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THE ENGLISH APPROACH TO COMPÉTENCE-COMPÉTENCE

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Table of Contents

1. Introduction....................................................................................................................1
   1.1 The Dual Effect of Compétence- Compétence.......................................................1
2. A Historical Perspective on the Law in the United Kingdom on Compétence-Compétence.......................................................2
3. The Approach of the United Kingdom to Arbitral Jurisdiction.....................................4
4. Methods of Judicial Review by Courts..........................................................................5
6. Challenging Jurisdiction of Arbitral Tribunals via Courts...........................................8
   6.1 Setting the Scene................................................................................................8
   6.2 The Emerging Jurisprudence on Section 67.......................................................8
   6.3 The Dallah Case.................................................................................................9
   6.4 Republic of Serbia v Imagesat International and the Azov Decision......................11
   6.5 Habas Sinai v Norscot Rig...............................................................................11
   6.6 S 72 of the Arbitration Act: Jurisdictional Challenges by a non-participant to the Arbitral Proceeding.................................................................12
7. The Significance of Section 32 of the Arbitration Act....................................................13
   7.1 Stay of Proceedings While an Application under s.32 is Made...............................13
   7.2 Critiques of Section 32......................................................................................13
8. Power of the Tribunal to Rule on its Jurisdiction...........................................................14
   8.1 Advantages of Allowing the Tribunal to Rule on its Jurisdiction...............................15
9. Application of the Negative Effect in the United Kingdom............................................16
   9.1 Birse Ltd v St David: Negating the Jurisdiction of the Tribunal.............................17
   9.2 The XL Insurance Case: A Renewed Recognition of the Arbitral Tribunal.............18
   9.3 Fiona Trust: The Return to an Arbitration-Friendly Culture?.................................19
10. Summary

Abstract

This article examines the jurisdiction of arbitral tribunals to rule on their own jurisdiction. It reviews arbitral jurisdiction in the United Kingdom by considering the principle of compétence-compétence as provided for in its arbitration law. The term compétence-compétence – also referred to as compétence sur la compétence or kompetenz-kompetenz – confers a right on arbitrators to decide their own jurisdictional authority to hear a dispute and is essential to the practice of international commercial arbitration. Although this principle is

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1 The principle of compétence-compétence is defined as the arbitrators’ power to determine their own jurisdiction, to hear and determine the dispute before them. Thomas E Carbonneau, Cases and Materials on the Law and Practice of Arbitration (Juris, 3rd revised ed, 2003) 21. The German principle of Kompetenz-Kompetenz will not be used in this article because this term was traditionally employed to denote the Kompetenz-Kompetenz clause which is a particular agreement to empower the arbitral tribunal to rule on its own jurisdiction. Such a ruling is final and cannot be examined by national courts at the phase of challenge or enforcement of the award. Under the current German law, such a clause is not...
recognised in the national arbitration laws of many jurisdictions, there are some important
differences. For instance, there is divergence in the stage at which judicial intervention occurs
and the degree of intervention by courts of different countries. Divergence is also observed in
the type of judicial review undertaken by the courts.

1. Introduction

This article examines the United Kingdom legislation, case law and practice in *compétence-
compétence*. It provides an overview of arbitral jurisdiction and proceeds to review the
English approach to arbitral jurisdiction. The extent and the stage at which court intervention
occurs in this jurisdiction is examined focusing on the strengths and weaknesses of the United
Kingdom approach. The article begins with an analysis of the positive and negative effect of
*compétence-compétence*. This is followed by a historical perspective which considers the
subtleties of *compétence-compétence* in the English context. Key features of the *Arbitration
Act* are discussed. The recent case law is highlighted to draw attention to some new
developments. The focus of the discussion is on the degree of judicial intervention in arbitral
proceedings. It is argued that the practice adopted by the United Kingdom leaves the door
slightly open for parties to challenge jurisdiction of arbitral tribunals.

1.1 The Dual Effect of Compétence- Compétence

There are two effects of the principle of *compétence-compétence*, positive and negative. The
positive effect is to permit arbitral tribunals to make a ruling on their own jurisdiction to hear
the dispute. By emphasising the jurisdiction of the tribunal, the positive effect sets out a
framework of concurrent jurisdiction between courts and arbitral tribunals. The negative
effect on the other hand is more controversial and rests on the notion that the arbitral tribunal
should have a chronological priority to rule on its jurisdiction before the courts. The negative
effect thereby restricts the function of the court to provide the tribunal with the first
opportunity to determine its own jurisdiction and the validity of the arbitration agreement. In
this manner, the negative effect bars a court from reviewing the merits of the dispute when
deciding on the existence or validity of the arbitration agreement prior to the arbitral
tribunal.

According to the negative effect, a national court may review the jurisdiction of a tribunal at
the enforcement stage. Such prioritisation of tribunals over national courts concerning the
review of validity is an essential feature of the negative effect. Although both the *New York
Convention* and the *Model Law* provide for courts to conduct a complete review prior to the
award being issued, the negative effect is receiving gradual recognition in many countries.

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3 (‘Positive Effect’).
   (‘Negative Effect’).
5 Jean François Poudret and Sébastien Besson, *Comparative Law of International Arbitration* (Sweet and
   Maxwell, 2nd ed, 2007) [488]. Most national arbitration laws prevent courts from reviewing the merits of
   arbitral awards. See *New Decree*, art 1493.
6 Stavros Brekoulakis, ‘The Negative Effect of Compétence-Compétence: The Verdict has to be Negative’
   Queen Mary University of London, School of Law, Legal Studies Research Paper No, 22/2009. See *New
   York Convention*, art II(3) and the *Model Law* art 8. Although some contend that the *Model Law* art 8
The basis for *compétence-compétence* is the intention of the parties to grant the arbitrators authority to determine every issue related to their dispute, including questions of jurisdiction. Such authority usually appears in the language of the arbitration agreement. Meanwhile, the courts still possess the authority to supervise the ruling of the tribunal but not to be a substitute. The empowerment of the tribunal to determine its own jurisdiction in the first instance is tempered by granting the tribunal’s ruling a provisional status, which is reviewable by the court.\(^7\) Courts reserve the power to conduct a review once an award is issued, to either set the award aside or enforce it.

In order to give full efficacy to the *negative effect*, priority must be given to the arbitral tribunal if the same subject matter is pending a decision in court. Concomitantly, the court should refrain from intervening until a jurisdictional ruling is issued by the tribunal. Further, this must be combined with the barring of judicial proceedings to determine the validity of a tribunal’s jurisdiction as well as any determination on the merits of a dispute. The *negative effect* does not provide an absolute priority, only a priority for the tribunal to rule on jurisdiction prior to the court.\(^8\) The majority of jurisdictions do not provide for express recognition of the *negative effect* in their laws. The *European Convention on International Commercial Arbitration* appears to recognise the *negative effect* in Article VI (3):

> ‘Where either party to an arbitration agreement has initiated arbitration proceedings before any resort is had to a court, courts of Contracting States subsequently asked to deal with the same subject-matter between the same parties or with the question whether the arbitration agreement was non-existent or null and void or had lapsed, shall stay their ruling on the arbitrator’s jurisdiction until the arbitral award is made, unless they have good and substantial reasons to the contrary.’\(^9\)

The expression in the above provision ‘unless they have good and substantial reasons to the contrary’ where arbitration proceedings already have been commenced, suggests that the *prima facie* method of judicial review is enshrined here.\(^10\) By contrast, the *New York Convention* does not make any express provision for the *negative or positive effect* of *compétence-compétence*. The question of jurisdiction is typically a preliminary matter for the arbitral tribunal.\(^11\) Whether a dispute ought to be determined by a tribunal rather than a court is subject to questions such as whether an arbitration agreement exists, whether it is valid and whether the dispute lies within the scope of the arbitration agreement. These questions are addressed below, however, this analysis would be incomplete without a historical context of the law on arbitral jurisdiction in the United Kingdom.\(^12\)

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\(^8\) Poudret and Besson, above n 5, [458].


\(^10\) The *prima facie* method of review is examined in detail below under sub-heading 4, Methods of Judicial Review by Courts.

\(^11\) Christopher Brown Ltd v Genossenschaft Oesterreichischer Waldbesitzer Holzwirtschaftsbetriebe Registrierte GmbH [1954] I QB 12, 13 (Devlin J).

1. A Historical Perspective of the Law in the United Kingdom on Compétence-Compétence

Customarily, the English common law tradition was premised on case law and the doctrine of precedent; in recent history, however, courts in the United Kingdom have increasingly relied on legislation when resolving arbitration disputes. The Arbitration Act 1996 (UK) is the cornerstone of the English approach. The Act came into effect on 31 January 1997. One of its principal aims was to consolidate English law into one statute and create a coherent legal framework. The primary purpose of the Act, as recited in its preamble, was to restate and improve the law relating to arbitration. Whilst the United Kingdom jurisdiction is not unfavourable to upholding arbitration agreements, the legal framework allows greater scope for judicial intervention. Compétence-compétence does not have the same force in the United Kingdom as it does in other countries such as France. This carries a number of important implications which are explored further in this article.

Historically, courts of the United Kingdom sought to apply their own domestic practices and establish a regime of arbitration which would protect traditional presumptions, procedural and substantive rules. Foreign judicial decisions and general rules of international arbitration were not considered important. Generally, English arbitrators deemed principles of international arbitration law as academic, theoretical or too abstract. The view was that by agreeing to arbitrate in the United Kingdom, foreign parties had consented to the application of local rules and customs. As far as the enforcement of arbitration agreements was concerned, United Kingdom courts only provided half-hearted support for the principle of separability and retained firm constraints on compétence-compétence. Until 1996, control regarding the jurisdiction of the arbitral tribunal was almost exclusively in the hands of the courts. The approach which dominated until that time was that courts possessed the authority to determine if a valid arbitration agreement existed and they could intervene before or after the award was made. As noted in the Departmental Advisory Committee Report, it was ‘generally thought that arbitrators had no power to do more than express a view as to whether they had jurisdiction or not.’

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14 The Act. Its predecessor Arbitration Act 1979 (UK) came under increasing criticism for having been rushed through under pressure from the international community.
16 To obtain an analysis of the French jurisdiction contact the author for her article pending publication.
19 Ibid.
Moreover, case law from English courts indicates that any questions regarding the validity, scope or existence of an arbitration agreement remained for the courts to address rather than the arbitral tribunal.\textsuperscript{21} An example of the interventionist approach is \textit{S.A. Coppee Lavalin v Ken Ren Fertilisers}.\textsuperscript{22} The House of Lords held that an English court had jurisdiction to order security for costs notwithstanding the lack of connection the parties had with England.\textsuperscript{23} With respect to \textit{Lavalin}, Lord Saville stated that it was perceived as ‘confirming the widely held suspicion that the English courts were only too ready to interfere in the arbitral process and to impose their own dicta on the parties, notwithstanding the agreement of the parties to arbitrate rather than litigate.’\textsuperscript{24}

\section*{2. The Approach of the United Kingdom to Arbitral Jurisdiction}

The general scheme of the Act enshrines the espousal of non-intervention and for matters of substantive jurisdiction to be determined or ruled upon in the first instance by the tribunal.\textsuperscript{25} The Act does not provide a definition of arbitration although s. 1 states ‘the object of arbitration is to attain a fair resolution of disputes by an impartial tribunal without unnecessary delay or expense’.\textsuperscript{26} Since its enactment courts have intervened to a greater extent than originally expected.\textsuperscript{27} Notwithstanding the power of the courts, arbitrators have the authority to continue proceedings and make an award whilst the jurisdictional challenge is pending before the court. 28 The underlying rationale is to discourage parties from using court challenges as a delaying tactic and to allow arbitrators whose jurisdiction is challenged to proceed with the arbitration if the tribunal believes the challenge is groundless.\textsuperscript{29}

The tendency for unnecessary intervention by the courts has led to criticism.\textsuperscript{30} Although not adopting the \textit{UNCITRAL Model Law on International Commercial Arbitration}, the Act follows it in large part, notably with respect to the nature of the grounds for challenge.\textsuperscript{31} The \textit{DAC Report} sheds light on the key principles which subsequently emerged in the Act. The Report stated:

\begin{itemize}
\item \textsuperscript{22} \textit{S.A. Coppee Lavalin v Ken Ren Fertilisers} [1994] 2 All ER 449. (‘\textit{Lavalin}’).
\item \textsuperscript{23} Ibid.
\item \textsuperscript{25} \textit{Arbitration Act1996} (UK) ss. 1, 30, 32. \textit{Vale do Rio Doce Navegacao SA v Shanghai Bao Steel Ocean Shipping} [2002] 2 LR 1 where Thomas J held that ‘without the permission of the parties or the tribunal, ordinarily the courts should decline in the first instance to intervene in cases of dispute as to arbitrator’s substantive jurisdiction is convincing. See also Arts 5 and 8.2 of the \textit{Model Law}. See also, David Joseph, \textit{Jurisdiction and Arbitration Agreements and Their Enforcement} (Sweet & Maxwell, 1\textsuperscript{st} ed, 2005), 294.
\item \textsuperscript{26} \textit{Arbitration Act1996} (UK) s. 1(a).
\item \textsuperscript{27} \textit{Arbitration Act1996} (UK). See John Lurie, ‘Court Intervention in Arbitration: Support or Interference (2010) 76(3) Arbitration 447, 447.
\item \textsuperscript{29} DAC Report, above n 20, 8.
\item \textsuperscript{31} See \textit{Arbitration Act1996} (UK) s. 30. See also \textit{UNCITRAL Model Law on International Commercial Arbitration}, UN Doc A/40/17 (11 April 1980) art 16. (‘\textit{Model Law}’).
\end{itemize}
‘The ideal system of arbitration law in the view of the Committee is one which gives the parties and their arbitrators a legal underpinning for the conduct of disputes which combines the maximum flexibility and freedom of choice in matters of procedure with a sufficiently clear and comprehensive set of remedies which will permit the coercive, supportive and corrective powers of the court to be invoked when, but only when, the purely consensual relationships have broken down.’\(^{32}\)

The current English approach is to confer concurrent power on tribunals and courts to determine challenges to the arbitration agreements.\(^{33}\) Where a party to an arbitration has raised a jurisdictional challenge in a national court, then if the court finds it can review the jurisdiction, there are two methods of review: \textit{prima facie} review or \textit{full review}. The next section examines the merits of both methods.

\section{Methods of Judicial Review by Courts}

The method of review may be stipulated by the applicable national arbitration laws, but it is also subject to how the courts interpret the legislation and the policies adopted. The \textit{prima facie} review is, as the term suggests, a basic review to ensure that an arbitration agreement exists and is not manifestly void or inapplicable. The term ‘\textit{prima facie}’ is defined as ‘at first sight, on first appearance but subject to further evidence or information’.\(^{34}\) Alternatively, it can be defined as an evidentiary standard that is ‘sufficient to establish a fact or raise a presumption unless disproved or rebutted’.\(^{35}\) In practice, it is a more limited inquiry by the courts as to whether an arbitration agreement exists \textit{prima facie}. Following such a review, if the court is satisfied that an agreement exists, the judicial proceedings will be stayed and the matter referred to arbitration.\(^{36}\) Public and private resources will be saved if courts conduct a \textit{prima facie} review and only conduct a full review where necessary.

A \textit{full review} is a more in-depth judicial scrutiny to ascertain the existence, validity and scope of the arbitration agreement. A \textit{full review} may, however, lead to reviewing the award on the merits which is not generally within the role of the courts. There may be a saving of public resources if the courts are not required to conduct a \textit{full review}. Further, the parties may also realise a saving in that they do not need to pay for legal costs associated with a court conducting a \textit{full review} in addition to the costs of arbitration. A corollary of \textit{full review}, therefore, is an increase in costs for the parties and a delay in time. A court may exercise its discretion to depart from a \textit{prima facie} review in particular circumstances where, the question falls within a complex matrix of facts and a \textit{prima facie} review is insufficient to determine the question.

In some cases, a \textit{prima facie} review may prove insufficient. An example is provided by a complex multi-party dispute involving non-signatories to the arbitration agreement who may

\begin{itemize}
\item[33] See \textit{Arbitration Act 1996} (UK) s. 32(4).
\item[34] Bryan A Garner, \textit{Black’s Law Dictionary} (West Group, 9\textsuperscript{th} ed, 2009) 458.
\item[35] Ibid.
\end{itemize}
in fact be bound by it. The risk of a full review is that it may usurp the jurisdiction of the arbitral tribunal from ruling on its own jurisdiction. Unless there are legitimate reasons to conduct a full review, it is inconsistent with the principle of compétence-compétence.

The Model Law for guidance as to which method of review to apply is of little assistance. National courts in Model Law jurisdictions differ as to whether Art 8 provides for prima facie or full review. There are curial decisions in some jurisdictions where full reviews have been conducted which are at odds with the prima facie method. Bachand argues that the prima facie review is more closely aligned to the legislative history, framework and underlying objectives of the Model Law. One of the reasons he cites for this view is that full review typically takes a long time for courts to determine and this may serve the party who uses it as a tactic to stall or frustrate the arbitral process.

Courts should be cautious to avoid an interpretation which undermines compétence-compétence by conducting a full review unless it is warranted by the particular circumstances of the case. Moreover, it would be unreasonable for legislation to be too prescriptive in this regard. There should be some discretion granted to the judiciary to conduct a full review where a prima facie one will be detrimental to the parties’ interests. This raises competing interests at play for the court. The court has a dual role with respect to arbitration. On one hand, it has the role of assisting the arbitration procedure yet, on the other, it has the role of controlling it. If the courts become too controlling - for example undertaking a full review as standard procedure - this risks undermining the integrity and efficacy of arbitration as a tool of dispute resolution. It will also result in a waste of public and private resources. Conversely, if the court becomes reluctant to intervene it may undermine the effectiveness of both arbitration and the courts.

Since agreements to arbitrate are essentially substantive contracts, critics question why such agreements should have a lower threshold to prove consent of the parties. It is argued that the threshold should be no different to any other contract. Moreover, critics assert that the prima facie review method, fails to establish validity. The prima facie review is criticised, therefore, on the grounds that it will find most agreements valid, only ruling out saliently void agreements. To confer validity to arbitration agreements in this way is mistaken.

Notwithstanding criticism of the prima facie review method, it remains the best option. There is an efficiency argument in that the resources of courts should not be wasted conducting a full review as standard procedure. The most substantial ground for upholding the prima facie review is that unless otherwise stated by the parties, the parties empower the arbitral tribunal

40 Bachand, above n 38, 464.
41 Stavros Brekoulakis, ‘The Negative Effect of Compétence-Compétence: The Verdict has to be Negative’ Queen Mary University of London, School of Law, Legal Studies Research Paper No. 22/2009.
to rule on all issues relating to their dispute. Although the judicial system reserves the authority to oversee the arbitral tribunal’s decision (to set aside or enforce the award) it does not substitute for the arbitral tribunal.42

In conclusion, the prima facie method is more amenable to maintaining the integrity and efficiency of arbitration whilst preventing undue delay and expense for the parties. More importantly, the prima facie method is supportive of the negative effect of compétence-compétence.


This article distinguishes between two alternative procedures for dealing with jurisdictional objections. One is to have recourse to courts. As seen in the following discussion there are a number of avenues to contest the jurisdiction of the tribunal. The other alternative is to ask the arbitral tribunal itself to determine its jurisdiction. When a court orders a matter to be heard before the court notwithstanding a valid arbitration agreement, it negates the principle of compétence-compétence as adopted in section 30 of the Act.43

5. Challenging jurisdiction of arbitral tribunals via courts

6.1 Setting the scene

Although the Act expressly provides for compétence-compétence, it also provides opportunities for the courts to review the jurisdiction of arbitral tribunal.44 Thus, jurisdictional challenges may be brought under sections 32, 67 and 72. Section 67 provides that a party to an arbitral proceeding may apply to the court challenging an award of the arbitral tribunal as to its substantive jurisdiction. The provision allows a party to seek a court order declaring an award made by the tribunal to be void, in whole or in part, because the tribunal lacked substantive jurisdiction.45 The court may set aside, vary, or confirm the tribunal’s award once an application under section 67 is made.

Section 67 of the Act is the key provision for challenging an award on substantive jurisdictional grounds. However, there are strict time limits to such challenge. Evidence indicates that parties often accept a fully reasoned decision of the tribunal on jurisdiction in order to avoid the costs of re-litigating the same matter before courts.46 However, an important distinction is made between jurisdictional objections raised by a non-participant, on one hand, and a participant in arbitration, on the other. Section 72(1) states that a person alleged to be a party but who takes no part in the proceedings may challenge the substantive jurisdiction of the tribunal by seeking an injunction or declaration in court. He or she has the

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42 Jean François Poudret and Sébastien Besson, *Comparative Law of International Arbitration* (Sweet and Maxwell, 2nd ed, 2007) [458].
43 Section 30 is discussed under subheading 8 below.
44 The Act. The Act’s applicability is not limited to England. See The Act 1996 pt 1, s. 2. Jean François Poudret and Sébastien Besson, *Comparative Law of International Arbitration* (Sweet and Maxwell, 2nd ed, 2007) [464]. Section 1(c) of the Arbitration Act also confers courts with residual jurisdiction although it fails to outline how this jurisdiction should be exercised. See JT Mackley & Co Lid v Gosport Marina Lid [2002] EWHC 1315 (TCC).
45 The Act s. 67(2).
46 The parties cannot apply directly to the courts except for situations described in ss.32 and 72. The DAC Report art 138 states that these provisions serve to prevent delaying tactics.
same right as a party to the arbitral proceeding to challenge an award under section 67 on the ground of a lack of substantive jurisdiction in relation to him/her.\textsuperscript{47}

Section 32 must be read in conjunction with sections 67 and 72 of the Act. Its value lies in avoiding delayed proceedings. Section 32 allows the court to make a preliminary ruling on the question of substantive jurisdiction. The provision applies where the jurisdictional dispute has gone to arbitration, and makes it possible for the arbitrators to consent to refer the jurisdictional question to the court for a preliminary ruling.\textsuperscript{48}

\textbf{6.2 The Emerging Jurisprudence on Section 67}

A significant body of case law concerning section 67 has developed. The case law indicates that where required, the courts will undertake a full rehearing into the matter rather than a mere review of the tribunal’s ruling. This occurred in \textit{Dallah Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan}.\textsuperscript{49}

\textbf{6.3 The Dallah Case}

The Court of Appeal in \textit{Dallah} held that an order granting leave to enforce a French arbitration award was correctly set aside by the High Court. The Court of Appeal found that in accordance with section 103(2)(b) of the Act, the government was not a party to the arbitration agreement.\textsuperscript{50} The High Court and the Court of Appeal agreed that an application pursuant to section 103(2)(b) required a rehearing of the facts in dispute.\textsuperscript{51}

In this case, the Government of Pakistan (Government) had established a pilgrimage trust (Trust) for the purpose of serving its citizens who performed pilgrimage in Mecca. Initially, Dallah executed a Memorandum of Understanding with the Government for the construction of accommodation. The Trust formed an agreement with Dallah to build accommodation near Mecca for Pakistani pilgrims. The agreement provided for arbitration by the ICC in Paris; however, no choice of law was specified. Subsequent to the dissolution of the Pakistani Government in 1996, the Trust also was dissolved. Dallah consequently sought arbitration by the ICC against the Government. Although the Government did not submit itself to the jurisdiction of the tribunal, the tribunal relying on \textit{competence-compétence}, ruled that the

\textsuperscript{47} \textit{The Act} s. 72(2).

\textsuperscript{48} \textit{The Act} s. 32.

\textsuperscript{49} \textit{Dallah Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan} [2010] EWCA Civ 46 (3 November 2010). (‘\textit{Dallah}’). Pursuant to Article V.1 of the \textit{New York Convention} which is given effect by section 103 of the \textit{Arbitration Act 1996} (UK), if such a challenge is found to exist by the court, it may amount to a ground for refusal to enforce the award. See Matthew Weiniger, \textit{Supreme Court rejects Dallah appeal and refuses enforcement of French ICC Award} (11 November 2010) International Law Office <http://www.internationallawoffice.com>.

\textsuperscript{50} Section 103(2)(b) stipulates that:

\begin{itemize}
  \item[(1)] recognition or enforcement of a \textit{New York Convention} award shall not be refused except in the following cases.
  \item[(2)] Recognition or enforcement of the award may be refused in the person against whom it is invoked proves –
    \begin{itemize}
      \item[(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’.
    \end{itemize}
\end{itemize}

Government was a party to the agreement. Accordingly, the tribunal ruled that it had jurisdiction to determine the claim.\footnote{Stephen Moi and Paul Collier,  \textit{Case Update: Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan} (8 December 2010) Clyde & Co. LLP <http://www.clydeco.com/knowledge/articles/case-update>.}

The dispute was determined in favour of Dallah. Pakistan resisted enforcement in the courts of the United Kingdom on the grounds that the arbitration agreement was invalid under the laws of France, where the award was made. The Government argued that it was not a party to the agreement and, therefore, it was not bound by the arbitration agreement. Given that there was no express choice of law provided for by the parties in their agreement, the law of France was applied to the agreement. In particular, the question of whether the Government was a party to the agreement had to be determined in accordance with French law.

On appeal by Dallah, the Supreme Court of the United Kingdom reopened jurisdictional matters relating to both facts and issues prior to issuing its judgment. As a result, the Court re-examined the issue of competing interests between the roles of arbitral tribunals and national courts in ruling on jurisdiction. In particular, the court considered two key questions: the effect of the \textit{compétence-compétence} principle and the application of arbitration agreements to non-signatories pursuant to French law. Although Lord Collins of the Supreme Court acknowledged the worldwide pattern to restrict review of determinations by tribunals and emphasised the pro-enforcement policy of the \textit{New York Convention}, neither of these matters played a central role in this case.\footnote{Convention on the Recognition and Enforcement of Foreign Arbitral Awards, opened for signature 10 June 1958, 330 UNTS 38 (entered into force 7 June 1959) arts II(3), V. (‘\textit{New York Convention}’). Supreme Court Unanimously Rejects Appeal to Dallah Judgment Refusing Enforcement of a French ICC Award (4 November 2010) Young OGEMID <http://www.transnational-dispute-management.com/young-ogemid/>.}

The Supreme Court dismissed the appeal by Dallah. The first reason was that although the tribunal had jurisdiction, its ruling was subject to review at the stage of setting aside or enforcement of the award.\footnote{Moi and Collier, above n 52.} Whether the award has its \textit{seat} in England or elsewhere is immaterial for this purpose. In reaching its decision, the Supreme Court undertook a comparative analysis of how \textit{compétence-compétence} is used in different jurisdictions. It is interesting to note that at paragraph 30 of the judgment, the Court reaffirmed the award being subject to judicial review and held that ‘the tribunal’s own view of its jurisdiction has no legal or evidential value, when the issue is whether the tribunal has any legitimate authority in relation to the Government at all.’\footnote{Dallah [2010] EWCA Civ 46 (3 November 2010) 30.}

Secondly, the U.K. Supreme Court accepted the submission made by the Government pursuant to section 103(2)(b) of \textit{the Act}. Under this section the court must decide if the party objecting to the arbitration gave consent to it. The decision clarified the degree to which a court may utilise the discretion conferred on it in section 103 to re-examine questions of fact and law in order to ascertain whether a valid arbitration agreement exists between the parties.

The court found that there was no common intention between the parties to bind the Government. The Supreme Court concluded its judgment by affirming the decisions of the
two courts below where the matter had been heard and no jurisdiction was held to exist by the tribunal. Accordingly, the award was not enforceable.\textsuperscript{56} The judges in \textit{Dallah} also reaffirmed there is no duty for a party to contest or appeal an award in the courts of the \textit{seat} (in this case France), prior to challenging enforcement in another jurisdiction. It appears that the Supreme Court undertook a \textit{full review} on the question of jurisdiction.

As seen in \textit{Dallah}, although the United Kingdom is deemed to be a pro-arbitration jurisdiction, its law leaves the door slightly more open to judicial review.\textsuperscript{57} This has accentuated the tension between the English legal community’s pro-arbitration attitude and \textit{the Act}, which may assign jurisdiction to the English courts rather than international arbitral tribunals.

\textbf{6.4 Republic of Serbia v Imagesat International and the Significance of the Azov decision}

In \textit{Republic of Serbia v Imagesat International}, the English High Court considered the application of s 67.\textsuperscript{58} The court heard a challenge to the substantive jurisdiction of an ICC tribunal.\textsuperscript{59} The tribunal ruled, \textit{inter alia}, that it had jurisdiction to address whether Serbia had conferred on the ICC tribunal jurisdiction to rule if it was a party to the arbitration agreement.

In reaching its decision, the High Court relied on \textit{Azov Shipping Co v Baltic Shipping Co}.\textsuperscript{60} \textit{Azov} is a leading authority on s 67. In the case, Justice Rix stated that s 67 provided the challenger with a means to ‘present his case and challenge the opposing party’s case on the question of jurisdiction with the full panoply of oral evidence and cross-examination so that, in effect, the challenge becomes a complete rehearing of all that already occurred before the arbitrator’.\textsuperscript{61} Justice Longmore opined that the applicants who had their jurisdictional challenge defeated by the tribunal were ‘effectively now having a second bite at the same cherry’.\textsuperscript{62}

In \textit{Serbia}, the Court found that in hearing a challenge pursuant to section 67, ‘it is for the court to determine whether the arbitrator had jurisdiction and whether he was correct in deciding that he did.’\textsuperscript{63} Following the approach in \textit{Azov}, the Court also opined that the decision of the arbitrator regarding jurisdiction is only provisional.

The significance of \textit{Azov} lies in its expression of the English principle that a jurisdictional challenge will be heard \textit{de novo} and in full by the courts, even if (in effect) that decides the case on the merits.\textsuperscript{64} This is in clear contrast to approaches adopted by other countries such as...
France. It is in contradiction with the general principle that a court must not review the merits of a decision reached by the arbitral tribunal.

6.5 Habas Sinai v Norscot Rig

Another recent case where section 67 received consideration is the Habas decision. The High Court had no reservations conducting a full review. The English High Court in Norscot Rig Management also allowed a rehearing of jurisdiction, but the challenge was dismissed. This is in clear conflict with the generally accepted notion that courts should avoid deciding jurisdictional issues on their merits. Some scholars have asserted that this emphasises a divergence between the pro-arbitration and pro-enforcement attitude of the English legal community and the wide discretion of the High Court’s jurisdiction to hear challenges under section 67. In such circumstances, due deference is not provided to the arbitral award.

Although the challenges pursuant to section 67 in the cases of Azov, Serbia, Habas and Norscot were not successful, the ability to require, as of right, a full rehearing tends to negate the foundation of international commercial arbitration. The approach taken by the courts in these cases appears to be in conflict with the concept of limited judicial review. The cases discussed above illustrate that courts do not consistently provide the necessary priority to tribunals on the question of their jurisdiction.

6.6. Section 72 of the Arbitration Act: Jurisdictional Challenges by a Non-Participant to the Arbitral Proceeding:

Section 72 allows a non-participant to a proceeding to contest the jurisdiction of the arbitral tribunal. An action under section 72 is not subject to a preliminary contest before the tribunal and its rationale is to safeguard people who refute that the tribunal has any authority over them, thereby avoiding participation in the arbitration. In some disputes before the courts, a prima facie review may be sufficient to ascertain the questions before the court. Conducting a full review of the arbitration agreement would amount to a waste of public and private resources for the court.

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69 Norscot Rig Management PVT Ltd v Essar Oilfields Services Ltd [2010] EWHC 195 (Comm). (‘Norscot’).
70 The Act s 67.
71 Born and Lindsay, above n 51.
72 Ibid. The position regarding costs for unsuccessful challenges of jurisdiction in court is that the losing party pays costs.
73 Born and Lindsay, above n 51.
74 In particular see the Act ss 7 and 30.
75 Poudret and Besson, above n 31, [485].
76 See Law Debenture Trust Corp Pty Ltd v Elektrim Finance BV [2005] EWHC 1412 (Ch). (‘Law Debenture’).
7. **The Significance of Section 32 of the Arbitration Act**

A section 32 application is not considered unless:

- **7.6.** it is made with the agreement in writing of all the other parties to the proceedings, or

- **7.7.** it is made with the permission of the tribunal and the court is satisfied—
  - (i) that the determination of the question is likely to produce substantial savings in costs,
  - (ii) that the application was made without delay, and
  - (iii) that there is good reason why the matter should be decided by the court.

The safeguards found in section 32 are designed to prevent parties from using this provision to stall the arbitral proceedings.  

**7.1 Stay of Proceedings While an Application Under Section 32 is Made**

Section 31(5) provides that ‘[t]he tribunal may in any case, and shall if the parties so agree, stay proceedings whilst an application is made to the court under section 32’. Given that the party objecting to arbitration would not be against a stay of the arbitral process in order to have judicial review of jurisdiction, the party in support of arbitration would effectively determine whether to request a preliminary ruling from the tribunal regarding jurisdiction.

There are concomitant risks to proceeding with arbitration in the presence of a jurisdictional challenge. One risk is that if the pro-arbitration party loses, it will usually suffer the wasted costs of the tribunal proceeding in such circumstances. Further, there will be a subsequent duplication of proceedings in court causing delays and more expense. Section 32 would offer the benefit of permitting a pro-arbitration party who is concerned about the risk of wasted costs, to give consent to the party refusing arbitration and have the matter addressed beforehand by judicial intervention.

**7.2 Critiques of Section 32**

Section 32 has been criticised for permitting the tribunal to request that the court address the question of jurisdiction at the outset of the arbitration, which has been viewed as inefficient. Instead, it has been recommended that the tribunal render a preliminary award on jurisdiction and only if required, refer the matter for judicial review. This criticism should be balanced against its aims to create a high threshold to be satisfied prior to judicial intervention. In particular, if there is failure to effect mutual agreement between the disputing parties, the tribunal must have legitimate reservations concerning the validity of the arbitration agreement before referring the matter to judicial review.

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77 *The Act* s. 31(5) is in contrast to the *Model Law*.
78 *The Act* s. 31(5).
Section 32(2) stipulates the court must be satisfied that determination of the question is likely to produce substantial savings in costs and the application is made without delay. This imposes strict conditions which are clearly designed to avoid dilatory tactics. An additional safeguard is found in section 32(4) which provides that the tribunal may continue the arbitral proceedings and issue an award whilst an application to court is pending. Thus, arbitrators who are challenged by parties have the discretion to continue with the arbitral proceedings. This provision ensures that dilatory tactics employed by a party challenging the validity of the arbitration agreement fail to stall the arbitral proceedings. Although section 32(4) does not fully accommodate the negative effect of compétence-compétence, it nevertheless provides some deference to it by conferring discretion on the tribunal to initiate or continue with its proceedings.

Further, sections 32(5) and (6) of the Act limit subsequent appeals once the court has delivered a judgment. This section stipulates that an appeal from the court’s decision is subject to leave which is only granted if the case concerns a question of law of general significance or is deemed as ‘special grounds’ by the Court of Appeal. The court must also have substantial grounds for intervening in the arbitral process. For example, section 72 permits a person who is a non-participant in an arbitration but who is alleged to be a party to arbitral proceedings, to challenge the validity or scope of the arbitration agreement. These provisions indicate that although efforts are made to discourage parties from engaging in dilatory tactics, the door is left open for parties to challenge the jurisdiction of the tribunal in court and the negative effect does not receive full deference from the courts or the statute as it does in France.

8. Power of the Tribunal to Rule on its Jurisdiction

The principle of compétence-compétence is addressed in section 30 of the Act. Subsection 30(1) is one of the most fundamental provisions. It permits the arbitral tribunal, subject to the parties agreeing otherwise, to rule on its own substantive jurisdiction in three circumstances:

(a) whether there is a valid arbitration agreement,
(b) whether the tribunal is properly constituted, and
(c) what matters have been submitted to arbitration in accordance with the arbitration agreement.

83 Poudret and Besson, above n 21, [485].
84 Ibid.
85 See above n 14.
86 The Act s 30(1) commences with ‘unless otherwise agreed by the parties’. Therefore, it is not a mandatory provision.
87 See Downing v Al Tameer Establishment [2002] EWCA 721 where a party denied the existence of the arbitration agreement and this denial was accepted by the court. The court held that this would bring the arbitration to an end. (‘Downing’).
88 The Act s 30(1). For matters outside the arbitration agreement, see M/S Alghanim Industries Inc v Skandia International Insurance Corporation [2001] 2 All ER 30. (‘Alghanim’).
Subsection 30(1) is supplemented by subsection 30(2) which permits rulings regarding the three circumstances above to be challenged by processes of appeal within the arbitral rules, as well as by judicial review. Article 1448 of the New Decree is the French equivalent of section 30 of the Act. The French provision is more succinct and does not set out in detail the circumstances in which the jurisdiction of the arbitral tribunal may be challenged. Compared to Article 1448 section 30 provides more possibilities for challenge, despite the safeguards in the Act to prevent dilatory tactics.

Thus, the fact that section 30 is subject to the parties’ agreement stands in stark contrast to Article 1448 of the New Decree. Pursuant to the French New Decree, compétence-compétence is a mandatory provision. The powers of the French arbitral tribunals cannot be excluded by agreement of the parties.

8.1 Advantages of Allowing the Arbitral Tribunal to Rule on its Jurisdiction

Although not making compétence-compétence a mandatory provision, the English legislators acknowledged the advantages of the principle. The benefit of allowing the arbitral tribunal to rule on matters of its own jurisdiction was highlighted in the DAC Report where it was observed that the application of compétence-compétence would discourage parties from delaying 'valid arbitration proceedings indefinitely by making spurious challenges to its jurisdiction.'

An advantage of permitting the tribunal to rule on its own jurisdiction arises in relation to knowledge of foreign laws. International arbitration frequently requires the application of a governing law other than English law. The tribunal is likely to be more familiar with the foreign governing law than the courts. This is because when appointing arbitrators, knowledge of the relevant law is usually an important criterion. Finally, if the seat is abroad but the proceedings are brought in the English courts, the courts have a greater incentive to stay the litigation. This is primarily because the arbitrators are better equipped and more qualified to address the application of foreign laws.

9 Application of the Negative Effect in the United Kingdom

United Kingdom courts have oscillated in their approach to the negative effect. Some courts have refuted the negative effect whilst others have supported it. It has been suggested, however, that in difficult cases, the court is inclined to rule on the issue of jurisdiction, prior to the tribunal. This may be considered a cautious approach where the dispute is too complex to ascertain existence or validity by conducting a prima facie review. The English position sits somewhere in centre of the spectrum – with the French position being the most extreme in its provision of exclusive jurisdiction to the arbitral tribunal.

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89 The Act s 30(2).
90 New Decree, art 1448. The Act s 30.
91 New Decree, art 1448.
92 Ibid.
93 Ibid.
94 Joseph, above n 25, 295.
95 The Act. ‘Res Judicata’ means the rule that if a dispute is judged by a court of competent jurisdiction, the judgment of the court is final and conclusive as to the rights and duties of the parties involved. Res judicata constitutes an absolute bar to a subsequent suit for the same cause of action.
In this context, it is useful to highlight the interplay between the negative effect and section 9 of the Act. Subsection 9(1) of the Act states that a party to an arbitration agreement against whom legal proceedings are brought, may apply to the court in which the proceedings have been brought to stay the judicial proceedings. Section 9(4) further provides that 'on an application under this section the court shall grant a judicial stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed'.

Section 9(4) of the Act mirrors the language of Article II (3) of the New York Convention and to an extent, the language in Article 8(1) of the Model Law. The preferable approach to the interpretation of the provision was enunciated by the House of Lords in the pro-arbitration decision of Premium Nafta Products Ltd v Fili Shipping Co Ltd where it was held that:

to determine on the evidence before the court that [an arbitration agreement] does exist in which case (if the disputes fall within the terms of that agreement) a stay must be granted, in the light of the mandatory ‘shall’ in section 9(4). It is this mandatory provision which is the statutory enactment of the relevant article of the New York Convention, to which the United Kingdom is a party.

The judgment placed significance on the responsibilities of the United Kingdom as a signatory to the New York Convention thereby highlighting the importance of the United Kingdom as a jurisdiction favourable to arbitration and giving priority for tribunals to determine their jurisdiction.

Moreover, concerning the stay of court proceedings, the House of Lords in Premium Nafta held ‘the Act contemplates that it will, in general, be right for the arbitrators to be the first tribunal to consider whether they have jurisdiction to determine the dispute’. Most importantly perhaps, the decision in Premium Nafta asserted the doctrine of separability and the principle of compétence-compétence. A contrary approach, however, was adopted by the court in the earlier decision of Birse Ltd v St David.

9.1 Birse Ltd v St. David: Negating the Jurisdiction of the Tribunal

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96 The Act s 30 provides the positive effect of competence-competence of the tribunal. Also s 31(4) allows arbitrators the right to issue a separate decision on jurisdiction or to decide the question in the award on the merits.

97 The Act s 9(4); New York Convention, Model Law. Barcelo, above n 55, 1130.

98 Premium Nafta Products Ltd v Fili Shipping Co Ltd [2007] UKHL 40. (‘Premium Nafta’). This case previously came before the English Commercial Court under the name of Fiona Trust & Holding Corporation v Yuri Privalov [2007] EWCA Civ 20. (‘Fiona Trust’). It subsequently changed name to Premium Nafta when it came before the House of Lords.


100 The term ‘United Kingdom’ is defined as the ‘United Kingdom of Great Britain and Northern Ireland’ in the status document for ratification of the New York Convention.

101 Ibid. The Act.

102 Premium Nafta [2007] UKHL 40. Similar to the Model Law, sections 30(1) and 30(2) of the Arbitration Act 1996 (UK) permit the arbitrators to determine questions on jurisdiction either in a preliminary award or in the final award.

103 Ibid.

104 Birse Construction Ltd v St David Ltd [1999] EWHC 253. (‘Birse’).
In Birse, the parties were in dispute over an outstanding sum which was allegedly owed by St David to Birse on a building contract. As Birse sought recovery of the sum in court, St David applied for a stay of court proceedings pursuant to section 9 of the Act. In his decision, Lloyd J commented on the power of the tribunal under section 30 of the Act. His Honour emphasized that section 30 was not a mandatory provision and stated that:

‘The existence of the power does not mean that a court must always refer a dispute about whether or not an arbitration agreement exists to the tribunal whose competence to do so is itself disputed. The Act does not require a party who maintains that there is no arbitration agreement to have that question decided by an arbitral tribunal. A court would first have to be satisfied that there is an arbitration agreement before acting under section 9 (and that a dispute about such a matter falls outside section 9). In other cases it may be appropriate to leave the matter to be decided by an arbitrator. The latter course is likely to be adopted only where the court considers that it is virtually certain that there is an arbitration agreement or if there is only a dispute about the ambit or scope of the arbitration agreement.’

The divergence of the courts towards arbitral jurisdiction is highlighted in the court’s judgment in Ahmad Al Naimi v Islamic Press Agency where it held that:

‘it is not mandatory and the existence of the power does not mean that a court must always refer a dispute about whether or not an arbitration agreement exists to the tribunal whose competence to do so is itself disputed. The Act does not require a party who maintains that there is no arbitration agreement to have that question decided by an arbitral tribunal.’

Another case which illustrates undue intervention by English courts in is FT Mackley & Co Ltd v Gosport Marina. The court prevented the tribunal from ruling on its jurisdiction. In so doing, the court relied on section 1(c) of the Act. Section 1(c) is the equivalent of Article 5 of the Model Law. The section provides that ‘in matters governed by this Part the court should not intervene except as provided by this Part.’ The term ‘should’ was argued to be a weaker limitation on court intervention than the word ‘shall’ in the Model Law and the court in Mackley was willing to take a broad approach to its powers of review. The reasoning in Birse and Mackley suggests that an arbitration agreement which is prima facie valid is insufficient to provide tribunals with exclusive jurisdiction to decide the validity of an arbitration agreement. According to these decisions, the court must review arbitration agreements, ascertaining their validity and applicability. In doing so, the arbitral proceedings are delayed, if not prevented, which is contrary to compétence-compétence and to the purpose of the Act.

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105 Ibid.
106 The Act s 9.
107 The Act s 30 provides that unless otherwise agreed by the parties, the tribunal may rule on its own substantive jurisdiction including whether there is a valid arbitration agreement.
110 FT Mackley & Co Ltd v Gosport Marina [2002] BLR 367. (‘Mackley’).
111 The Act s 1(c).
112 Model Law.
113 The Act.
In a subsequent case, *Law Debenture Trust Corp Plc v Elektrim Finance BV*, an application was made to stay the court proceedings and permit the tribunal to determine the dispute.\(^{114}\) The court refused a stay and held that ‘[t]here is no support for any suggestion that the court should inevitably allow the arbitral tribunal to decide the jurisdiction question and stay the court proceedings in the meanwhile’.\(^{115}\) By interpreting the tribunal’s authority to have first priority to rule on jurisdiction as non-compulsory, it may be argued that the United Kingdom courts’ construction of the negative effect restricts its efficacy.

### 9.2 The XL Insurance Case: A Renewed Recognition of the Arbitral Tribunal

The approach in *Birse* and *Mackley* has been displaced in recent times in favour of an approach which recognises the importance of international arbitration law and practice. English judges are now willing to recognise that local rules are not always applicable. “They appear increasingly aware of their role as transnational decision-makers in arbitrations between nationals of different states.”\(^{116}\) There is now an attempt to harmonise English arbitration practice with that of other jurisdictions.

‘The judiciary’s new inclusive approach to international and comparative law extends to arbitral awards not traditionally considered to be a source of law in England. Indeed, citation of arbitral awards was actively opposed. They were believed to lack authority. Fear was expressed that reliance on arbitral awards would lead to unfairness and the creation of autonomous systems of ‘pseudolaw’ through departures from State law.’\(^{117}\)

Thus, in contrast to *Birse*, the court in *XL Insurance Ltd v Owens Corning\(^{118}\)* took a pro-arbitration approach. Unlike *Birse* and *Mackley*, the court took a narrow interpretation of its review powers. The issues for the court included: (1) whether there was an arbitration agreement in existence between the parties; (2) which law governed the validity of the alleged arbitration agreement; (3) which tribunal should decide its validity and (4) how the court’s discretion ought to be determined.\(^{119}\) *XL Insurance* successfully obtained an anti-suit injunction to restrain Owens from proceeding with litigation and sought to enforce an agreement to arbitrate whose validity was contested by Owens Corning.\(^{120}\) Toulson J found that the agreement to arbitrate was prima facie valid and, thereby, deferred the final decision regarding the validity of the arbitration agreement to the tribunal stating that:

> ‘under the arbitration clause and the provisions of the Act, it will be for the arbitral tribunal to rule on the validity of the arbitration agreement, if Owens Corning challenges its jurisdiction on that ground, unless the matter is referred to the Court for determination under s.32. I am

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\(^{114}\) *Law Debenture* [2005] EWHC 1412 (Ch). See also *Azov* [1999] 1 LR 68 which favours the approach that the court should determine matters concerning the existence or the terms of the arbitration agreement. Otherwise there may be two hearings: one before the tribunal and one before the court on a challenge.

\(^{115}\) *Law Debenture BV* [2005] EWHC 1412 (Ch) [34].


\(^{117}\) Ibid 68.

\(^{118}\) *XL Insurance Ltd v Owens Corning* [2000] LR 2 QB 500. (‘*XL Insurance*’).

\(^{119}\) Ibid.

\(^{120}\) Stavros Brekoulakis, ‘The Negative Effect of Compétence-Compétence: The Verdict has to be Negative’ Queen Mary University of London, School of Law, Legal Studies Research Paper No. 22/2009.
satisfied that in the meantime, justice requires that an injunction should be granted restraining Owens Corning from continuing its litigation against XL in Delaware. ¹²¹

His Honour found that as a matter of substance rather than form, it was unequivocal that the parties had formed a contract which included an arbitration agreement with the arbitral seat in London and governed by the laws of the United Kingdom. ¹²² He opined that:

‘[... ] as a matter of good case management, and in compliance with the overriding objective, which of course all business in this court is conducted pursuant to, namely that the parties should save expense and should have the case dealt with in ways that are proportionate given the amount of money involved, expeditiously and fairly the arbitrator’s decision as to the existence of the contract should come first.’¹²³

9.3 Fiona Trust: The Return to an Arbitration-Friendly Culture?

The decision in Fiona Trust & Holding Corporation v Yuri Privalov is a landmark case.¹²⁴ The judgment played a crucial role in clarifying the position of the United Kingdom on enforcement of arbitration agreements and the doctrine of separability. Until this decision, these notions had remained nebulous. The dispute arose from a number of charter party contracts entered into between a Russian group of ship owners (owners) and a number of charter companies (the charterers). The owners claimed that the charter parties were executed by way of bribery.¹²⁵ The owners commenced litigation in the Commercial Court in London on the grounds of fraud. The contracts included a key law and litigation clause which permitted the parties to resolve any dispute arising from the contract by arbitration.

Relying on this clause the charter parties commenced proceedings for arbitration. In turn, the owners applied to the court pursuant to section 72 to restrain the arbitration proceedings pending the court trial.¹²⁶ His Honour stated the arbitrator lacked jurisdiction because the arbitration clause was not separable from the charter party contracts.¹²⁷

The charterers successfully appealed the decision of the Commercial court. The first issue considered by the Court of Appeal was whether the arbitration clause was sufficiently broad to address claims that bribery had induced the charter parties. Longmore LJ held in the affirmative on this question. His Lordship stated that:

‘If businessmen go to the trouble of agreeing that their disputes be heard by a tribunal of their choice they do not expect (at any rate when they are making the contract in the first place)
that time and expense will be taken in lengthy argument about whether any particular cause of action comes within the meaning of the particular phrase that they have chosen in their arbitration clause. If any business man did want to exclude disputes about the validity of a contract, it would be comparatively simple to say so... It seems to us that any jurisdiction or arbitration clause should be liberally construed.’

This decision was hailed as a success for cementing an arbitration-friendly environment in the United Kingdom and reaffirming the doctrine of separability. In relation to this doctrine, the court held that:

‘As we have sought to explain, once the separability of the arbitration agreement is accepted, there cannot be any question but that there is a valid arbitration agreement... If there is a contest about whether an arbitration agreement had come into existence at all, the court would have discretion as to whether to determine that issue itself but that will not be the case where there is an overall contract which is said for some reason to be invalid e.g. for illegality, misrepresentation or bribery and the arbitration agreement is merely part of that overall contract.’

The decision in Fiona has shown that in assessing an application under section 9, the court may only rule on the question of validity of the arbitration agreement itself in cases where there is a challenge regarding whether an arbitration agreement ever existed or any other question of validity affecting the arbitration agreement is particularly raised. The Court of Appeal in Fiona has therefore provided a narrow interpretation to sections 9 and 72 of the Act, rendering it a decision supportive of compétence-compétence.

10 Summary

The principle of compétence-compétence has gained more traction in English courts in the last decade. However, it seems to be a case of ‘one step forward, two steps back’ at times with divergent decisions taken by the courts. Although compétence-compétence appears to have become more established in the English arbitration jurisprudence – with judgments such as Fiona Trust – there is substantial scope for further entrenchment of this principle. Unlike in France, the case law in the United Kingdom demonstrates an oscillation between a narrow and wide interpretation. This has prevented the development of a unified and consistent body of law. Moreover, there are numerous opportunities in the Act for a party to raise a challenge to the jurisdiction of the tribunal such as section 67.

It is accepted that the courts must balance two crucial yet competing interests: (a) to exercise a supervisory role to ensure that tribunals do not usurp the rights of the parties and; (b) to support the arbitration agreement and ensure that parties honour their agreement to arbitrate. Parties can request courts in various circumstances to vary, or set aside, arbitral awards in whole or in part. The above analysis has drawn attention to the jurisdictional challenges that can be brought under the Act. Particular emphasis was placed on the ability of non-participants to challenge the substantive jurisdiction of arbitral tribunals.

130 Fiona Trust [2007] EWCA Civ 20 (24 January 2007), [38].
This article has traced the evolution of the English approach. The *Arbitration Act 1996* was a watershed. It was intended to bring the laws of arbitration in the United Kingdom into alignment with other pro-arbitration jurisdictions. However, as has been shown in this article, the *Act* was only partially successful in achieving this objective. As Lord Steyn stated ‘arbitrators are entitled, and indeed required, to consider whether they will assume jurisdiction. But that decision does not alter the legal rights of the parties and the courts have the last word.’\textsuperscript{133}