Scientific Research Publishing

Open Journal of Social Sciences, 2019, 7, 168-179
http://www.scirp.org/journal/jss
ISSN Online: 2327-5960
ISSN Print: 2327-5952

The Doctrine of *Kompetenz-Kompetenz*: An Instrument of Fraud or Justice? The Case of *Dallah Real Estate and Tourism Holding Company* (*Appellant*) (*Dallah*) *v the Ministry of Religious Affairs* (*Government of Pakistan*)[1]

Alhassan Salifu Bawah

Business School, University of Education, Winneba, Ghana
Email: saliba101@yahoo.com

How to cite this paper: Bawah, A.S. (2019) The Doctrine of *Kompetenz-Kompetenz*: An Instrument of Fraud or Justice? The Case of *Dallah Real Estate and Tourism Holding Company* (*Appellant*) (*Dallah*) *v the Ministry of Religious Affairs* (*Government of Pakistan*). *Open Journal of Social Sciences*, **7**, 168-179.
https://doi.org/10.4236/jss.2019.76014

Received: March 11, 2019
Accepted: June 23, 2019
Published: June 26, 2019

Copyright © 2019 by author(s) and Scientific Research Publishing Inc.
This work is licensed under the Creative Commons Attribution International License (CC BY 4.0).
http://creativecommons.org/licenses/by/4.0/

Open Access

Abstract

The arbitral tribunal is vested with wide ranging powers when it comes to the issue of jurisdiction. As a result, there is the potential of the arbitral tribunal assuming disputable jurisdiction. The power of the arbitral tribunal to determine its own jurisdiction is known as *Kompetenz-Kompetenz*. This paper's position is that the *Kompetenz-Kompetenz* doctrine is a necessary evil that aids in the administration of justice. Without an arbitral tribunal being clothed with this power, the determination of the jurisdiction of the arbitral tribunal at the law courts, prior to arbitration, could have been endless. *Dallah* was just unfortunate to have contracted with a very clever party (the Government of Pakistan). Therefore, after a careful examination of recent cases on *Kompetenz-Kompetenz*, this paper concludes that the doctrine of *Kompetenz-Kompetenz* is an instrument of justice.

Keywords

Arbitral Tribunal, Arbitration Agreement, Arbitrators, Rescission, Separability Principle, Ghana Arbitration Act, UK Arbitration Act, Kompetenz-Kompetenz, Recognition and Enforcement, Foreign Arbitral Awards, Jurisdiction, International Commercial Arbitration, Anti-Suit Injunction and Justiciability

1. Introduction

Arbitral procedures constitute a complex and highly technical topic of profes-

[1][2010] UKSC 46, [2010] 2 Lloyd's Rep 691.

sional and academic discourse, bringing to light, literally hundreds of books and articles annually, for a growing audience of users and specialists. The underlying reason for this complexity lies in the pluralist nature of arbitration and its symbiotic relationship to other legal orders, both national and international [1].

The doctrine of *Kompetenz-Kompetenz* has taken center-stage in most academic debates in recent times. This is partly as a result of Arbitration replacing litigation for high-stakes adversarial disputes, that is, as it became an effective substitute for domestic courts, tribunals found themselves in the same kind of balancing situations as their peers on the bench. Domestic judges most often consider the extent to which public policy considerations impinge upon freedom of contract; and, under the New York Convention, they may refuse to enforce the arbitral awards of those tribunals that fail to do same. In complex transnational disputes, pleadings to a greater extent involve the interpretation of specific statutory requirements. In such instances, the tribunal will have no choice but to take into account public policy concerns which most often require balancing. As a strategic matter, balancing also enables dispute resolvers to split differences between the parties, and to fashion awards that will harm the loser as little as possible [1].

When parties agree to arbitrate their disputes, they give up the right to have those disputes decided by a national court. Instead, they agree that their disputes will be resolved privately, outside of any court system [2].

This paper sets out to effectively examine the powers of the arbitral tribunal under the Arbitration Agreement. The paper, relying on the provisions of the Ghana Arbitration Act 2010 (Act 798) and the UK Arbitration Act 1996, with the aid of the "black-letter" approach to doctrinal research, submits that on a comprehensive and careful analysis of the UK Supreme Court decision in *Dallah*, it is possible for sovereign authorities to cleverly maneuver and extricate themselves out of their contractual obligations in contracts entered into between State entities and the private sector. This paper will bring to light some of the hidden intricacies of the *Kompetenz-Kompetenz* doctrine that would potentially put private individuals and companies on notice, when entering into contracts with State entities that contain arbitration clauses, especially with "clever" States like the Government of Pakistan.

In *Dallah v Government of Pakistan*, the Pakistani Government strenuously denied being a party to any arbitration agreement with *Dallah*, and maintained its jurisdictional reservation argument, and proceeded to do nothing to either submit to the jurisdiction of the arbitral tribunal or waive its sovereign immunity. The arbitral tribunal, deriving authority under the principle of *Kompetenz-Kompetenz* (that an arbitral tribunal has competence to rule on its own jurisdiction) held that the Government of Pakistan, was a true and proper party to the arbitration agreement, and bound by the arbitration clause. The arbitral tribunal concluded that it had jurisdiction to determine *Dallah's* claim against the Pakistani Government.

The subsequent arbitral award in favour of *Dallah*, was denied enforcement in

the English courts. The UK Supreme Court concluded that even though an arbitral tribunal per the powers vested in it could make an initial ruling on its own jurisdiction to arbitrate a particular dispute, the said ruling was subject to review by a court, even in situations where the subsequent court action relates to the enforcement of the award.

The mantra of arbitrators of cross-border commercial disputes, across many centuries, has been to give primacy to the intent and expectations of the contracting parties, a disposition that is now institutionalized as a fiduciary duty. Thus, the commitment to the freedom to choose arbitration entails building norms, organizational hierarchies, and capacity to dialogue with national courts within the New York Convention system [1].

Section 1 examines the legal basis for the separability principle under Act 798 of Ghana, and determination of jurisdiction in international arbitration. The doctrine of *Kompetenz-Kompetenz* is introduced. Section 2 focuses on jurisdiction and *Kompetenz* in *Dallah*. More light is thrown on the facts of *Dallah* and the holding of the UK Supreme Court. This is then followed by the author's observations and conclusion in Section 3.

1.1. The Separability Principle

Though the arbitration clause is most often contained within the contract between the parties, under most laws and rules, it is nonetheless considered a separate agreement. It thus may continue to be valid, even if the main agreement, thus, the contract where the arbitration agreement is found, may be potentially invalid. In some jurisdictions, this doctrine of separability permits the arbitrators to hear and decide the dispute even if one side claims, for instance, that the contract is terminated, or never existed in the first place, or is invalid because it was fraudulently procured. Such claims would not deprive the arbitrators of jurisdiction because the said claims pertain to the main contract and not specifically to the arbitration clause [2].

Section 3 (1) of Act 798 of Ghana provides that: "Unless otherwise agreed by the parties, an arbitration agreement which forms or is intended to form part of another agreement, shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid or did not come into existence or has become ineffective and shall for that purpose be treated as a distinct agreement". This provision gives effect to the separability principle.

Whether the arbitration agreement is physically distinct or not, s. 3 (1) of Act 798 of Ghana is unequivocal that the agreement to arbitrate is as a matter of law severable from the main obligation and stands or falls in its own right. This reflects the position as it was under the Common Law and embodied in Article 16 (1) of the Model Law.

As a result of the then UK House of Lords decision in *Fiona Trust & Holding Corporation & Others v Yuri Privalov & Others*[2] (which was part of a wider dispute between the Russian Sovcomflot Group of Companies and Mr. Nikitin,

[2] [2008] 1 Lloyd's Rep 254.

who was alleged to have successfully bribed one or more of their directors or employees), clever distinctions in the formulation of the arbitration clause as to for example scope, are no longer relevant, in that very clear words would be needed before a court was satisfied that it had been accorded some sort of residual jurisdiction to consider, for example, restitutionary or tortious claims arising out of an agreement, whereas strictly "contractual" claims were within the sole province of the arbitrators. Furthermore, to be outside the scope of the arbitration clause, the issue of illegality would have to be directed at the arbitration clause itself, which would obviously be rare.

The question that arose for the House of Lords to decide in *Fiona Trust* was twofold. First was whether an arbitration clause was capable of extending the jurisdiction of the arbitration tribunal to issues pertaining to the basic validity of the contract of which the clause was part of, and secondly, whether such an arbitration clause was binding on the parties following rescission of the contract. The House of Lords answered both limbs of the question in the affirmative.

On the separability issue, the owners asserted that rescission of the charter-parties on account of bribery operated to rescind the entire contract including the arbitration clause and consequently the arbitral tribunal had no jurisdiction.

The House of Lords rejected this argument as one that flew in the face of s. 7 of the UK Arbitration Act 1996, which provides for the separation of the arbitration agreement from the main contract, just like s. 3 of Act 798 of Ghana. Lord Hoffman expressed the effect of that section as a requirement to treat the arbitration agreement and the main agreement as "having been separately concluded".

Even before *Fiona Trust*, in *Vee Networks Ltd v Econet Wireless International Ltd*,[3] Coleman J had held that s. 7 of the UK Arbitration Act 1996 empowered the arbitrator to decide whether or not a contract of supply was void for being *ultra vires* the customer [3].

El Nasharty v J Sainsbury plc[4] was decided as the House of Lords decision in *Fiona Trust* was emerging, and in reliance in part on the decision in *Fiona Trust*, confirmed that a challenge to the existence of an arbitration agreement based on duress had to be based on the facts specific to the arbitration agreement, and not simply parasitic upon a challenge to the validity of the contract containing it. Issues as to the variation and rectification of the main agreement may on the same basis be determined by the arbitrators.

Having established the basis of the separate status of the arbitration agreement from the main contract above, the focus will now turn to an in-depth analysis of jurisdiction, which is intrinsically linked to the separability principle.

1.2. Jurisdiction in International Arbitration

After establishing the legal basis of the separability of the arbitration clause from

[3][2005] 1 Lloyd's Rep 192.

[4][2008] 1 Lloyd's Rep 261.

the main contract above, the subsequent hurdle to overcome, is the proposition that the arbitrators are free to determine their own substantive jurisdiction under the main agreement itself, in respect of issues such as the validity of the arbitration clause, the validity of their own appointments and the issue of what matters have been submitted to arbitration (sections 14 and 24 of Act 798 of Ghana). Act 798 of Ghana, consistent with the Common Law, does not permit the arbitrators to have the final word on their own jurisdiction, and sections (ss) 15 and 16 of Act 798 of Ghana, provide a special procedure, based on Article 16 of the Model Law, for challenges to the arbitrator's assertion or denial of jurisdiction.

In international commercial arbitration, the powers, duties and jurisdiction of an arbitral tribunal arise from a complex mixture of the will of the parties; the law governing the arbitration agreement; the law of the place of arbitration; the law to which the parties have agreed to subject the arbitration; and the law of the place where recognition or enforcement of the award may be sought [4].

A balance must therefore be struck between the sanctions that may be imposed on arbitrators who carry out their functions in a careless or improper manner, and the equally necessary requirement that an arbitral tribunal should be able to perform its task without constantly 'looking over its shoulder' for fear of being challenged in the courts of law.

It may be argued that arbitrators should be given virtually unlimited powers in order to adapt the process to the dispute in question and encourage speed and effectiveness in the arbitral process; but the requirement of public policy, whether national or international, make some control necessary so as to ensure that the parties are not without recourse if there is wrongful conduct on the part of an arbitral tribunal. In particular, it is considered critical that an arbitral tribunal gives the parties a fair hearing and that it decides only matters within its competence, or jurisdiction.

Section 24 of Act 798 of Ghana provides for the competence of the tribunal to rule on its own jurisdiction. In so providing, the section has adopted in a modified form the principles contained in Article 16 of the Model Law, the difference being that s. 24 is not mandatory and can be contracted out of by the parties. It is an enactment for the first time in Ghanaian law, of the internationally recognized doctrine of *Kompetenz-Kompetenz*. The advantage of *Kompetenz-Kompetenz* is that the scope for one party to delay the proceedings by claiming want of jurisdiction and taking the matter to the courts is considerably reduced [3]. The doctrine had been recognised previously in English cases such as *Christopher Brown Ltd v Genossenschaft GmbH*,[5] in which arbitrators, whose jurisdiction was challenged, were held to be entitled to make their own inquiries into the question whether or not they had jurisdiction to determine their own course of action [5].

Under section 24 of Act 798 of Ghana, jurisdictional determination by the arbitral tribunal is subject to challenge, either at the appointing stage, if any, or at the High Court under s. 26 of Act 798, or post-award, under s. 58 of Act 798. There is likely to be a conflict in having two competing provisions relating to ju-

[5](1954) 1 QB 8.

risdiction. In *Vee Networks*, Coleman J drew a distinction between a jurisdiction arising under s. 7 and jurisdiction arising under s. 30 of the UK Arbitration Act 1996, thus sections 3 and 24 of Act 798 of Ghana. He clarified that a challenge to the arbitrator's jurisdiction must be explicit and cannot be inferred from arguments on the merits.

In *Harbour Assurance Co. Ltd v Kansa General International Insurance Co. Ltd*,[6] it was held that the main contract and the obligation to arbitrate, were distinct agreements, and that provided that the arbitration clause was sufficiently widely worded, the arbitrators in principle would have the jurisdiction to determine whether the main agreement was valid.

In *Azov Shipping Co. v Baltic Shipping Co.* (*No.* 1),[7] it was held that the justiciability of an issue was a question which went to jurisdiction. In other cases, the identity of the correct claimant or respondent may also be an issue which goes to jurisdiction (*Primetrade AG v Ythan Ltd*).[8]

Regardless as to whether or not the arbitration clause authorizes a determination of jurisdiction, it is open to the parties to enter into an *ad hoc* agreement which does confer such jurisdiction. Section 24 of Act 798 of Ghana further provides for the validity of the arbitration agreement, including its existence and legality, thus *ABB Lummus Global Ltd. v Keppel Fels Ltd.*;[9] and whether the issues referred to the tribunal fall within the arbitration agreement as was the case in *Al Naimi v Islamic Press Inc.*[10]

The distinction between jurisdictional and non-jurisdictional issues, is most often clear. An arbitrator who exceeds his powers in conducting arbitration is not to be regarded as having exceeded his jurisdiction. The former relates only to procedure, and the rules on jurisdiction are inapplicable (*Petroships Pte Ltd of Singapore v Petec Trading & Investment Corporation*).[11]

One of the areas of difficulty in this context is where the respondent alleges that there is no valid agreement between the parties. If the allegation relates solely to the arbitration agreement, then any ruling by the tribunal on the validity or otherwise of the arbitration agreement is a matter of jurisdiction and falls within s. 24 of Act 798 of Ghana. By contrast, where the allegation is that there is no main agreement between the parties and thus nothing to go to arbitration, the severability principle in s. 3 of Act 798 allows the tribunal to deal with the allegation under the independent arbitration clause and may thereafter issue an award on the consequences of finding an agreement or of not finding an agreement as the case may be. Thus, no jurisdiction issue is at stake in such a case (*Vee Networks*) [4].

There is an intermediate possibility, that is, an allegation that there is no main agreement and no arbitration clause. In such a case, the severability principle al-

[6][1993] 1 Lloyd's Rep 455.
[7][1999] 1 Lloyd's Rep 68.
[8]The Ythan [2006] 1 Lloyd's Rep 457.
[9][1992] 2 Lloyd's Rep 24.
[10][2000] 1 Lloyd's Rep 522.
[11][2001] 2 Lloyd's Rep 348.

lows the tribunal to rule on the validity of the main issue, but any preliminary ruling made by it in respect of the arbitration clause itself is one which goes to jurisdiction under s. 24 of Act 798 of Ghana.

Any ruling on jurisdiction given by the tribunal is provisional only, in the sense that it is subject to challenge by the disaffected party. The manner of the challenge depends upon the respondent's attitude to the arbitration. The respondent may simply refuse to have anything to do with the arbitration, in which case he may bring an immediate action for injunctive or declaratory relief under s. 25 of Act 798, or he may await the award itself and then challenge it under s. 58 of Act 798.

Using the mechanism provided for under s. 26 of Act 798, the respondent may participate in the arbitration, but if the award or ruling is subsequently to be challenged, the participation must be under protest, in the form of an objection to jurisdiction made at the first available opportunity. The tribunal having received the objection could choose to deal with the matter itself either by a partial award confined to jurisdiction or by a final award which encompasses both jurisdictional and substantive issues. That award may then be challenged by the respondent under s. 58 of Act 798.

Section 26 of Act 798 further sets out a mechanism for the court to rule on any jurisdictional issue if all the other parties to the arbitration or arbitrators agree on a preliminary point of reference. The court has no power other than give a ruling on jurisdiction and the court may not under this section grant an anti-suit injunction (an order of a court or arbitral tribunal preventing an opposing party from commencing or continuing proceedings in another jurisdiction or forum) in support of the arbitration, unless the parties otherwise agree. The ultimate ruling by the court is to be treated as a judgment under s. 26 (6) of Act 798. However, no appeal may be made against it unless the twin cumulative conditions are met. First, if the ruling involves a point of law which is fundamental to the case; or is one which for some special reason deserves consideration by the High Court or the Court of Appeal.

Any appeal under s. 58 of Act 798 to set aside an award may not be made after three months from the date the applicant received the award unless the Court for a justifiable cause orders otherwise. A final determination on jurisdiction may be regarded by the courts as an award even if this is not stated to be so by the arbitrators (*Ranko Group v Antarctic Maritime SA*, *The Robin*).[12]

Separability and the right to determine jurisdiction are distinct concepts, in that separability is concerned with the right of the arbitrators to rule on the validity of the main contract, whereas the latter is concerned with the right of the arbitrators to determine whether they have the power to sit as arbitrators. These two concepts were the main issues in contention in *Dallah*, which is analysed next.

2. Jurisdiction and *Kompetenz* in "*Dallah*"

The UK Supreme Court heard an appeal brought by *Dallah* against the Govern-

[12][1998] ADRLN 35.

ment of Pakistan. *Dallah* had sought to enforce an arbitral award made by an International Chamber of Commerce (ICC) arbitral tribunal sitting in Paris, France. The High Court and the Court of Appeal had both decided not to enforce the award on the ground that the tribunal had been wrong to find that the Pakistani Government had been bound by an agreement to arbitrate. The UK Supreme Court's judgment explores and clarifies the overlapping boundaries between the roles of arbitral tribunals and national courts in determining jurisdiction.

The court may acquire jurisdiction as a result of an exclusive jurisdiction agreement or a non-exclusive jurisdiction agreement, or in some instances, the defendant's submission to the foreign court's jurisdiction. An exclusive jurisdiction clause stipulates that legal disputes arising from the relevant transaction can only be litigated in the nominated jurisdiction, for example, the courts of New York or Singapore. A non-exclusive jurisdiction clause confers jurisdiction on the relevant nominated courts even though, in the absence of such a clause, that jurisdiction would not have been available to the parties [6].

2.1. Brief Facts of *Dallah*

In 1996, the Government of Pakistan established by statute, the Awami Hajj Trust (the Trust) to mobilise savings from, and provide services to Pakistani pilgrims visiting Mecca for the Hajj. Soon after, the Trust entered into an agreement with *Dallah* for the construction of housing near Mecca to provide accommodation for Pakistani pilgrims, which would be leased by *Dallah* to the Trust for 99 years. The Agreement contained an arbitration clause referring disputes between *Dallah* and the Trust to ICC arbitration in Paris. No express choice of law was nominated in the Agreement. The seat has an important bearing on the processes of ascertaining both the law governing the arbitration agreement and the law governing the arbitration process, or the "curial law" [6].

Previously, *Dallah* had reached a Memorandum of Understanding regarding the construction of the project with the Pakistani Government, but following the creation of the Trust, the Agreement was signed directly with the Trust and not the Government. Following the collapse of Benazir Bhutto's government in 1996, the Trust ceased to exist, and *Dallah* subsequently issued a request for ICC arbitration against the Pakistani Government in 1998.

The Pakistani Government denied being a party to any arbitration agreement, maintained a jurisdictional reservation and did nothing to submit to the jurisdiction of the tribunal or waive its sovereign immunity. The arbitral tribunal, under the principle of *Kompetenz-Kompetenz*, that an arbitral tribunal has competence to rule on its own jurisdiction, held that the Pakistani Government was a true and proper party to the Agreement; was bound by the arbitration clause; and therefore the tribunal had jurisdiction to determine *Dallah's* claim against the Pakistani Government.

The tribunal subsequently made an award of US$20,588,040.00 in *Dallah's*

favour. Leave to enforce the award was initially granted in England, but set aside by the High Court after an appeal by the Pakistani Government, which succeeded in resisting enforcement on the ground that, the arbitration award was not valid under the law of the country where the award was made, thus France, as per s. 103 (2) (b) of the UK Arbitration Act 1996 reflecting Article V (1) (a) of the New York Convention (NYC) on the Recognition and Enforcement of Foreign Arbitral Awards.

It was common ground between the parties that this provision covers cases where the arbitration agreement was not binding on a party because that party was never a party thereto, and it was on this ground that the Pakistani Government argued that the arbitration agreement was not valid, and the award unenforceable. It was also common ground that, as there was no express choice of law under the Agreement, whether or not the Government had been a party to the Agreement was a matter of French law (France being the jurisdiction in which the award had been made).

The English Court of Appeal held that the Pakistani Government should not be regarded as a party to the arbitration agreement, and that the arbitral tribunal was therefore, flawed, in holding that the Pakistani Government should be regarded as a true and proper party. According to the English Court, the correct approach, founded on French law, required investigation whether the parties' dealings disclosed a common subjective intention (express or implied), shared by Pakistan and the named arbitration parties, that Pakistan would be treated as a party to the arbitration agreement. The Court of Appeal considered that the Paris arbitral tribunal, had erred by invoking more general notions of "good faith" and that these nebulous notions were insufficiently tied to the question of common intention [6]. *Dallah* appealed to the Supreme Court.

2.2. The UK Supreme Court Decision

The Supreme Court unanimously dismissed the appeal. Its reasoning being that, although the arbitral tribunal can rule on its own jurisdiction under the principle of *Kompetenz-Kompetenz*, this decision is still subject to review by the courts if an action is brought to set aside or enforce the award, regardless of whether the seat of the arbitration is England or elsewhere. The Supreme Court rejected *Dallah's* argument that the Government was bound to challenge the award before the courts of the seat of arbitration (France), and that this precluded consideration of the tribunal's jurisdiction by the enforcing court.

The UK Supreme Court further dismissed *Dallah's* submission that it should only conduct a limited review of the tribunal's jurisdiction given that the tribunal had already ruled on its own jurisdiction. The Supreme Court accepted the Pakistani Government's submission that under s. 103 (2) (b) of the UK Arbitration Act 1996, and Article V (1) (a) of the NYC, when the issue is initial consent to arbitration, the Court must first determine whether or not the objecting party actually consented. The objecting party has the burden of proof, which it may

seek to discharge as it sees fit. In making its determination, the Court may have regard to the reasoning and findings of the arbitral tribunal, if they are helpful, but it is neither bound nor restricted by them.

The UK Supreme Court further held that: "The tribunal's own view of its jurisdiction has no legal or evidential value when the issue is whether the tribunal had any legitimate authority in relation to the Government at all".

The UK Supreme Court therefore concluded that it should conduct an independent investigation on the facts as to whether the Government could prove that it was not a party to the arbitration agreement.

The central issue under French law was whether there had been a "common intention" between the parties that the Pakistani Government should be bound by the Agreement. The UK Supreme Court held in the negative, and advanced five reasons why this decision was reached and concluded that, there had therefore been no "common intention" between the parties to bind the Pakistani Government to the arbitration agreement.

The UK Supreme Court rejected *Dallah's* alternative argument that the court should exercise its residual discretion under section 103 (2) of the UK Arbitration Act 1996 (recognition and enforcement of the award may be refused) to enforce the award, notwithstanding that the Pakistani Government was not a party to the arbitration agreement. While the Supreme Court agreed that although such discretion did exist in theory, it was limited to cases where the foreign law rendering the arbitration agreement invalid, outrages the court's sense of "justice or decency", for example, where it is "discriminatory or arbitrary". The court also rejected *Dallah's* argument that it should exercise its discretion by enforcing the award, because the Pakistani Government had failed to challenge the jurisdiction of the tribunal in the courts of the seat (the French courts).

This was not a sufficient reason and the Court, agreeing with Moore-Bick LJ in the Court of Appeal, held that: "The failure by the resisting party to take steps to challenge the jurisdiction of the tribunal in the courts of the seat would rarely, if ever, be a ground for exercising the discretion in enforcing an award made without jurisdiction" [7].

Accordingly, the UK Supreme Court decisively concluded that as there had been no common intention that the Pakistani Government would be a party to the Agreement so as to be bound by the arbitration clause, both courts below had been correct in finding that the tribunal had had no jurisdiction over the dispute. The arbitral award was therefore unenforceable.

3. Discussion

The UK Supreme Court's judgment offers welcome clarification of the *Kompetenz-Kompetenz* principle, that although an arbitral tribunal does have jurisdiction to make an initial ruling on its own jurisdiction to arbitrate a particular dispute, such a ruling is always subject to review by a Court, even if the subsequent Court action relates merely to enforcement of the award. In effect, this

means that the tribunal is entitled to make its own finding on its own jurisdiction first, free from any judicial interference, but that such jurisdiction will always be potentially subject to annulment by the Court, for example at the enforcement stage, as was the case in *Dallah*.

The circumstances of this case also highlight the importance of structuring transactions so as to ensure that agreements are enforceable in practice; that is, against entities controlling State assets. In this regard, the Pakistani Government achieved presumably what it had set out to do in contracting with *Dallah* not directly but through a corporate trust.

Although some commentators argue that the decision is not arbitration-friendly, it is worth noting that this is only one of the few reported cases, where an English Court has failed to enforce an international arbitral award. Further, this decision turned on the factual circumstances surrounding the case (most notably, the intentions of the parties concerned) and so is unlikely to have a detrimental impact on the attractiveness of international arbitration as a forum for dispute resolution.

It is hardly surprising that the Courts are reluctant to enforce an award made by an arbitral tribunal that had no jurisdiction over the dispute, against an entity that had never assented to (indeed, deliberately structured the transaction so as to avoid) arbitral proceedings in the first place. The decision further highlights the crucial role of the Courts in arbitration, and may encourage the Courts to adopt a more robust and comprehensive approach when reviewing whether an arbitral tribunal has jurisdiction over a dispute.

Juxta-positioning the decision in *Dallah* with other cases such as *Mobil Cerro Negro Ltd. v Petroleos de Venezuela SA*,[13] *and ETI Euro International NV v Bolivia*,[14] it seems the English Courts are less willing, in the absence of a clear picture of malfeasance by the respondent, to tip the balance in favour of the "righteous claimant", even though they have the power to do so. In a nutshell, the English Courts are reluctant to intervene with "rocket force" in matters over which they will ultimately have little or no jurisdiction.

4. Conclusions

It is submitted that the principle of *Kompetenz-Kompetenz* provided for in the Model Law and recognised by both the UK Arbitration Act 1996 and Act 798 of Ghana, reduces to the barest minimum, the scope for one party to delay the proceedings by claiming want of jurisdiction and taking the matter to the Courts. Coupling this with the severability principle provided for under s. 7 of the UK Arbitration Act 1996, and s. 3 of Act 798 of Ghana, that is, where the arbitration agreement stands or falls on its own, forms the bedrock of any arbitral proceedings.

The fact that the arbitral tribunal has no absolute power and almost all its decisions can be appealed against is irrelevant. Under every properly constituted

[13][2008] EWHC 532 (Comm).

[14][2008] EWHC Civ 880.

constitutional process, there is need for checks and balances to serve as a watchdog for possible abuse of power. As a result, an appeal to the Court or the trial judge as the case may be on a decision of the arbitral tribunal jurisdiction or validity of an award is in line with normal democratic principles. After all, it is said that "power corrupts, and absolute power corrupts absolutely".

Therefore, no fraud was perpetrated by the Pakistani government on Dallah Real Estate. It appears appropriate to infer that the Pakistani Government was a "step ahead" of *Dallah* during the contract negotiations. The doctrine of *Kompetenz-Kompetenz* in essence, comprehensively served as an instrument to deliver justice in *Dallah*.

Conflicts of Interest

The author declares no conflicts of interest regarding the publication of this paper.

References

[1] Sweet, R.S. and Grisel, F. (2017) The Evaluation of International Arbitration. 1st Edition, Oxford University Press, Oxford.

[2] Moses, M.L. (2008) The Principles and Practice of International Commercial Arbitration. Cambridge University Press, New York. https://doi.org/10.1017/CBO9780511819216

[3] Merkin, R. and Flannery, L. (2008) Arbitration Act 1996. 4th Edition, Informa Law, London.

[4] Redfern, A. and Hunter, M. (2009) On International Arbitration. Oxford University Press, Oxford.

[5] Marshall, E.A. (2001) Gill: The Law of Arbitration. 4th Edition, Sweet & Maxwell, London.

[6] Andrews, N. (2016) Arbitration and Contract Law. Springer International Publishing, Switzerland.

[7] https://www.supremecourt.uk/cases/docs/uksc-2009-0165-judgment.pdf