreement "*…stood repudiated on account of [the] default of [Dallah]…".* Paragraph one of the application refers to the Trust as still existing. Paragraph 10 refers to the alleged defaults of Dallah and states that this "*...repudiation was accordingly accepted by [the Trust] vide its letter dated 19.01.97".* Mr Lutfallah Mufti signed the verification at the foot of the application, stating that "*…paragraphs 1 to 13 are correct to the best of my knowledge and belief…".* That is the best evidence I have of the state of mind of the Secretary of the MORA at the time It indicates that he, on the part of the GoP, thought the Trust had rights it could enforce. It does not indicate an intention on the part of the GoP to be bound by the Agreement or the arbitration clause or any intention to step into the shoes of the Trust.

120. **The 1998 proceedings and the letter of 5 June 1998 to the ICC:** The arbitrators referred to two further pieces of evidence which they concluded were support for their finding that there was a common intention that the GoP be bound by the Agreement and the arbitration clause. First, the GoP's instigation of the 1998 proceedings on 2 June 1998. Secondly, the terms of the letter of the GoP to the ICC on 5 June 1998.

121. In relation to the 1998 proceedings, the arbitrators concluded that the effect of the GoP's case was that it was admitting that it was a party to the Agreement with Dallah and had accepted Dallah's repudiation of that Agreement.[77] However, if one examines the pleading carefully, it does not state expressly that the GoP was a party to the Agreement, save in paragraph 16, where it refers to "*the Agreement being entered into between the parties in Islamabad".* That paragraph is there to establish jurisdiction in the Court of the Senior Judge, Islamabad. I do not read it (or the terms

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[77] FPA: Section III paragraph 11.2.

of the prayer at the end of the pleading) as an admission by the GoP that it was or had become a party to the Agreement. That would be inconsistent with the pleading in paragraph 14, which refers to the judgment of the judge in the 1997 proceedings by the Trust, when the judge had stated that "*liabilities and duties against [Dallah] can be agitated by the Government of Pakistan*".

122. If the GoP had pursued these proceedings to their logical conclusion then I accept that they might be a powerful factor in favour of a conclusion that the GoP had subjectively determined to become bound by the Agreement and the arbitration clause. But the process under French law principles requires me to consider the whole chronology, not to take a snapshot at any particular date. Therefore I have to put into the balance the fact that the GoP withdrew its 1998 proceedings in January 1999 and then started a further set of proceedings in which it expressly sought a declaration that it had never been a party to the Agreement.

123. Before I consider the effect of the GoP's solicitors' letter of 5 June 1998, I must record one other point on which Mr Landau and Miss Heilbron were agreed concerning the Pakistani proceedings. Both accepted, having considered the principles set out by Bingham J in ***Westfal – Larsen and Co A/S v Ikerigi Compania Naviera SA (the "Messiniaki Bergen")***[78] that none of the proceedings could give rise to issue estoppel in the current application concerning the question of whether or not the GoP was a party to the Agreement or the arbitration agreement.

124. With regard to WMS' letter of 5 June 1998 to the ICC, the arbitrators point out, correctly, that the letter did not say that the ICC arbitration could not go ahead because the GoP was not a party to the Agreement.[79] The letter stated that the arbitration could not go ahead because of the 1998 proceedings in Pakistan, in which the GoP was the claimant and it was seeking a declaration that the Agreement had been repudiated or was void.

125. In my view, the letter is equivocal. I accept it certainly does not state expressly that the GoP is not a party to the Agreement. At the same time, it does not say that it is. The effect of the Pakistani proceedings to which it refers is left opaque, although a copy of the court's order was enclosed.

126. **Principles of "transnational law"** Even assuming that the French court would consider, as part of the overall equation, principles of "transnational law", the parties have not adduced any evidence nor identified any specific principles that might be brought into account in this case. I note that the arbitrators refer in their Reasons to "*transnational general principles and usages*".[80] But, these are left on a high level of generality. It is said that these reflect "*the fundamental requirements of justice in international trade and the concept of good faith in business*".[81] With respect, I have concluded that this does not add anything to the exercise I have to undertake.

127. **Article 173 of the Constitution of Pakistan.** It is agreed that, at the least, this Article *directs* that contracts which are intended to bind the GoP shall be in the name

78 [1983] 1 Lloyd's Rep 424 at 426 and 428 – 9.
79 FPA Section III paragraph 11.2
80 FPA Section III para 4 (*bis).*
81 *Ibid*.

of the President. The fact that the Agreement is not in the name of the President - and that no one ever suggested that it ought to have been - suggests that there was no initial intention that the GoP should be bound by the Agreement or the arbitration clause. Thereafter this issue is not discussed and so it is a neutral factor.

128. **Conclusions on the chronology as a whole applying the principles of French law.** To recall: the parties agree that, as a matter of French law, the underlying question to be considered when deciding whether a party is bound by an arbitration clause is: was the subjective common intention of all the parties that the relevant party should be bound by the arbitration clause? I have to consider whether the relevant party was directly implicated in the underlying contract and any disputes arising out of it. I have to consider the respective contractual situations of the parties and their existing commercial relations. I have to decide whether the relevant party was aware of the existence and scope of the arbitration clause by which it is said that party is bound. I must also bear in mind the fact that the relevant party sought to be bound in this case is a state entity and that, if it were bound, it might thereby lose its immunity from suit and enforcement. I must take account of the doctrine of good faith. In doing all this I have to analyse the whole chronology, from beginning to end.

129. On the evidence before me, my conclusion is that it was not the subjective intention of all the parties that the GoP 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.

130. I find it difficult to follow the logic of the statement at paragraph 14 of Section III of the Reasons in the FPA. If, on whatever principles are applicable, it is found that the GoP was a party to the arbitration clause and the Agreement, good faith adds nothing. If, on the other hand, it is found that the GoP is not a party, then I hold, on the French law evidence before me, that the invocation of a general principle of good faith in commercial relations and international arbitration is insufficient to make it a party. Unlike the arbitrators, I cannot take into account Article 264 of the Constitution of Pakistan in this regard. Dallah accepts that it cannot use that provision as a means of showing that the GoP became a party to the Agreement or arbitration agreement. Therefore I respectfully agree with the comment of Justice Dr Shah and Lord Mustill, stated at the end of paragraph 14 of Section III of the FPA, that they are not convinced that "*…a duty of good faith can operate to make someone a party to an arbitration who on other grounds could not be regarded as such*".

L. Issue Six: Has the GoP satisfied the burden of proving, for the purposes of *section 103(2)(b)*, that the arbitration agreement in clause 23 is not valid?

131. In this case I think that once the GoP has demonstrated that, according to French law principles, it is not bound by the Agreement or the arbitration clause, then there is nothing more it need prove, to the English standard of proof, in order to satisfy the test in ***section 103(2)(b)*** of the Act. Therefore, subject to Issues Seven and Eight, the court will refuse to recognise or enforce the Final Award. This is because the

assumption on which it is based, ie. that the GoP is bound by the arbitration agreement, thus giving the arbitrators jurisdiction to make the Final Award, has been held to be false. In the words of ***section 103(2)(b),*** the arbitration agreement (in clause 23) is not valid.

M. Issue Seven: Is there an issue estoppel arising out of the First Partial Award that prevents the GoP from being able to argue that the arbitration agreement is not valid for the purposes of *section 103(2)(b)* of the Act?

132. Miss Heilbron argues that the issue of whether the GoP is bound by the arbitration clause in the Agreement has already been decided by the arbitral tribunal in the FPA. She submits that, as a matter of English law,[82] this gives rise to an issue estoppel between the GoP and Dallah on that matter. The effect of this, it is submitted, is to preclude the GoP from re-arguing that point in these proceedings for the recognition and enforcement of the Final Award. In short, it prevents the GoP from relying on ***section 103(2)(b)*** as a ground for asking the court not to recognise and enforce the Final Award.

133. Miss Heilbron's argument runs as follows: first, under Article 6.2 of the ICC Rules, an ICC arbitral tribunal has the power to decide its own jurisdiction. That is not in dispute.[83] Secondly, if it has power to decide its own jurisdiction, therefore it is a competent tribunal to do so. In this regard, Miss Heilbron relies on remarks of the Court of Appeal in the ***Svenska case,***[84] at paragraph 90 in particular. Thirdly, under French law, an arbitration agreement is regarded as independent from the underlying contract.[85] The FPA has not been set aside by the French court, who are the "supervising court" because Paris was the seat of the arbitration. The GoP has confirmed that it does not intend to apply to the French court to set aside the FPA. Therefore, fourthly, in French law the FPA is valid and is *res judicata* in relation to the dispute it resolves.[86] Fifthly, the English court should, under ***section 101*** of the Act, recognise the FPA as a final and conclusive Convention award between Dallah and the GoP concerning the issues decided by it. Lastly, therefore the decision in the FPA that the GoP is bound by the arbitration clause gives rise, in the English court, to an issue estoppel as between Dallah and the GoP. This is because the decision on whether the GoP was a party to the arbitration clause was made by a competent tribunal; it was final and conclusive between those parties and it was on "the merits" of that issue.[87] This prevents the GoP from raising the same point now in attempting to rely on ***section 103(2)(b)*** to challenge the validity of the arbitration agreement that gave rise to the Final Award.

134. Because the decision of the Court of Appeal in the ***Svenska case*** is so fundamental to Miss Heilbron's argument on this issue, it is best to set out now its facts and what it

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[82] It was agreed between counsel that the question of whether or not an issue estoppel binds the GoP must be decided according to English law principles, even though the findings said to give rise to the issue estoppel were made by an arbitral tribunal that was not purporting to apply English law.
[83] Nor is it suggested that this would be inconsistent with French *ordre publique.*
[84] [2007] QB 886.
[85] Joint Memorandum of French law experts: para 2.7.
[86] Article 1476 of the French New Code of Civil Procedure, as applied to international arbitration pursuant to Article 1500 of the NCCP, quoted in the report of M. Derains, para 10. This is not in dispute.
[87] Cf. ***DSV Silo – Und Verwaltungs-gesellschaft MBH v Owners of the "Sennar" and 13 other ships (The "Sennar") (No2)*** [1985] 1 WLR 490, particularly at 499, per Lord Brandon of Oakbrook.

decided. The claimant ("Svenska") had entered into a joint venture agreement with a Lithuanian state – owned oil company to exploit oil reserves in Lithuania. The agreement made references to the rights and obligations of the Lithuanian government. The Lithuanian government was not expressed to be a party to the agreement and it did not sign it. However, over the signatures of the state owned entity and Svenska there was a rubric that the Lithuanian government acknowledged itself to be legally and contractually bound as if it were a signatory to the agreement. The agreement contained an arbitration clause whereby disputes were to be submitted to an ICC tribunal in Denmark. It also contained a clause waiving all rights to sovereign immunity.

135. The state owned company was privatised as AB Geonafta ("ABG"). Disputes arose between Svenska and ABG. Svenska brought an ICC arbitration against both ABG and the Republic of Lithuania ("RoL"). The RoL challenged the jurisdiction of the arbitrators over it. The arbitrators held that the RoL had agreed to refer disputes to arbitration, so that they had jurisdiction to decide the claim against both ABG and the RoL. In a second award the tribunal awarded Svenska damages of US$ 12,579,000 against both the RoL and ABG.

136. Svenska brought proceedings in the English court for the recognition and enforcement of the second award, as a Convention award, against the RoL and ABG. An order was made *ex parte* under ***section 101*** of the Act and ***CPR Pt 62.18,*** giving Svenska leave to enforce the second award as a judgment. The RoL applied to set this order aside on the ground of state immunity.[88] After a hearing of six days, Gloster J dismissed the RoL's application. She held that the RoL had agreed to submit the dispute with Svenska to ICC arbitration in Denmark and that the application to enforce the second award involved proceedings relating to the arbitration award within ***section 9*** of the ***State Immunity Act 1978.***[89] Therefore the RoL could not rely on state immunity to avoid enforcement of the award. Amongst the arguments advanced by Svenska before Gloster J was one that the first award (which had never been challenged in Denmark) had finally determined in its favour that the RoL had agreed to refer the dispute to arbitration and so gave rise to an issue estoppel against RoL. Gloster J ruled in Svenska's favour on that issue. The RoL appealed.

137. It will be apparent that the issues facing Gloster J and the Court of Appeal were not precisely the same as in this case. The fundamental issue for decision in the ***Svenska case*** was whether the RoL could challenge the jurisdiction of the English court to make orders recognising and enforcing the second award by relying on state immunity under ***section 1*** of the ***State Immunity Act 1978.*** Svenska argued the RoL had submitted to the jurisdiction under either ***section 2, section 3*** or ***section 9.*** The question of issue estoppel arose in relation to whether, for the purposes of ***section 9,*** it had already been decided by the arbitrators, as between Svenska and the RoL, that the RoL had agreed in writing to submit a dispute to arbitration.

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[88] There were interlocutory proceedings before Mr Nigel Teare QC, sitting as a Deputy Judge in the Commercial Court, but I do not need to refer to those in detail here.

[89] ***Section 9(1)*** provides: "*Where a State has agreed in writing to submit a dispute which has arisen or may arise, to arbitration the state is not immune as respects proceedings in the courts of the United Kingdom which relate to the arbitration*".

138. In the Court of Appeal, the court dealt first with the issue of whether the RoL had in fact agreed to submit disputes with Svenska to ICC arbitration.[90] Its conclusion, after a full analysis, was that the judge had been correct to hold that the RoL agreed to submit disputes with Svenska to arbitration under the ICC rules in accordance with the provisions of article 9 of the agreement.[91] The court therefore agreed with the conclusion of the arbitrators, although it said that its reasons were slightly different.

139. The court then stated, at paragraph 90:

> "*However, the question that must now concern us is not whether the arbitrators were right, but whether the first award finally disposed of the issue as far as these parties are concerned. In our view it did. Under Lithuanian law an arbitration clause is regarded as an autonomous agreement which gives rise to rights and obligations which exist independently of the contact within which it is found, and an agreement to arbitrate under the ICC rules confers on the arbitrators jurisdiction to decide whether they have jurisdiction in any given case. In the present case by agreeing to ICC arbitration the parties conferred on the arbitrators jurisdiction to determine that question and are therefore bound by their award".*

140. The court noted, in paragraph 92, that once it had been decided that the RoL had agreed to refer disputes to arbitration, the debate about the effect of the first award (on jurisdiction) ceased to have any significance. Nevertheless, the court agreed with the judge that the first award was "final" as far as Danish law was concerned and that it was no longer capable of being challenged in the Danish courts.[92] The court also noted that Mr Nigel Teare QC, sitting as a Deputy Judge, had (in the interlocutory proceedings involving these parties) concluded that the first award should be recognised for the purposes of ***section 103*** of the Act. Therefore, the Court of Appeal concluded, the first award must finally have disposed of the issue of jurisdiction of the arbitrators.[93]

141. I hope I accurately summarise the conclusions of the Court of Appeal on the issue estoppel point as follows: first, it concluded that the judge was correct to find that the RoL had agreed to submit disputes with Svenska to ICC arbitration in Denmark. Secondly, it has to follow from that conclusion and the terms of Article 6 of the ICC rules that the ICC arbitration tribunal must have had jurisdiction, over both Svenska and the RoL, to decide the scope of its own jurisdiction. In short, it was a competent tribunal to decide the issue of whether or not the RoL had agreed to arbitrate disputes with Svenska before an ICC arbitral tribunal in Denmark. Thirdly, the first award of the arbitrators was final and conclusive between Svenska and the RoL. Fourthly, therefore, all the necessary components were present to establish an issue estoppel, as understood in English law. First, the relevant issue, which was the same before the ICC arbitrators and the English court, was whether the RoL had agreed to submit disputes with Svenska under the agreement to an ICC arbitration panel in Denmark. Secondly, the parties were identical in the ICC arbitration and the London court

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90 Para 16.
91 Para 90.
92 Para 102.
93 Para 104.

proceedings. Thirdly, the issue had been decided by a competent tribunal and it had done so "on the merits".[94] Fourthly, the competent tribunal had decided the issue in a manner that was final and binding between the parties.

142. I must now deal with the stages in Miss Heilbron's arguments. In my view the first flaw arises at the second stage of the argument. The tribunal does indeed have the power to decide its own jurisdiction, by virtue of Article 6 of the ICC rules. But whether or not it can do so in a manner that binds the parties over whom the tribunal purports to rule must depend on the prior question of whether those parties have agreed to confer that jurisdiction on the tribunal. That is the very issue at stake here. I have held that the GoP did not agree to confer that jurisdiction on the ICC tribunal because the GoP did not agree to be bound by the arbitration clause. So, unlike the Court of Appeal in ***Svenska,*** I do not uphold the arbitrators' view. If the Court of Appeal in ***Svenska*** had held that the arbitrators had been wrong, I find it difficult to see how it could have concluded that the arbitral tribunal was a competent tribunal to decide the issue of jurisdiction.

143. The next flaw, in my view, lies in the proposition that the English court should recognise the FPA because it is valid under French law (the law of the seat) and has not been challenged in the French courts and will not be. I accept that ***section 101*** of the Act gives the English court the power to recognise the FPA as a Convention award. But it also has the power not to do so if one of the grounds set out in ***section 103(2)*** is proved. I have held that the ground in ***section103(2)(b)*** is proved. Although the present application concerns the recognition and enforcement of the Final Award, it seems to me that it would be illogical to hold that the arbitration agreement is invalid for the purposes of the Final Award, yet have to hold it is valid for the purposes of the FPA.

144. Is the fact that the FPA has not been challenged in the French court sufficient to prevent this court from holding that the FPA is valid and binding and so capable of giving rise to an issue estoppel between the parties? In my view it is clear from the Court of Appeal's decision in the ***Svenska case*** that this does not prevent this court from ruling on that issue, at least on the facts of this case. It will be recalled that in ***Svenska*** the first award of the ICC arbitrators in Denmark was not challenged in the Danish courts and could not be challenged by the time the enforcement proceedings were before the English court. Gloster J held that because the first award was no longer capable of being challenged in Denmark, it finally determined the question of the tribunal's jurisdiction. The Court of Appeal agreed with that conclusion, but "*….primarily because we are satisfied that the [RoL] had agreed to refer disputes to arbitration under the ICC rules…".*[95]

145. The court went on to deal with an argument that the RoL was entitled to challenge that first award under any of the grounds set out in ***section 103(2)*** of the Act despite the lack of challenge in the Danish courts. The court held that it was always open to the RoL to challenge the first award by proving one of the grounds in ***section 103(2).***

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94 As defined by Lord Brandon of Oakbrook in ***the "Sennar" No 2,*** *(supra)* at page 499 E – G: "*...a decision on the merits is a decision which establishes certain facts as proved or not in dispute; states what are the relevant principles of law applicable to such facts; and expresses a conclusion with regard to the effect of applying those principles to the factual situation concerned"*

95 Paragraph 103 of the judgment.

Furthermore, it held that "*...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".*[96] However, that prima facie position was changed by the fact that, in interlocutory proceedings, the Deputy Judge had held that the first award should be recognised and there had been no challenge to that decision. Therefore the first award had finally disposed of the question of jurisdiction.[97]

146. Thus in ***Svenska*** the Court of Appeal decided it *would* recognise the ICC award on jurisdiction for two reasons. First because it had concluded that the RoL had agreed to submit disputes to ICC arbitration. Secondly, because the Deputy Judge had decided that the first award on jurisdiction should be recognised and there had been no appeal from that ruling.

147. In the present case there has been no decision by the English court on the recognition of the FPA. I refuse to recognise it because I have held that the GoP has proved that arbitration agreement is not valid for the purposes of ***section 103(2)(b).*** I see no further discretionary ground why I should nevertheless recognise and enforce the FPA or the Final Award, despite the fact that the ground in ***section 103(2)(b)*** has been proved.[98]

148. My refusal to recognise the FPA makes the position different from the ***Svenska case.*** In the present case there is no basis in this court on which to found an issue estoppel on the jurisdiction issue. But even if I were prepared to recognise the FPA, there would remain the question of whether the issue that had been decided by the arbitrators is the same issue as the one I have to decide under ***section 103(2)(b).*** As the Court of Appeal noted in ***Svenska,*** even if it is clear that some issues have been finally determined, it is important to identify with care what those issues are.[99] The arbitrators did not have to decide whether the ground set out in ***section 103(2)(b)*** had been proved. They were considering the issue of whether the GoP was bound by the arbitration clause on broad, international arbitration law principles. Despite the fact that M. Derains agreed that the tests applied by the arbitrators accorded with that under French law, I am very doubtful that the issue decided by the arbitrators is sufficiently the same issue as I have decided under ***section 103(2)(b)*** as to be capable of giving rise to an issue estoppel.

149. I conclude, therefore, that no issue estoppel can arise out of the First Partial Award that prevents the GoP from being able to argue that the arbitration agreement is not valid for the purposes of ***section 103(2)(b)*** of the Act.

N. Issue Eight: Is there a residuary discretion under *section 103* of the Act to recognise and enforce the Final Award, even if the ground in *section 103(2)(b)* is proved and there is no issue estoppel operating against the GoP?

150. Miss Heilbron argues that on the correct construction of ***section 103,*** there is a residual discretion to recognise and enforce a Convention award, despite the fact that

[96] Paragraph 104 of the judgment.
[97] Paragraph 104 and also 105 of the judgment.
[98] In relation to the Final Award, see the argument under Issue Eight.
[99] Paragraph 109 of the judgment, citing ***Arnold v National Westminster Bank plc*** [1991] 2 AC 93.

the party seeking to avoid this has proved a ground under ***section 103(2)*** and despite there being no issue estoppel operating against the GoP. She submits that the Final Award should be enforced because the FPA decision, reached in 2001, has stood unchallenged until the present application of the GoP. It is clear, she submits, that the GoP has taken careful advice from French lawyers before deciding not to challenge the FPA in the Paris Cour d'appel.[100] Miss Heilbron does not submit that the GoP has done or said anything that would give rise to any other sort of estoppel, other than the issue estoppel for which she contends under Issue Seven. Nonetheless she submits that, following the purpose of the Convention, the circumstances require the court to exercise its discretion to recognise and enforce the Final Award despite proof of the ***section 103(2)(b)*** ground.

151. I cannot accept this submission. In ***Dardana Ltd v Yukos Oil Co,***[101] Mance LJ stated, at paragraph 8, that ***section 103(2)*** could not introduce an *"open discretion"*. He accepted that the word "*may*" in that sub-section was intended to cater for the possibility that, despite the existence of one of the grounds set out in ***section 103(2),*** the right to rely on the relevant ground might have been lost by the party trying to avoid recognition and enforcement. This might be done by either contract or estoppel.

152. This comment was followed in the subsequent Court of Appeal decision of ***Ajay Kanoria v Tony Francis Guinness:***[102] see the remarks of Lord Phillips of Worth Matravers CJ at paragraph 25 and May LJ at paragraph 30. May LJ states that ***section 103(2)*** and ***(3)*** are concerned with "*the fundamental structural integrity of the arbitration proceedings"*. If there is something unsound about the arbitration proceedings, so that the person who is trying to resist recognition and enforcement proves one of the grounds set out in ***section 103(2)*** or ***(3),*** then "*the court is unlikely to make a discretionary decision in favour of enforcement"*.[103]

153. In this case I have held that there is something unsound in the fundamental structural integrity of the ICC arbitration proceedings, viz. that the GoP did not agree to be bound by the arbitration agreement in clause 23 of the Agreement. I have also concluded that there is no issue estoppel that prevents the GoP from raising that issue and proving the ground set out in ***section 103(2)(b)*** of the Act. Miss Heilbron has not suggested that there is any other form of contractual agreement or estoppel which can be used against the GoP in this regard. The fact that the FPA has not been challenged in the French court these last 7 years cannot be a sufficient basis for saying that I should exercise a discretion to allow the recognition and enforcement of the Final Award, given my finding that the non – challenge does not found any issue estoppel against the GoP.

O. Overall Conclusions

154. Dallah seeks to enforce the Final Award of the arbitrators. That award was made in Paris, which was the seat of the ICC arbitration that took place between Dallah and the GoP. However, the GoP has proved, under ***section 103(2)(b)*** of the Act, that

[100] The French law experts agree that it is the Paris Cour d'appel that would have had jurisdiction to determine any challenge to the FPA: Joint Memorandum paragraph 2.2.
[101] [2002] 2 Lloyd's Rep 326
[102] [2006] 1 Lloyd's Rep 701.
[103] See paragraph 30 of the report.

the arbitration agreement in clause 23 of the Agreement entered into between the Trust and Dallah was not valid as between the GoP and Dallah under French law,[104] that being the law of the country in which the Final Award was made.

155. There is no issue estoppel which prevents the GoP from asserting that the arbitration agreement in clause 23 of the Agreement was not valid as between the GoP and Dallah under French law.

156. There is no other reason to exercise a discretion to recognise and enforce the Final Award.

157. Accordingly, the *ex parte* order of Christopher Clarke J. made on 9 October 2006, which gave Dallah leave to enforce the Final Award in the same manner as a judgment of the Court, must be set aside.

158. I wish to repeat my thanks to counsel for their industry and assistance in their most interesting arguments.

ANNEX 1

"MEMORANDUM of UNDERSTANDING

THIS Memorandum of Understanding is made this 24 July 1995, between the President of the Islamic Republic of Pakistan through the Ministry of Religious Affairs Government of Pakistan. ………. Of the first part and Dallah Real Estate & Tourism Holding Company, a Company duly organized and existing under the laws of the Kingdom of Saudi Arabia,…… of the second part.

WHEREAS GOP is interested in taking on lease reliable housing facilities in the holy city of Makkah, Kingdom of Saudi Arabia, for Pakistani pilgrims whilst performing Hajj and Umra; and

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[104] I am using "French law" here as a shorthand for French law in the extended way that has been discussed under Issue Three.

WHEREAS Dallah has agreed to acquire the necessary real estate, construct the required structures and buildings for the purpose and lease the same to GOP.

NOW, THEREFORE, in consideration of the mutual covenants and conditions hereinafter set forth, the parties hereto agree as follows:

1. Dallah shall acquire within the holy city of Makkah the lands necessary for the development and construction of housing facilities sought by GOP for Pakistani pilgrims whilst performing Hajj and Umra, as more specifically described in the Schedule A attached hereto, and develop, construct and complete said housing facilities thereon.

2. That the total cost of the lands and the housing facilities to be constructed thereon by Dallah shall not exceed U.S.$ 242 million ($ 242,000,000.00), as itemized in the Schedule-B attached hereto.

3. Upon completion of the housing facilities Dallah shall demise and lease them to the GOP along with the land and GOP shall take the said facilities and land on such lease for a term of ninety-nine (99) years subject to Dallah arranging the necessary financing for GOP on terms approved by GOP in accordance with the provisions of this Agreement ("Lease Financing").

4. Within thirty (30) days of the execution hereof, Dallah shall prepare and submit to GOP for its approval, the terms and conditions of the proposed lease ("the Lease") and the detailed plan for financing of the same ("the Financial Plan"). Approval and acceptance of the Lease and the Financial Plan by GOP will be communicated in writing to Dallah. The date of receipt of such approval by Dallah will be the Approval Date. Where such approval and acceptance is not conveyed by GOP within ninety days of submission of terms and conditions of the proposed lease and detailed financing plan by Dallah to GOP or GOP conveys its disapproval or non-acceptance of such terms and conditions of lease and financing plan, no liability or claim shall be incurred by either party.

5. The Lease Financing to be arranged and organized by Dallah as per the approved Financial Plan will be secured by the Borrower designated by GOP under the Sovereign Guarantee of GOP.

6. Within sixty (60) days of the Approval Date, Dallah shall prepare and submit to GOP detailed specifications and drawings of the housing facilities based upon the requirements of GOP as contained in Schedule A. Within twenty-four (24) months from the date that GOP approves in writing said specifications and drawings, Dallah shall develop, construct, complete in all respects and hand over vacant possession of the housing facilities to GOP upon execution and registration of the lease.

………..

19. This Agreement shall be binding upon and shall enure to the benefit of the parties hereto and to the benefit of their successors and permitted assigns to the extent that such enurement does not violate any specific provisions of the Lease and applicable Saudi Arabian and Pakistani laws.

………..

23. This Agreement shall be governed by the applicable laws and regulations of the Kingdom of Saudi Arabia.

24. Any dispute between the parties hereto as to the interpretation of this Agreement or in respect of any matter arising under, out of or in connection with this Agreement shall be resolved in accordance with the Saudi laws and regulations for the time being in force relating to arbitration through an arbitration committee composed of three arbitrators, GOP shall appoint one arbitrator and Dallah shall appoint one arbitrator and the two arbitrators so appointed shall appoint the third arbitrator who shall preside over the arbitration committee. The arbitration proceedings shall be held in Jeddah or such other place as the parties may agree and the decision of the arbitration committee shall be final and binding upon the parties hereto.

25. To the extent that GOP may be entitled in any jurisdiction to claim for itself immunity in respect of its obligations under this Agreement itself from any proceedings, suit, award, execution, attachment (whether in aid of execution, before award, judgment or otherwise) or other legal process or to the extent that in any jurisdiction there may be attributed such immunity (whether or not claimed).

26. GOP hereby irrevocably waives any objection now or hereafter to the siting of the venue of any arbitration, action, suit or proceeding in any such place or court as is referred to in Article 24 and any claim that any such action, suit or arbitration proceedings have been brought in an inconvenient

forum under such proceedings are brought outside Saudi Arabia.

27. GOP also hereby consents generally in respect of any proceedings arising out of or in connection with this Agreement to the giving of any relief related thereto or the issue of any process in connection with such proceedings including, without limitation, the making, enforcement or execution against any award, order or judgment which may be made or given in such proceedings.

…………..”

ANNEX 2

“PART 1

Acts, Ordinances, President’s Orders and Regulations

GOVERNMENT OF PAKISTAN

MINISTRY OF LAW, JUSTICE AND PARLIAMENTARY AFFAIRS
(Law and Justice Division)

Islamabad, the 31st January 1996

No. F. 2(1)/96-Pub. – The following Ordinance made by the President is hereby published for general information:-

ORDINANCE NO. VII OF 1996

AN

ORDINANCE

To provide for the establishment of an Awami Hajj Trust

WHEREAS it is expedient to provide for the establishment of an Awami Hajj Trust to mobilize savings from the pilgrims desirous of performing Hajj and investment thereof in the Islamic modes of investment and for facilitating Hajj operations and matters connected therewith and incidental thereto:

AND WHEREAS the National Assembly is not in session and the President is satisfied that circumstances exist which render it necessary to take immediate action:

(67)

……

68 THE GAZETTE OF PAKISTAN, EXTRA, JA:

NOW THEREFORE, exercise of the powers conferred by clause (1) of Article 89 of the Constitution of the Islamic Republic of Pakistan, the President is pleased to make and promulgate the following Ordinance:-

1. Short title, extent and commencement. –

(1) This Ordinance may be called the Awami Hajj Trust Ordinance, 1996.

………

2. Definitions – In this Ordinance unless there is anything repugnant in the subject or context:

(a) "Board" means the Board of Trustees of the Awami Hajj Trust constituted under section 5;

(b) "Fund" means the Awami Hajj Savings, and Investment Fund established under section 10;

(c) "Haji" or "Hujjaj" means a person or persons who have performed, or are intending to proceed to perform Hajj;

(d) "Hajj" means performance of Hajj by visiting Makkah and Madina in Saudi Arabia in accordance with the Injunctions of Islam as laid down in Holy Quran and Sunnah of the Holy Prophet (peace be upon him):

(e) "Managing Trustee" means the Secretary, Religious Affairs Division, Government of Pakistan, or such other person of integrity having a good record of fiduciary conduct and expertise in financial management and knowledge of Shariah as the Federal Government may appoint to perform the functions of the Managing Trustee;

(f) "member" means an intending Haji who wishes to save and finance the Hajj expenses by becoming a member of the Fund;

(g) "Trust" means the Awami Hajj Trust established under section 3; and

(h) "Trustee Bank" means a bank or financial institution appointed by the Board to collect deposits from embers, maintain their accounts in the Fund and make investment thereof in accordance with the directions of the Board.

3. Establishment of the Trust –

(1) As soon as may be, after the commencement of this Ordinance, the Federal Government shall, by notification in the Official Gazette, establish a trust to be known as the Awami Hajj Trust.

(2) The Trust shall be a body corporate having perpetual succession and a common seal with power to acquire, hold and dispose of property, and may by its name, sue and be sued.

(3) The headquarters of the Trust shall be at Islamabad and it may establish its regional offices in such other places as the Federal Government may determine.

4. Purposes and objects of the Trust – The purposes and objects of the Trust shall be to:

(a) mobilize savings from members;

(b) invest savings of the members in appropriate schemes yielding maximum returns and credit profits accrued therefrom in the members' accounts;

(c) defray the expenses of Hajj and individual members out of their savings and profit accrued thereon; and

(d) adopt measures for facilitating the performance of Hajj by members.

5. Board of Trustees –

(1) The general direction and administration of the Trust and its affairs shall vest in the Board of Trustees consisting of -

(i) Federal Minister for Religious Affair …. Chairman
(ii) Federal Minister for France …………….. Member
(iii) Chairman, Council of Islamic Ideology … Member
(iv) Deputy Chairman, Planning Commission ... Member
(v) Secretary, Ministry of Finance ………….. Member

(vi) Secretary, Religious Affairs Division, Government of Pakistan, if he is not Appointed as the Managing Trustee …..... Member
(vii) Chairman, Pakistan Banking Council …… Member
(viii) Managing Trustee ……………………….. Member

(2) The Secretary, Religious Affairs Division, Government of Pakistan shall act as Secretary of the Board.

6. Powers and function of the Board - The powers and functions of the Board shall be to –

(a) provide guidelines to the Managing Trustee for managing Hajj savings and investment operations in an efficient and productive manner;

(b) approve the budget of the Managing Trustee relating to the Fund;

(c) review and approve the audited income and expenditure of the Fund;

(d) approve implementation plans for functions assigned to the Trustees bank;

(e) adopt measures for promotion and welfare of the Hujjaj during Hajj operations; and
(f) perform such other functions as may be assigned to it by the Federal Government for the purposes of this Ordinance.

…………

11. Reports – The Managing Trustee shall, by the end of each financial year or as and when the Federal Government may direct, submit annual audited report of Fund to the Board and such other reports about its activities as the Board or the Federal Government may direct.

12. Rules – (1) The Board may, with the prior approval of the Federal Government, make rules for carrying out the purposes of this Ordinance.

(2) Without prejudice to the foregoing powers, such rules may provide for –

(a) the procedure for deposit of amounts in the Fund and its utilization for defraying Hajj expenses of the members;

(b) determination of Hajj expenses; and

(c) such other activities as may facilitate the performance of Hajj in conformity with the purposes of the Trust.

……… ”

ANNEX 3

“AGREEMENT

THIS AGREEMENT is made this tenth day of September, 1996 between the AWAMI HAJJ TRUST, established under section 3 of the Awami Hajj Trust Ordinance, 1996 (Ordinance No. VII of 1996)…….of the first part and Dallah Real Estate and Tourism Holding Company, a Company duly organised and existing under the laws of the Kingdom of Saudi Arabia,…… of the second part.

WITNESSETH

WHEREAS the Trust is interested in leasing reliable housing facilities in the holy city of Makkah, Kingdom of Saudi Arabia, for Pakistani pilgrims whilst performing Hajj and Umra; and

WHEREAS Dallah owns adequate and appropriate real estate at a distance of 1500 metres from the Haram, and has agreed to construct the required structures and buildings on the same for the purpose and to lease them to the Trust.

NOW THEREFORE, in consideration of the mutual covenants and conditions hereinafter set forth, the parties hereto agree as follows:

1. Dallah shall undertake, within the holy city of Makkah, development and construction necessary for the accommodation of 45,000 Pakistani pilgrims (on the basis of 2.5 cu. Metres per person) whilst performing Hajj and Umra on a part of the plot of land owned by Dallah in the Al-Misfalah district of Makkah comprising an area of 22,000 square metres which is at a distance of 1500 metres from the Haram as identified and described in Schedule “A” attached hereto (referred to as “the Housing”).

2. The total leased value of the said land area of 22,000 square metres and the total construction cost of the Housing is computed at US$210,000,000 and US$135,000,000 respectively aggregating US$345,000,000 (U.S.$ Three Hundred and Forty-five Million only), out of which the Trust shall pay a lump sum of U.S.$100,000,000 (U.S. Dollars One Hundred Million only) to Dallah by way of advance ("the Advance Lease Payment") within thirty (30) days from the date of execution of this Agreement by the Parties, subject to (i) Dallah arranging through one of its affiliates a U.S. Dollars 100,000,000 (U.S.$ One Hundred Million only) Financing Facility for the Trust against a guarantee of the Government of Pakistan, (ii) Dallah submitting to the Trust a Performance Bond covering the Advance Lease Payment in the format attached as Schedule "B" to this Agreement. (iii) A counter guarantee issued by the Trust and Al-Baraka Islamic Investment Bank, E.C., Bahrain, (Hereinafter referred to as the (Trustee Bank") appointed by the Board of Trustees pursuant to Section 8 of the Awami Hajj Trust Ordinance, 1996 in favour of the Government of Pakistan.

3. This Agreement shall come into effect on the date that Dallah receives from the Trust the Advance Lease Payment and submits the aforesaid Performance Bond to the Trust ("Date of Effectiveness").

4. Dallah shall develop, construct and complete the Housing in accordance with such detailed specifications and drawings that shall be approved by the Trust within ninety (90) days of the execution of this Agreement. Upon such approval they will be signed by both parties. Such signed documents will be referred to herein as "the Approved Specifications". Within twenty-four (24) months from the Date of Effectiveness hereof Dallah shall make available to the Trust the Housing, subject to execution and registration of the Lease Agreement specified in Clause 5(a) below, for occupation by Pakistani pilgrims, complete in all respects, and prior to Dhul-qa'da 1, 1420 HIJRA.

5(a) The Trust irrevocably and unconditionally agrees to take on lease the Housing for a term of ninety-nine (99) years in terms of the draft lease contained in Schedule "C" hereto ("the Lease Agreement") for which entire term the Lease Payments shall be made in strict accordance with either of the two options specified in the attached Schedule "D" hereto. On the completion of the Housing as aforesaid the Lease Agreement shall be executed by and between the parties, which will be governed by the provisions of this Agreement insofar as applicable.

………..

19. This Agreement shall be binding upon and shall enure to the benefit of the parties hereto and to the benefit of their successors and permitted assigns to the extent that such enurement does not violate any specific provision of the Lease Agreement and applicable law.

………..

23. 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 the Conciliation and Arbitration of the International Chamber ofCommerce, Paris, by three arbitrators appointed under such Rules.

24. To the extent that the Trust may be entitled in any jurisdiction to claim for itself immunity in respect of its obligations under this Agreement from any proceedings, suit, award, execution, attachment (whether in aid of execution, before award, judgment or otherwise) or other legal process or to the extent that in any jurisdiction there may be attributed such immunity (whether or not claimed), the Trust hereby irrevocably agrees not to claim and hereby irrevocably waives such immunity to the fullest extent permitted by the law of such jurisdiction.

25. The Trust hereby irrevocably waive any objection now or hereafter to the siting of the venue of any arbitration, action, suit or proceeding in any such place or court as is referred to in Clause 23 and any claim that any action, suit or arbitration proceedings have been brought in an inconvenient forum.

26. The Trust also hereby consents generally in respect of any proceedings arising out of or in connection with this Agreement to the giving of any relief related thereto or the issue of any process in connection with such proceedings including, without limitation, the making, enforcement or execution against any award, order or judgment which may be made or given in such proceedings.

27. The Trust may assign or transfer its rights andobligations under this Agreement to the Government of Pakistan without the prior consent in writing of Dallah.

………".

ANNEX 4

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958

…………..

"Article II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Article III

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

Article IV

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

(a) The duly authenticated original award or a duly certified copy thereof;

(b) The original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

“Article V

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 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.

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 matter 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.

………. ”

ANNEX 5

The Arbitration Act 1996: Part III

“**101 Recognition and enforcement of awards**

(1) A New York Convention award shall be recognized as binding on the persons as between whom it was made, and may accordingly be relied on by those persons by way of defence, set-off or otherwise in any legal proceedings in England and Wales or Northern Ireland.

(2) A New York Convention award may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect.

As to the meaning of “the court” see section 105.

…………….

102 Evidence to be produced by party seeking recognition or enforcement

(1) A party seeking the recognition or enforcement of a New York Convention award must produce—

(a) the duly authenticated original award or a duly certified copy of it, and

(b) the original arbitration agreement or a duly certified copy of it.

(2) If the award or agreement is in a foreign language, the party must also produce a translation of it certified by an official or sworn translator or by a diplomatic or consular agent.

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—

> (a) that a party to the arbitration agreement was (under the law applicable to him) under some incapacity;
>
> (b) that the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made;

…………………

(3) Recognition or enforcement of the award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to recognize or enforce the award.

(4) An award which contains decisions on matters not submitted to arbitration may be recognized or enforced to the extent that it contains decisions on matters submitted to arbitration which can be separated from those on matters not so submitted.

(5) Where an application for the setting aside or suspension of the award has been made to such a competent authority as is mentioned in subsection (2)(f), the court before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the recognition or enforcement of the award.

It may also on the application of the party claiming recognition or enforcement of the award order the other party to give suitable security

………..”

ANNEX 6

Does *section 103(2)(b)* of the *Arbitration Act 1996* ("the Act") cover the argument of a party who says that he is not bound by the arbitration agreement?

1. Consideration of this issue must start with the Convention, on which the ***Arbitration Act 1975*** and ***Part III*** of the 1996 Act are based. The Convention contemplates two stages of recognition and enforcement of a Convention award. The first stage is dealt with in *Article IV.* A party to an arbitration agreement who applies for it to be recognised and enforced in a Convention state other than the one in which the award was made must "*supply*" the award and also the original "*agreement",* as defined in *Article II* of the Convention.[105] Those requirements are carried into the current English statute in ***section 102(1)*** of the Act.

2. The second stage is dealt with in *Article V* of the Convention. Recognition and enforcement of the Convention award may be refused, at the request of the party against whom it is invoked, but only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof of one of the matters set out in *Article V.1 (a)* to *(e).* ***Section 103(2)(b),*** like its predecessor ***section 5(2)(b)*** of the Arbitration Act 1975, is the parliamentary draftsman's version of the second half of *Article V.1(a)* of the Convention.

3. As Mance LJ has demonstrated in his analysis of the Convention and the provisions of ***sections 102*** and ***103*** of the Act in ***Dardana Ltd v Yukos Oil Co and Petroalliance Services Co Ltd,***[106] there appears to be a possible inconsistency between the approach of the Convention and that of the Act concerning what has to be proved at the first stage and what topics can be challenged at the second stage.[107]

4. ***Part III*** of the Act, which comprises ***sections 99 – 104,*** covers the recognition and enforcement of Convention awards. ***Section 100(2)(a)*** of the Act provides that, for the purposes of Part III of the Act, an "*arbitration agreement means an arbitration agreement in writing",* which will have the same meaning as in Part I of the Act. ***Section 5*** of the Act (in Part 1), sets out the scope of the phrase an "*agreement in writing"* for the purposes of the Act. ***Section 6*** of the Act defines "*arbitration agreement".* It means "*an agreement to submit to arbitration present or future disputes (whether they are contractual or not)".* Together, these definitions give a broader meaning to "*arbitration agreement*" than that in the Convention. In Article II.2 of the Convention only a partial definition is given to that phrase: "*The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams".*

5. In ***Dardana Ltd v Yukos Oil Co and Petroalliance Services Co Ltd,***[108] Mance LJ concluded that an analysis of the interrelationship between ***sections 102*** and ***103*** of

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[105] That is: "*…an agreement in writing under which the parties undertake to submit to arbitration all or any difference which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration".*
[106] [2002] 2 Lloyd's Rep 326 at paragraphs 8 – 15.
[107] See paragraphs 11 and 12 of the judgment.
[108] [2002] 2 Lloyd's Rep 326.

the Act would assist in determining the scope of what is covered by phrase in ***section 103(2)(b).*** The facts of that case were as follows: the predecessor in title to Dardana had obtained two arbitration awards from the same Swedish arbitral tribunal; one against Yuganskenftegas ("YNG") and one against Yukos. The awards concerned sums that Dardana's predecessor in title claimed under a contract. The Swedish tribunal made the award against Yukos having held that it, by its conduct, had become a party to the contract and the arbitration agreement, despite the fact that there was no written agreement to that effect.

6. In May 2000, Yukos applied to the Stockholm District Court to set aside the award against it. In June 2000, Dardana applied *ex parte* to David Steel J for leave to enforce the Swedish award against Yukos as a judgment, pursuant to ***section 102*** of the Act. He granted leave to do so. Yukos then applied to set that order aside on the ground that there was no valid arbitration clause,[109] or, in the alternative, for an adjournment pursuant to ***section 103(5)*** .[110] Dardana sought an order (under ***section 103(5))*** that Yukos provide security if the English proceedings were to be adjourned pending a decision of the Stockholm court. HHJ Chambers QC adjourned Yukos' application to set aside David Steel J's order (ie. he adjourned the ***section 103(2)(b)*** point) until after the decision of the Stockholm court, but ordered Yukos to give security in the meantime.

7. Yukos appealed, as it wished not only to set aside David Steel J's order entirely, but also to reverse the order of HHJ Chambers QC that it provide security. In the Court of Appeal, Mance LJ, who gave the only substantial judgment, dealt first with the issue of the basis on which Yukos could resist enforcement of the Swedish award before the English Courts.

8. At paragraph 8 of his judgment, he records that it was common ground before the court that Yukos could challenge the recognition and enforcement of the Swedish award under ***section 103(2)(b)*** of the Act, by maintaining that it never became a party to the contract and arbitration agreement. Nevertheless, Mance LJ analysed the scheme of the Act to show why Yukos could mount this challenge under ***section 103(2)(b).***

9. First of all, Mance LJ noted that there appeared to be some overlap and inconsistency between ***section 102*** and ***section 103*** of the Act. This was because under ***section 102,*** a party seeking recognition and enforcement of the Convention award has to produce first, the award itself and secondly, the arbitration agreement in writing. He pointed out that the latter could be interpreted to mean an arbitration agreement that is *proved* to give the tribunal jurisdiction over the party against whom it is sought to enforce the award. Yet issues concerning defects in the arbitration agreement are also dealt with specifically in ***section 103(2).***

10. Mance LJ resolved this possible overlap and inconsistency through an interpretation of ***section 100.*** He noted that this provided that the award to be recognised or enforced under the Convention must be "*...an award made in pursuance of an*

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[109] That is, it relied on ***section 103(2)(b)*** of the Act.
[110] This provides that where an application to set aside an award has been made to a "competent authority", then the court in which recognition or enforcement is sought can adjourn the decision on recognition or enforcement.

arbitration agreement…". He construed this as meaning an award "*purporting to be made* under an arbitration agreement". Therefore all that was required at the first stage of recognition and enforcement was production of apparently valid documents, including an apparently valid arbitration clause, by reference to which the arbitrators accepted that the parties had agreed to arbitrate.[111] Accordingly, he decided, it is only at the second stage, when the *prima facie* right to recognition and enforcement is challenged, that the court will consider the issue of whether the apparently valid arbitration clause was, in fact, an agreement to arbitrate between the party seeking recognition and enforcement of the award and the party against whom the award was to be invoked. Also at that stage the court can consider, under ***section 103(2)(b),*** any issue of whether (under the relevant law applicable) the arbitration agreement was validly made.[112]

11. Therefore, in ***section 103(2)(b),*** the phrase "*the arbitration agreement was not valid under…"* the relevant law, must be construed as including the issue of whether, in fact, the party against whom the award is to be invoked is indeed bound by the arbitration clause which gave the arbitrators their jurisdiction to make the award.

12. As Mr Landau pointed out in argument, this construction accords with common sense. A party that alleges that it never agreed to arbitrate a dispute must have the right to argue that point in the courts of countries where it is sought to enforce the award. The party should not be confined to remedies in the courts of the state in which the award was made. In England and Wales, the only statutory wording that enables this to be done is that in ***section 103(2)(b).***

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[111] Paragraphs 10 and 12 of the judgment.
[112] Paragraph 12 of the judgment.