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He has been counsel in many important actions, arbitrations, and appeals before all levels of courts in many Canadian provinces as well as the Supreme Court of Canada.

Thomas Heintzman is the author of Goldsmith & Heintzman on Building Contracts, 4th Edition which provides an analysis of the law of contracts as it applies to building contracts in Canada.

Goldsmith & Heintzman on Building Contracts has been cited in 182 judicial decisions including the two leading Supreme Court of Canada decisions on the law of tendering:

*M.J.B. Enterprises Ltd. v. Defence Construction (1951),* [1999] 1 S.C.R. 619 and
*Double N Earthmovers Ltd. v. Edmonton (City), 2007* SCC3, [2007] 1 S.C.R. 116-2007-01-25 Supreme Court of Canada

## What Happens When a Party Refuses to Arbitrate?

A construction lawyer must keep track of the general law of contract and arbitration. In turn, many construction cases have settled fundamental principles of the general law. The recent decision of the UK Supreme Court in *Dallah Real Estate and Tourism Holding Company v. The Ministry of Religious Affairs, Government of Pakistan* is a case in point. This decision dealt with a fundamental element in the principle of *competence-competence* in relation to the jurisdiction of arbitration boards.

At its heart, this case was just an ordinary construction case. But its international dimensions may take it out of the radar screen of construction lawyers. The Plaintiff, Dallah entered into a Memorandum of Understanding with the Government of Pakistan to provide housing for pilgrims to Saudi Arabia through a 55-year lease of property with related financing. That MOU was replaced by an agreement between Dallah and a Pakistani Trust promulgated under an ordinance of the Pakistani government. The Trust was to be financed by contributions and savings from pilgrims and philanthropists. The Pakistani Ministry of Religious Affairs was to act

as secretary of the Trust. The agreement between Dallah and the Trust provided for arbitration under the ICC (Paris) Rules.

With a change in government in Pakistan, no additional ordinances were promulgated and the Trust disappeared under Pakistani law. The project collapsed and Dallah commenced an arbitration, asserting that the Government of Pakistan was the real party to the agreement and was bound by the arbitration clause. The Government of Pakistan asserted that it was not a party to the agreement and refused to participate in the arbitration. Dallah appointed its nominee and the ICC appointed the other two nominees to the arbitration board.

The arbitration board sat in France. Applying the *competence-competence* principle now well known to arbitration law, it held that it was competent to determine its own competence. The board held that the Government of Pakistan was the real party to the agreement and found the Government liable under that agreement.

Dallah then sought to enforce that arbitration award in England. The decision of the UK Supreme Court (which has replaced the House of Lords as the highest court in the United Kingdom) is of importance to construction lawyers for two reasons.

First, the Supreme Court held that the decision of the arbitration board about its own competence and jurisdiction had no effect on the UK court, and provided no support for the enforcement of the award.

Second, the Court held that, on the facts, the Government of Pakistan was not a party to the agreement and was not bound by that agreement or the arbitration clause found in it.

The Court rejected a variety of arguments that the decision of the arbitration board should be *res judicata*, or given some weight. While the principle of *competence-competence* did allow the tribunal to make an initial decision about its competence, that principle and that decision was only valid and effective for the purpose of the arbitration tribunal itself and its decision about whether to proceed with the arbitration hearing or not.

However, if a party refused to participate in that process, as the Government of Pakistan did, it was not bound by the result, nor did principles of estoppel come into effect. The Court said: "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." That principle applied whether the tribunal's award was sought to be enforced in the jurisdiction where it was made, or in another jurisdiction.

Nor was the issue affected by the tribunal's own decision about jurisdiction. The UK Supreme Court said: "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. This is so however full was the evidence before it and however carefully deliberated was its conclusion." The Court used a tennis analogy when it described Dallah's application to enforce the award in England: "Dallah starts with the advantage of service, it does not start fifteen or thirty love up".

This part of the decision of the UK Supreme Court is of legal significance. The second part of its award is of some importance from a comparative fact standpoint. The Court held that, on the evidence, the Government of Pakistan was not a party to the agreement and the arbitration clause found in that agreement. The Court looked to: the initial involvement of the Government in the MOU and the distancing of itself from the subsequent agreement; the separate legal existence of the Trust; the Government's specific guarantee of certain obligations and not others, and its obtaining of counter-guarantees from the Trust and the Trustee's bank; and the conduct of the parties in performing the agreement. The fact that the Trust never had assets did not prove that it was a mere tool of the Government since its acquisition of property was dependent on arrangements through Dallah which were never carried out.

These sorts of circumstances may be familiar to those involved in construction projects. Often, a party of substance inserts a corporation, trust or other entity as the named contracting party. The other party will have to be very careful to ensure that the named contracting party has the wherewithal to complete the project, or that suitable guarantees are obtained from the party of substance or from other guarantors.

In the result, a case of international proportions has some down-to earth-lessons for construction lawyers. First, if a construction agreement contains an arbitration clause, an award under that clause is only as good as the binding effect of the agreement, unless the opposing party separately agrees to submit to the jurisdiction of the arbitrators. Second, it is difficult to impose a construction agreement on a party which has not signed and expressly agreed to be a party to that agreement.

**Arbitration - Competence-Competence - Construction Law - Construction Agreement – Enforcement**

*Dallah Real Estate and Tourism Holding Company v. The Ministry of Religious Affairs, Government of Pakistan*, [2010] UKSC 46 http://bit.ly/eWoL7w