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Ozlem Susler

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The English Approach to Compétence-Compétence

Ozlem Susler*

I. 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 by 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 (the Act) are discussed.¹ 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.² 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.³ The *negative effect* thereby restricts the function of the court to provide the tribunal with the first opportunity to

1. Arbitration Act, 1996, (U.K.) [hereinafter *The Act*].

2. ('*Positive Effect*').

3. Amokura Kawharu, *Arbitral Jurisdiction*, 23 NEW ZEALAND UNIV. L. REV. 238, 243 (2008) [hereinafter *Negative Effect*].

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.⁴

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.⁵

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.⁶ 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 the tribunal issues a jurisdictional ruling. 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.⁷ The majority of jurisdictions do not provide for express recognition of the *negative effect* in

4. JEAN-FRANCOIS POUURET & SEBASTIEN BESSON, COMPARATIVE LAW OF INTERNATIONAL ARBITRATION 488 (2d ed. 2007). Most national arbitration laws prevent courts from reviewing the merits of arbitral awards. See *New Decree*, art 1493.

5. Stavros Brekoulakis, *The Negative Effect of Compétence-Compétence: The Verdict has to be Negative*, Queen Mary School of Law Legal Studies Research Paper No. 22/2009. See New York Convention, Convention on the Recognition And Enforcement of Foreign Arbitral Awards, art. II (3); Model Law, art. 8. Although some contend that the Model Law art 8 permits national courts to perform a *prima facie* review of an arbitration agreement: see *Rio Algom Ltd. v. Sammi Steel Co Ltd.*, [1991] 47 CPC (2d) 251 (Ontario Court of Justice). See also *Pacific International Lines Ltd. v. Tsinlien Metals and Minerals Co. Ltd.*, 2 HKLR 249 (1993).

6. Doug Jones, *Kompetenz-Kompetenz*, 75(1) ARBITRATION: THE JOURNAL BY THE CHARTERED INSTITUTE OF ARBITRATORS 56, 57 (2009).

7. POUURET & BESSON, *supra* note 5, at 458.

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.⁸

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.⁹ By contrast, the New York Convention does not make any express provision for the *negative* or *positive effect* of *compétence-competence*. The question of jurisdiction is typically a preliminary matter for the arbitral tribunal.¹⁰ 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.¹¹

II. 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 is the cornerstone of the English approach.¹² The Act came into effect on January 31, 1997. One of its

8. European Convention on International Commercial Arbitration, *opened for signature* April 21, 1961, 484 U.N.T.S. 349, art. VI(3) (entered into force Jan. 7, 1964), http://www.jus.uio.no/lm/europe.international.commercial.arbitration.convention.geneva.1961/_6.html [hereinafter *European Convention*].

9. See *infra* Part 3 (the *prima facie* method of review is examined in “Methods of Judicial Review by Courts”).

10. *Christopher Brown Ltd. v. Genossenschaft Oesterreichischer Waldbesitzer Holzwirtschaftsbetriebe Registrierte GmbH*, 1 QB 12, 13 (1954) (Devlin J.).

11. TIBOR VARADY, JOHN J BARCELO & ARTHUR T. VON MEHREN, *INTERNATIONAL COMMERCIAL ARBITRATION- A TRANSNATIONAL PERSPECTIVE* 87 (3d ed., 2006).

12. *The Act*, *supra* note 2.

principal aims was to consolidate English law into one statute and create a coherent legal framework.¹³ The primary purpose of the Act, as recited in its preamble, was to restate and improve arbitration law.¹⁴ While the United Kingdom's 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.¹⁵ 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 that would protect both traditional presumptions, and procedural and substantive rules.¹⁶ The courts did not consider foreign judicial decisions and general rules of international arbitration important. Generally, English arbitrators deemed principles of international arbitration law as too academic, too theoretical, or too abstract.¹⁷ 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 that 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.¹⁸ 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."¹⁹

Moreover, case law from English courts indicates that any questions regarding the validity, scope, or existence of an arbitration agreement

13. *Id.* Its predecessor, the Arbitration Act 1979 (U.K.) came under increasing criticism for having been rushed through under pressure from the international community.

14. *Inco Europe Ltd. v. First Choice Distribution*, 1 WLR 586 (2001) (Lord Nicholls).

15. To obtain an analysis of the French jurisdiction contact the author for her article pending publication.

16. William W Park, *Judicial Supervision of Transnational Commercial Arbitration: The English Arbitration Act of 1979*, 21 HARV. INT'L L.J. 87, 88 (1980).

17. Stewart R. Shackleton, *English Arbitration and International Practice*, 5(2) INT'L ARBITRATION L. REV. 67 (2002).

18. *Id.*

19. DEPARTMENTAL ADVISORY COMMITTEE, PARLIAMENT OF UNITED KINGDOM, REPORT ON THE ARBITRATION ACT 1996 9 (2006) [hereinafter DAC REPORT].

remained for the courts to address, rather than the arbitral tribunal.²⁰ An example of the interventionist approach is *S.A. Coppee Lavalin v. Ken Ren Fertilisers*.²¹ 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.²² With respect to *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.”²³

III. 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.²⁴ The Act does not provide a definition of arbitration, although section 1 states “the object of arbitration is to attain a fair resolution of disputes by an impartial tribunal without unnecessary delay or expense.”²⁵ Since its enactment, courts have intervened to a greater extent than originally expected.²⁶ Notwithstanding the power of the courts, arbitrators have the authority to continue proceedings and to make an award whilst the jurisdictional challenge is pending before the court.²⁷ The underlying rationale is to discourage parties from using court challenges as a delaying tactic and to allow arbitrators

20. Stewart Shackleton, *Annual Review of English Judicial Decisions on Arbitration-2002*, 6(6) INT’L ARBITRATION L. REV. 220 (2003).

21. *S.A. Coppee Lavalin v. Ken Ren Fertilisers*, 2 All ER 449 (1994).

22. *Id.*

23. Lord Mark Saville, *The Arbitration Act 1996: What We Have Tried to Accomplish*, 13 CONSTRUCTION L.J. 410, 414 (1997).

24. *The Act*, *supra* note 2, at §§ 1, 30, 32. *Vale do Rio Doce Navegacao SA v. Shanghai Bao Steel Ocean Shipping* 2 LR 1 (2002), where J. Thomas 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 Model Law; DAVID JOSEPH, JURISDICTION AND ARBITRATION AGREEMENTS AND THEIR ENFORCEMENT 294 (1d. ed., 2005).

25. *The Act*, *supra* note 2, at § 1(a).

26. *Id.* *See* John Lurie, *Court Intervention in Arbitration: Support or Interference*, 76(3) *Arbitration* 447, 447 (2010).

27. *The Act*, *supra* note 2, at § 32(2), (4). *See Dalmia Dairy Industries Ltd. v. National Bank of Pakistan*, 2 Lloyd’s Rep 223 (1978) and *Harbour Assurance v. Kansa*, 1 Lloyd’s Rep. 455 (1993).

whose jurisdiction is challenged to proceed with the arbitration if the tribunal believes the challenge is groundless.²⁸

The tendency for unnecessary intervention by the courts has led to criticism.²⁹ Although the act does not adopt the 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.³⁰ The DAC Report sheds light on the key principles that subsequently emerged in the Act. The report stated:

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.³¹

The current English approach is to confer concurrent power on tribunals and courts to determine challenges to the arbitration agreements.³² Where a party to an arbitration has raised a jurisdictional challenge in a national court, there are two methods of review if the court finds it can review the jurisdiction: *prima facie review* or *full review*. The next section examines the merits of both methods.

IV. 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 *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 *prima facie* is defined as “[a]t first sight, on first appearance but subject to further evidence or information.”³³ Alternatively, it can be defined as an evidentiary standard that is “[s]ufficient to establish a fact or raise a presumption unless

28. DAC REPORT, *supra* note 20, at 8.

29. See Anthony Crivellaro, *All's Well that Ends Well: London Remains a Suitable Venue for International Arbitration - But Only Thanks to the House of Lords*, 22(4) INT'L CONSTRUCTION L. REV. 480 (2005).

30. See *The Act*, *supra* note 2, at § 30. See also *UNCITRAL Model Law on International Commercial Arbitration*, UN Doc A/40/17, art. 16 (11 April 1980).

31. DEPARTMENTAL ADVISORY COMMITTEE, DEPARTMENT OF TRADE AND INDUSTRY, REPORT ON THE CURRENT ARBITRATION ACT (1989), at 41. The Committee advised against adopting the Model Law. *Id.*

32. See *The Act*, *supra* note 2, at § 32(4).

33. BLACK'S LAW DICTIONARY 458 (9th ed. 2009).

disproved or rebutted.”³⁴ In practice, whether a *prima facie* arbitration agreement exists is determined by a more limited inquiry by the courts. 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.³⁵ Public and private resources will be saved if courts conduct a *prima facie review* and only conduct a *full review* where necessary.

A *full review* is a more in-depth judicial scrutiny to ascertain the existence, validity and scope of the arbitration agreement. A *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 *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 *full review* in addition to the costs of arbitration. A corollary of *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 *prima facie review* in particular circumstances where, the question falls within a complex matrix of facts and a *prima facie review* is insufficient to determine the question.

In some cases, a *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 in fact be bound by it.³⁶ 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*.³⁷ There are curial decisions in some jurisdictions where *full reviews* have been conducted, which are at odds with the *prima facie* method.³⁸ Bachand argues that the *prima facie review* is more closely aligned to the legislative history,

34. *Id.*

35. Michael Pryles, *The Kaplan Lecture 2009*, 27(2) J. INT'L ARB. 105, 108 (2010).

36. See William W. Park, *An Arbitrator's Dilemma: Consent, Corporate Veil and Non-signatories*, in MULTIPLE PARTY ACTIONS IN INTERNATIONAL ARBITRATION 5 (Permanent Court of Arbitration, Oxford University Press 2009).

37. Frederic Bachand, *Does Article 8 of the Model Law Call for Prima Facie or Full Review of the Arbitral Tribunal's Jurisdiction?*, 22(3) ARB. INT'L 463, 463 (2006).

38. See *Recyclers of Australia Pty Ltd. v. Hettinga Equip. Inc.*, 175 ALR 725 (2000). See also *Canada Nat'l Rys. Co. v. Lovat Tunnel Equip. Inc.*, 174 DLR (4th) 385 (1999).

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.³⁹

Courts should be cautious to avoid an interpretation that 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* review would 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 it also 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.

Because 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. Conferring validity to arbitration agreements in this way is a mistake.⁴⁰

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 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.⁴¹

In conclusion, the *prima facie review* is more amenable to maintaining the integrity and efficiency of arbitration while preventing undue delay and

39. See Bachand, *supra* note 38, at 464–65.

40. 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.

41. See POUURET & BESSON, *supra* note 5, at 458.

expense for the parties. More importantly, the *prima facie* review is supportive of the *negative effect* of *compétence-compétence*.

V. JURISDICTIONAL OBJECTIONS: POWERS OF TRIBUNALS AND POWERS OF COURTS

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.⁴²

VI. 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 tribunals.⁴³ 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.⁴⁴ 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 a challenge. Evidence indicates that parties often accept a fully reasoned decision of the tribunal on jurisdiction in order to avoid the costs of

42. See *infra*, Part 8.

43. See *The Act*, *supra* note 2. *The Act's* applicability is not limited to England. See *id.* at pt. 1, § 2; POUURET & BESSON, *supra* note 5, at 464. Section 1(c) of *the Act* also confers courts with residual jurisdiction although it fails to outline how this jurisdiction should be exercised. See *JT Mackley & Co. Ltd. v. Gosport Marina Ltd.*, EWHC 1315 (2002) (TCC).

44. See *The Act*, *supra* note 2, at § 67(2).

re-litigating the same matter before courts.⁴⁵ 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. Such a person has the 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.⁴⁶

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.⁴⁷

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 *Dallah Estate and Tourism Holding Company v. The Ministry of Religious Affairs, Government of Pakistan*.⁴⁸

6.3. *The Dallah Case*

The Court of Appeal in *Dallah* held that an order granting leave to enforce a French arbitration award was correctly set aside by the High Court.⁴⁹ 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

45. The parties cannot apply directly to the courts except for situations described in §§32 and 72. The DAC REPORT art. 138 states that these provisions serve to prevent delaying tactics.

46. See *The Act*, supra note 2, at § 72(2).

47. See *id.* at § 32.

48. *Dallah Estate and Tourism Holding Company v. The Ministry of Religious Affairs, Government of Pakistan*, EWCA Civ 46 (2010) [hereinafter *Dallah*]. Pursuant to Article V.1 of the *New York Convention* which is given effect by section 103 of the Act, 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, *Supreme Court rejects Dallah appeal and refuses enforcement of French ICC award*, INTERNATIONAL LAW OFFICE (Nov. 11, 2010), <http://www.internationallawoffice.com/newsletters/detail.aspx?g=92e06a4c-113f-4c98-bf83-046301be4056>.

49. *Id.*

agreement.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.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.⁵² Initially, Dallah executed a Memorandum of Understanding with the Government for the construction of accommodation. The Trust formed an agreement with Dallah to build accommodations 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 was also 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 *competence-competence*, ruled that the Government was a party to the agreement. Accordingly, the tribunal ruled that it had jurisdiction to determine the claim.⁵³

The dispute was decided in favour of Dallah. Pakistan resisted enforcement in the United Kingdom courts 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,

50. Section 103(2)(b) stipulates that:

1. Recognition or enforcement of a *New York Convention* award shall not be refused except in the following cases.
2. Recognition or enforcement of the award may be refused in the person against whom it is invoked proves –
 - (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’.

51. Gary Born & Timothy J Lindsay, *Who is Most Competent? Some Comments on the Allocation of Jurisdictional Competence Under the English Arbitration Act 1996*, KLUWER ARBITRATION BLOG, (Apr. 12, 2010), <http://kluwarbitrationblog.com/blog/2010/04/12/who-is-most-competent-some-comments-on-the-allocation-of-jurisdictional-competence-under-the-english-arbitration-act-1996>.

52. See *Dallah*, *supra* note 49.

53. Stephen Moi & Paul Collier, *Case Update: Dallah Real Estate and Tourism Holding Company v. The Ministry of Religious Affairs, Government of Pakistan*, CLYDE & CO. LLP (Dec. 8, 2010), <http://www.clydeco.com/knowledge/articles/case-update>.

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 *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 New York Convention, neither of these matters played a central role in this case.⁵⁴

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.⁵⁵ Whether the award has its seat in England or elsewhere is immaterial for this purpose. In reaching its decision, the Supreme Court undertook a comparative analysis of how *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.”⁵⁶

Secondly, the U.K. Supreme Court accepted the submission made by the Government pursuant to section 103(2)(b) of 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

54. *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, opened for signature Jun. 10, 1958, 330 UNTS 38 (entered into force Jun. 7, 1959) arts. II(3) and V [hereinafter *New York Convention*]. *Supreme Court Unanimously Rejects Appeal to Dallah Judgment Refusing Enforcement of a French ICC Award*, Young OGEMID, (Nov. 4, 2010) <http://www.transnational-dispute-management.com/young-ogemid/>.

55. *Moi & Collier*, *supra* note 54.

56. *Dallah*, *supra* note 49.

award was not enforceable.⁵⁷ The judges in *Dallah* also reaffirmed there is no duty for a party to contest or appeal an award in the courts of the seat (in this case France), prior to challenging enforcement in another jurisdiction. It appears that the Supreme Court undertook a full review on the question of jurisdiction.

As seen in *Dallah*, although the United Kingdom is deemed to be a pro-arbitration jurisdiction, its law leaves the door slightly more open to judicial review.⁵⁸ This has accentuated the tension between the English legal community's pro-arbitration attitude and the Act, which may assign jurisdiction to the English courts rather than international arbitral tribunals.

6.4 *Republic of Serbia v Imagesat International and the Significance of the Azov decision*

In *Republic of Serbia v. Imagesat International*, the English High Court considered the application of section 67.⁵⁹ The court heard a challenge to the substantive jurisdiction of an ICC tribunal.⁶⁰ The tribunal ruled, *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.⁶¹

In reaching its decision, the High Court relied on *Azov Shipping Co. v. Baltic Shipping Co.*⁶² *Azov* is a leading authority on section 67. In the case, Justice Rix stated that section 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.”⁶³ Justice Longmore opined that the

57. *Moi & Collier*, *supra* note 54.

58. See *Midgulf International Ltd. v. Groupe Chimichie Tunisien* [2010] EWCA 66 (Civ) where the Tunisian and English courts adopted different approaches to jurisdiction of the arbitral tribunal.

59. *Republic of Serbia v. Imagesat International NV* [2009] EWHC 2853 (Comm).

60. *Id.*

61. *Id.*

62. *Azov Shipping Co. v. Baltic Shipping Co.* [1999] 1 LR 68. *Azov*'s decision established that where the seat of the arbitration is the United Kingdom, the court will examine the issue of jurisdiction brought under sections 32 or 67 of the Arbitration Act as a full review. *Id.*

63. *Id.*

applicants who had their jurisdictional challenge defeated by the tribunal were “effectively now having a second bite at the same cherry.”⁶⁴

In *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.”⁶⁵ Following the approach in *Azov*, the Court also opined that the decision of the arbitrator regarding jurisdiction is only provisional.⁶⁶

The significance of *Azov* lies in its expression of the English principle that a jurisdictional challenge will be heard *de novo* and in full by the courts, even if, in effect, that decides the case on the merits.⁶⁷ This is in clear contrast to approaches adopted by other countries such as France.⁶⁸ It is in contradiction with the general principle that a court must not review the merits of a decision reached by the arbitral tribunal.⁶⁹

6.5. *Habas Sinai v Norscot Rig*

Another recent case where section 67 received consideration is the *Habas* decision.⁷⁰ The High Court had no reservations conducting a full review.⁷¹ The English High Court in *Norscot Rig Management* also allowed a rehearing of jurisdiction, but the challenge was dismissed.⁷² 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

64. *Id.*

65. *Serbia*, EWHC (Comm) 2853; *The Act*, *supra* note 2, at §§ 32, 67.

66. *Id.*

67. *Id.* *De novo* is a matter heard over again from the beginning.

68. See Code de Procédure Civile [C.P.C.] 1458 (Fr.); see also Loi 2011-48 du 13 Janvier 2011 Portant Réforme de L'arbitrage [Decree No. 2011-48 of 13 January 2011 on the Reform of Arbitration], Journal Officiel de la Republique Francaise [J.O.] [Official Gazette of France], Jan. 14, 2011 (Fr.) [hereinafter *New Decree*].

69. See Convention on the Recognition and Enforcement of Foreign Arbitral Awards, arts. II(3), V, June 7, 1959, 330 U.N.T.S. 38. See also Albert Jan van den Berg, *The New York Convention of 1958: An Overview*, INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION, 1 (Apr. 15, 2009), http://www.arbitration-icca.org/media/0/12125884227980/new_york_convention_of_1958_overview.pdf.

70. *Habas Sinai ve Tibbi Gazlar Isthisal Endustri AS v. Cometal SAL* [2010] EWHC (Comm) 29.

71. *Id.*

72. *Norscot Rig Management PVT Ltd. v. Essar Oilfields Servs. Ltd.* [2010] EWHC (Comm) 195.

of the High Court's jurisdiction to hear challenges under section 67.⁷³ In such circumstances, due deference is not provided to the arbitral award.⁷⁴

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.⁷⁵ The approach taken by the courts in these cases appears to be in conflict with the concept of limited judicial review.⁷⁶ The cases discussed above illustrate that courts do not consistently provide the necessary priority to tribunals on the question of their jurisdiction.⁷⁷

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.⁷⁸ 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.⁷⁹ 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.⁸⁰

VII. 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,

73. *The Act*, *supra* note 2, at § 67.

74. Born & Lindsay, *supra* note 52.

75. *Id.* The position regarding costs for unsuccessful challenges of jurisdiction in court is that the losing party pays costs. *Id.*

76. *Id.*

77. See *The Act*, *supra* note 2, at §§ 7, 30.

78. *The Act*, *supra* note 2, at § 72.

79. POUURET & BESSON, *supra* note 5, at 412.

80. See *Law Debenture Trust Corp. Pty Ltd. v. Elektrim Finance BV* [2005] EWHC (Ch) 1412.

- (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.⁸¹

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.”⁸² 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.⁸³

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.⁸⁴ 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

81. Arbitration Act § 31(5) is in contrast to the Model Law on International Commercial Arbitration.

82. Arbitration Act § 31(5).

83. John J. Barcelo III, *Who Decides the Arbitrators' Jurisdiction? Separability and Competence-Competence in Transnational Perspective*, 36 VAND. J. OF TRANSNAT'L L. 1115, 1126 (2003).

84. Fouchard Gaillard Goldman On International Commercial Arbitration 682 (Emmanuel Gaillard & John Savage eds., 1999).

concerning the validity of the arbitration agreement before referring the matter to judicial review.⁸⁵

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 that are clearly designed to avoid dilatory tactics.⁸⁶ 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.⁸⁷ 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-competence*, 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.⁸⁸ 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.⁸⁹ 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.⁹⁰

85. Doug Jones, *Competence – Competence*, 75(1) *Arbitration* 56, 60 (2009).

86. Catherine Kessedjian, *Determination and Application of Relevant National and International Law and Rules*, in *PERVASIVE PROBLEMS IN INTERNATIONAL ARBITRATION* 83 (Loukas A. Mistelis & Julian D.M. Lew eds., 2006).

87. Poudret & Besson, *supra* note 5, at 485.

88. *Id.*

89. *The Act*, *supra* note 2, at § 72.

90. *See infra* note 14.

VIII. POWER OF THE TRIBUNAL TO RULE ON ITS JURISDICTION

The principle of *compétence-compétence* is addressed in section 30 of the Act.⁹¹ 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,⁹²
- (b) whether the tribunal is properly constituted, and
- (c) what matters have been submitted to arbitration in accordance with the arbitration agreement.⁹³

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.⁹⁴ Article 1448 of the New Decree⁹⁵ is the French equivalent of section 30 of the Act.⁹⁶ 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.⁹⁷ Pursuant to the French New Decree, *compétence-compétence* is a mandatory provision.⁹⁸ 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

91. *The Act, supra* note 2, at § 30(1) commences with “unless otherwise agreed by the parties.” Therefore, it is not a mandatory provision.

92. *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.

93. *The Act, supra* note 2, at § 30(1). For matters outside the arbitration agreement see *M/S Alghanim Industries Inc v Skandia International Insurance Corporation* [2001] 2 All ER 30.

94. *The Act, supra* note 2, at § 30(2).

95. *New Decree, supra* note 69, at art. 1448.

96. *The Act, supra* note 2, at § 30.

97. *New Decree, supra* note 69, at art. 1448.

98. *Id.*

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.”⁹⁹

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.¹⁰⁰

IX. 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.¹⁰¹ 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 center of the spectrum—with the French position being the most extreme in its provision of exclusive jurisdiction to the arbitral tribunal.

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

99. *Id.*

100. See Joseph, *supra* note 25, at 295.

101. *The Act*, *supra* note 2. Res Judicata means 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.

satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed.”¹⁰²

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.¹⁰³ The preferable approach to interpreting the provision was enunciated by the House of Lords in the pro-arbitration decision of *Premium Nafta Prods. Ltd. v. Fili Shipping Co. Ltd.*¹⁰⁴ 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.¹⁰⁵

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.¹⁰⁶ The House of Lords noted:

If in a case where an arbitrator does have jurisdiction to decide a particular dispute, he is to be restrained from so doing and no stay of court proceedings is to be granted, there is likely to be a potential breach of the United Kingdom’s international obligations in relation to commercial arbitrations under the New York Convention.†.†.† as enshrined in the 1996 Act.¹⁰⁷

Moreover, concerning the stay of court proceedings, the House of Lords in *Premium Nafta* held that “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.”¹⁰⁸ Most importantly perhaps, the decision in *Premium Nafta* asserted the doctrine of *separability* and the

102. *The Act*, *supra* note 2, at § 30 provides the *positive effect of competence-competence* of the tribunal. Also § 31(4) allows arbitrators the right to issue a separate decision on jurisdiction or to decide the question in the award on the merits.

103. *The Act*, *supra* note 2, at § 9(4); New York Convention, Model Law. See also *Barcelo*, *supra* note 84, at 1130.

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

105. *Premium Nafta*, [2007] UKHL 40 at 37.

106. 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*.

107. *Premium Nafta*, [2007] UKHL 40 (Hoffman, LJ).

108. *Id.*

principle of *compétence-compétence*.¹⁰⁹ A contrary approach, however, was adopted by the court in the earlier decision of *Birse Ltd. v. St David*.¹¹⁰

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

In *Birse*, the parties were in dispute over an outstanding sum which was allegedly owed by St David to Birse on a building contract.¹¹¹ 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.¹¹² In his decision, Justice Lloyd commented on the power of the tribunal under section 30 of the Act. His Honour emphasized that section 30 was not a mandatory provision¹¹³ 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.¹¹⁴

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:

[I]t 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

109. *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.

110. *Birse Constr. Ltd. v. St David Ltd.* [1999] EWHC 253.

111. *Id.*

112. *The Act*, *supra* note 2, at § 9.

113. Section 30 of the Arbitration Act 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.

114. *Birse*, [1999] EWHC 253 at [4].

maintains that there is no arbitration agreement to have that question decided by an arbitral tribunal.¹¹⁵

Another case which illustrates undue intervention by English courts in is *FT Mackley & Co. Ltd. v. Gosport Marina*.¹¹⁶ 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.”¹¹⁷ 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.¹¹⁸ 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.¹¹⁹

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.¹²⁰ 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.”¹²¹ 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.

115. Ahmad Al-Naimi v. Islamic Press Agency [2000] 1 Lloyd’s Rep 522, 525.

116. *FT Mackley & Co. Ltd. v. Gosport Marina* [2002] BLR 367.

117. *The Act*, *supra* note 2, at § 1(c).

118. MODEL LAW.

119. *The Act*, *supra* note 2.

120. *Law Debenture* [2005] EWHC (Ch) 1412. *See also Azov*, [1999] 1 LR 68 (favouring 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.

121. *Law Debenture BV*, [2005] EWHC (Ch) 1412 at [34].

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 that 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.”¹²² 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.¹²³

Thus, in contrast to *Birse*, the court in *XL Insurance Ltd. v. Owens Corning*¹²⁴ 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.¹²⁵ *XL Insurance* successfully obtained an anti-suit injunction to restrain Owens from proceeding with litigation and sought to enforce an agreement to arbitrate; the validity of which was contested by Owens Corning.¹²⁶ Justice Toulson 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:

[U]nder 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

122. Stewart R Shackleton, *English Arbitration and International Practice*, 5(2) INT’L ARB. L. REV. 67, 69 (2002).

123. *Id.* at 68.

124. *XL Insurance Ltd. v. Owens Corning* [2000] 2 Lloyd’s Rep. 500.

125. *Id.*

126. Stavros Brekoulakis, Research Paper, *The Negative Effect of Compétence-Compétence: The Verdict has to Be Negative*, Austrian Arbitration Yearbook, 2009, at 238-258.

under § 32. I am satisfied that in the meantime, justice requires that an injunction should be granted restraining Owens Corning from continuing its litigation against XL in Delaware.¹²⁷

His Honour found that as a matter of substance rather than form, it was unequivocal that the parties had formed a contract that included an arbitration agreement with the arbitral seat in London and governed by the laws of the United Kingdom.¹²⁸ He opined that:

[A]s 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.¹²⁹

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

The decision in *Fiona Trust & Holding Corp. v. Yuri Privalov* is a landmark case.¹³⁰ 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 and a number of charter companies. The owners claimed that the charter parties were executed by way of bribery.¹³¹ The owners commenced litigation in the Commercial Court in London on the grounds of fraud. The contracts included a key law and litigation clause that 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 on the grounds that the arbitration clauses including the charter party contracts had been rescinded for bribery.¹³² The charterers responded with a cross application requesting a stay of judicial proceedings in accordance with section 9 of the Act. At first instance, Justice Morison in the Commercial Court declined to stay judicial proceedings under section 9 and issued an injunction to restrain the arbitration proceedings pending the

127. *XL Insurance*, [2000] LR 2 Lloyd's Rep. at 509.

128. INTERNATIONAL COMMERCIAL ARBITRATION: IMPORTANT CONTEMPORARY QUESTIONS 35 (Albert Jan van den Berg ed., 2003).

129. *XL Insurance* [2000] LR 2 Lloyd's Rep. at 509.

130. *Fiona Trust & Holding Corp. v. Yuri Privalov* [2007] EWCA (Civ) 20.

131. *Id.*

132. *The Act*, *supra* note 2, at § 72.

court trial.¹³³ His Honour stated the arbitrator lacked jurisdiction because the arbitration clause was not separable from the charter party contracts.¹³⁴

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. Lord Justice Longmore 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.¹³⁵

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.¹³⁶

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.¹³⁷ 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*.¹³⁸

133. *The Act*, *supra* note 2, at § 9. *Fiona Trust*, [2006] EWHC 2583 (Morison, J.).

134. *Id.*

135. *Fiona Trust* [2007] EWCA (Civ) 20 at [17]–[18] (Longmore, LJ.).

136. *Id.* at [38].

137. *See also* Harbour Assurance Co. (UK) Ltd. v. Kansa Gen. Int'l Ins. Co. Ltd. [1993] QB 701.

138. *Fiona Trust*, [2007] EWCA (Civ) 20 at [38]. *See generally* *The Act*, *supra* note 2, at §§ 9, 72.

X. 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.

This article has traced the evolution of the English approach. The Arbitration Act 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.”¹³⁹

139. John Steyn, *England's Response to the UNCITRAL Model Law of Arbitration*, 10 ARB. INT'L. 1 (1994).