Death of the Pro-Enforcement Myth: Arbitration and England after *Dallah*?

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Duncan Speller
Wilmer Cutler Pickering Hale and Dorr LLP
London

Overview – Competence-competence

- Competence-competence as an elusive notion with different meanings in different contexts -- does *Dallah* provide conceptual clarity on (some of) its limitations?

- Interface between a tribunal’s power to determine its own jurisdiction and review by courts at place of enforcement:
  - Susceptibility to review?
  - Scope and intensity of any review?
  - Deference to courts at seat of arbitration?

- What limitations may exist on the scope of jurisdictional review by English courts in enforcement proceedings post-*Dallah*?
Dallah and competence-competence
Susceptibility to review

- Tribunal’s determination of its own jurisdiction does not preclude review of jurisdiction by courts at enforcement stage:
  - “So, also the principle that a tribunal in an international commercial arbitration has the power to consider its own jurisdiction is no doubt a general principle of law” (Lord Collins, para. 84).
  - “The principle that a tribunal has jurisdiction to determine its own jurisdiction does not deal with, or still less answer, the question whether the tribunal’s determination of its own jurisdiction is subject to review, or, if it is subject to review, what the level of review is or should be” (Lord Collins, para. 83).
  - An uncontroversial starting point?

Dallah and competence-competence
Susceptibility to review

- The basis for the starting point -- “proof” may be furnished to court that arbitration agreement is “not valid”:
  - New York Convention, Art. V(1)(a): “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 recognition and enforcement is sought, proof that...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.”
  - English Arbitration Act 1996, s.103(2)(b): “Recognition or enforcement of the 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.”
**Dallah and competence-competence**

**Scope and intensity of review**

- Does the tribunal’s determination of its own jurisdiction affect the scope and intensity of review?
  
  - “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” (Lord Mance, para. 30).

- “In these circumstances, I am of the view that to take as the starting point the ruling made by the arbitrators and to give that ruling some special status is to beg the question at issue, for this approach necessarily assumes that the parties have, to some extent at least, agreed that the arbitrators have power to make a binding ruling that affects their rights and obligations” (Lord Saville, para. 159).

- Do these statements apply in all cases where jurisdiction is challenged at the enforcement stage?

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**Dallah and competence-competence**

**Scope and intensity of review**

- The articulation of the English courts’ conclusion -- uniformity of result, but subtly different emphasis:

  - Language of Section 103(2)(b) of the Arbitration Act 1996/Article V(1)(a) of the New York convention (Aikens J – “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).”)

  - Comparative law perspective – present to some degree in Court of Appeal judgment (e.g., Rix LJ, paras. 75-76), but given particular emphasis in the Supreme Court judgment (Lord Mance, paras. 20-25; Lord Collins, paras. 86-92).
Dallah and competence-competence
Scope and intensity of review

- The comparative law dimension:
  - United States: “It appears that every country adhering to the competence-competence principle allows some form of judicial review of an arbitrator’s jurisdictional decisions” (Lord Mance, para. 25, citing China Minmetals Materials Import and Export Co. Ltd. v. Chi Mei Corporation 334 F.3d 274, 288 (2003)).
  - France: “the French Cour d’appel seised of an action for annulment of an award made in France for lack of jurisdiction, or seised with an issue relating to the jurisdiction of a foreign tribunal... has the widest power to investigate the facts” (Lord Collins, para. 89, citing inter alia Fouchard, Gaillard, Goldman, paras. 1605 to 1614).

- Should the law of jurisdiction of enforcement dictate evidentiary standards and procedures for review (e.g., whether foreign law must be proved as a question of fact)?

Dallah and competence-competence
Deference to courts at the seat?

- Supreme Court suggests courts at place of enforcement are entitled to conduct a full and independent review:
  - “Since Dallah has chosen to seek to enforce in England, it does not lie well in its mouth to complain that the Government ought to have taken steps in France” (Lord Mance, para. 29).
  - A prior English judgment “could prove significant... if French courts recognise any principle similar to the English principle of issue estoppel,” but that is “a matter for the French courts to decide” (Lord Mance, para. 29).

- Consistent with the approach in other jurisdictions?
**Dallah and competence-competence**

**Limitations on scope of review post-Dallah?**

- What limitations may exist on the scope of review of a tribunal’s determination of its own jurisdiction by courts at place of enforcement?
  - Does the same scope and intensity of review apply where the jurisdictional challenge relates not to *existence*, but instead, to the *validity, legality, enforceability* or *scope* of the agreement to arbitrate?
  - What is required for parties to submit the issue of arbitrability itself to the tribunal’s exclusive jurisdiction?
  - Does the same scope and intensity of review apply where jurisdictional objections have been, or are alleged to have been, waived?

- Is the standard of review the same if the jurisdictional challenge is based not on the *existence* of a relevant agreement to arbitrate but its *validity, legality, enforceability* or *scope*?
  - Is a distinction between existence, validity, legality and enforceability meaningful? Does it depend on the law applied?
  - Does a different standard of review apply to jurisdictional challenges based on scope of the agreement to arbitrate (under Article V(1)(c)) as distinct from its validity (see Lord Steyn in *Lesotho Highlands v. Impregilo SpA* [2005] UKHL 43)?
Dallah and competence-competence
Limitations on scope of review post-Dallah?

- Can the parties opt out of full jurisdictional review at the enforcement stage?
  - “Of course, it is possible for parties to agree to submit to arbitrators (as it is possible for them to agree to submit to a court) the very question of arbitrability” (Lord Mance, para. 24).
  - “Leaving aside the rare case of an agreement to submit the question of arbitrability itself to arbitration (Lord Mance, para. 25).
  - an arbitral tribunal’s decision as to the existence of its own jurisdiction cannot therefore bind a party who has not submitted the question of arbitrability to the tribunal” (Lord Mance, para. 26).

- What is required for an agreement to opt out?

- Is the English approach consistent with United States cases such as First Options of Chicago Inc. v. Kaplan 514 US 938, 944 (1995)?

Dallah and competence-competence
Limitations on scope of review post-Dallah?

- Can the parties waive the possibility of full jurisdictional review?
  - No suggestion of waiver on facts in Dallah, but, in principle, does the level of review differ where jurisdictional objections are alleged to have been waived?
  - Consistent with the U.S. approach? See, e.g., China Minmetals Materials Imp. & Exp. Co. v. Chi Mei Corp. 334 F. 3d 274, 286 (2003) (court should “refuse to enforce an arbitration award under the Convention where the parties did not reach a valid agreement to arbitrate, at least in the absence of a waiver of the jurisdictional objection”).
  - What law applies to the question of waiver?
Dallah and competence-competence
Conceptual clarity or Pandora’s Box?

- Conceptually, Dallah could be seen as a ‘pro-arbitration’ decision -- consistent with the consensual basis of international commercial arbitration -- when the existence of a relevant agreement to arbitrate is disputed, competence-competence will not prevent full and independent review of tribunal's jurisdictional findings at the enforcement stage.

- Practically, is the Dallah approach to competence-competence a positive development?
  - Practical benefits of conceptual clarity (e.g., predictability).
  - Similar principles in some other Contracting States (albeit that nuances, procedures and evidentiary rules may differ)?
  - Parties can clearly define competence of tribunal (including whether the tribunal has jurisdiction over questions of arbitrability).