Submission to the Law Commission of England and Wales

Consultation Paper 257: Review of the Arbitration Act 1996

The Role of the Courts in Reviewing Arbitral Tribunal Determinations on Substantive Jurisdiction

Alex Mills
Professor of Public and Private International Law
Faculty of Laws, UCL

1. I am writing to provide a submission on certain issues raised by **Law Commission Consultation Paper 257: Review of the Arbitration Act 1996** ('the Consultation Paper'), dated September 2022.

2. This submission addresses **Consultation Questions 22, 23 and 24**, each relating to the role of the courts in reviewing the determination by an arbitral tribunal of its own jurisdiction. This submission is broadly supportive of the position adopted by the Law Commission on these issues, and provides some additional context which may assist in their consideration.

Consultation Question 22

3. Consultation Question 22 relates to Section 67 of the Arbitration Act 1996, which is concerned with proceedings brought in court to challenge a tribunal award on the basis that the tribunal lacked substantive jurisdiction.[1] It applies only to arbitral proceedings with their seat in England and Wales. The issue raised for consultation concerns the nature of the judicial proceedings. It is proposed by the Law Commission that, in defined circumstances (discussed further below), such proceedings should be by way of an appeal rather than a full rehearing, as is currently the case.

4. This issue arises because of a tension between four guiding principles in this area of law.

5. The first is the need for efficiency in the resolution of disputes, including the avoidance of wasted or duplicated costs. This is reflected, for example, in the overriding objective of 'proportionate cost' under the Civil Procedure Rules (Rule 1.1).

6. The second is that an arbitral tribunal possesses 'positive competence-competence', which is to say, the necessary authority to determine its own jurisdiction. This is a well-established principle of arbitration law, reflected in section 30 of the Arbitration Act 1996.

7. The third is that the authority of an arbitral tribunal depends on the consent of the parties. If there is no valid arbitration agreement, the tribunal can have no authority, including as to the question of its own jurisdiction. This is the well-known 'bootstrapping' problem, referred to in the Consultation Paper.[2] It has the consequence that a determination by the tribunal that it

[1] As defined in the Consultation Paper, para 8.6.
[2] Paragraph 8.37.

has jurisdiction cannot be definitive – it must be subject to some possibility of review by a court of law.

8. The fourth is that an agreement by the parties that their disputes should be resolved through arbitration should, in the absence of exceptional circumstances, be respected.

9. This fourth principle evidently means that courts should stay proceedings on the *merits* brought contrary to an arbitration agreement, as provided for under section 9 of the Arbitration Act 1996. The principle is, however, often also considered to have an impact on the determination of the *jurisdiction* of the tribunal. This impact is sometimes referred to as a doctrine of 'negative competence-competence'.[3]

10. The negative aspect of competence-competence does not provide that *only* the arbitral tribunal has the power to rule on its own jurisdiction – if the tribunal does not in fact have jurisdiction, then no decision made by the tribunal as to its own jurisdiction can be effective to determine that it does, because of the third principle set out above. This doctrine is normally understood to have, at least principally, a temporal focus. It means that courts are minded, in certain circumstances, to give the tribunal the *first* opportunity to determine its own jurisdiction. The Court of Appeal of England and Wales has, for example, held on this basis 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'.[4]

11. The doctrine of negative competence-competence in English law does not have clearly defined contours – it is unclear, for example, precisely when the courts will decide that they ought to reach their own conclusions on the jurisdiction of an arbitral tribunal prior to the tribunal itself, and what standard they should apply in making that determination. It is, however, generally accepted that at least in some circumstances it is desirable for the tribunal to be given the first opportunity to determine its own jurisdiction. This policy is reflected in section 32 of the Arbitration Act 1996, which provides that a preliminary question concerning the jurisdiction of a tribunal may only be brought before the courts (i) with the agreement of the other parties to the proceedings, or (ii) with the permission of the tribunal (but only if the court is satisfied that certain conditions are met).

12. The issue addressed in Consultation Question 22 concerns a related but distinct question – whether the courts should give a degree of deference to a determination by a tribunal as to its own jurisdiction, particularly where both parties have participated in the tribunal proceedings. The present position under English law, generally considered to follow from the 2010 Supreme Court decision in *Dallah v Pakistan*, is that very limited deference is given – that '[t]he tribunal's own view of its jurisdiction has no legal or evidential value'.[5] Thus, where the courts are asked to review a decision by a tribunal as to its own jurisdiction, the proceedings are by way of a full rehearing.

13. It is important to note that, although the present position is generally considered to be supported by the Supreme Court decision in *Dallah v Pakistan*,[6] that case actually concerned the application of section 103 of the Arbitration Act 1996 in respect of a foreign arbitral award, rather than section 67 in respect of an English or Welsh arbitral award. As argued

[3] For further discussion of this doctrine, see Alex Mills, 'Arbitral Jurisdiction', in Thomas Schultz and Federico Ortino (eds.), *Oxford Handbook on International Arbitration* (Oxford University Press, 2020); Alex Mills, *Party Autonomy in Private International Law* (Cambridge University Press, 2018), Chapter 6; *Dallah v Pakistan* [2010] UKSC 46, [79ff] (per Lord Collins).
[4] *Fiona Trust v Privalov* [2007] EWCA Civ 20, [34].
[5] *Dallah v Pakistan* [2010] UKSC 46, [30] (per Lord Mance), see also [96] (per Lord Collins).
[6] Consultation Paper, para 8.15.

below and in the Consultation Paper (in relation to Consultation Question 24), a different approach may well be appropriate in relation to section 103. The decision in *Dallah v Pakistan* is therefore of uncertain value in relation to either the interpretation or policy of section 67.[7]

14. The present position raises concerns in relation to the first principle set out above. If the courts are only giving *temporal* deference to a tribunal – allowing it to make the initial decision on its jurisdiction, but then fully rehearing that decision – this raises a clear danger of wasteful and duplicative proceedings, as discussed in the Consultation Paper.

15. An additional concern arises that where the parties have agreed on arbitration, a full rehearing on the validity of the arbitration agreement is inconsistent with the second and fourth principles set out above – the doctrines of positive and negative competence-competence. A full rehearing means that a decision by the tribunal as to its own jurisdiction (pursuant to positive competence-competence) is not given any effect, other than by the tribunal itself.

16. In addition, in providing only a temporal deference to the arbitral tribunal's determination of its own jurisdiction, the courts are not in substance giving effect to an agreement that such issues should be resolved through arbitration, as they provide for the issues to be fully litigated in court. Where parties have in fact entered into an arbitration agreement, the approach presently adopted means that this agreement has no (or almost no) impact on the question of whether or to what extent disputes concerning the validity of the arbitration agreement can be litigated in court. This is notwithstanding the fact that the law of England and Wales otherwise adopts a presumption that parties intend their arbitration agreements to have broad effect, encompassing disputes about the validity of the arbitration agreement itself, unless clearly agreed otherwise.[8]

17. A purely temporal approach to negative competence-competence also increases the likelihood that arbitral proceedings will ultimately involve wasted costs, not only in duplicated hearings, but because of the possibility that a court will finally determine – through an independent rehearing based potentially on different evidence – that the tribunal had no jurisdiction and its award is of no legal effect. It may indeed be questioned why a tribunal should be given temporal priority in determining its own jurisdiction, if this does nothing more than delay a full judicial hearing on that question.

18. The proposal adopted in Consultation Question 22, it is submitted, would better balance these policy considerations and the underlying principles. Providing that a review of the tribunal's jurisdictional determination under section 67 is by way of appeal would give 'negative competence-competence' not only a temporal element, but also a *deferential* element. In the circumstances in which both parties have participated in the arbitral proceedings, this appears both appropriate and desirable.

19. Consistently with the first principle, it is likely to lead to reduced duplication of work between the tribunal and the court, and also decrease the likelihood that the court will reject a finding by the tribunal in favour of its (the tribunal's) substantive jurisdiction, rendering the arbitral proceedings as wasted costs. It is also more consistent with the second and fourth principles, as it gives greater effect to the arbitration agreement in conferring competence on

[7] There is, however, first instance authority which directly supports the traditional interpretation of section 67 as requiring a full rehearing: see eg *Republic of Serbia v Imagesat International NV* [2009] EWHC 2853 (Comm); *Habas Sinai VE Tibbi Gazlar Isthisal Endustri A.S. v Sometal S.A.L.* [2010] EWHC 29 (Comm); *Golden Ocean Group Ltd v Humpuss Intermoda Transportasi Tbk Ltd* [2013] EWHC 1240 (Comm).
[8] See *Fiona Trust v Privalov* [2007] UKHL 40, [13].

the tribunal. It remains, however, consistent with the third principle, because it leaves the ultimate determination of the jurisdiction of the arbitral tribunal to the court.

20. It is true that deferring to the tribunal might be thought to raise potential bootstrapping concerns – if in fact there is no valid and applicable arbitration agreement, it might be queried whether deference to a decision by the arbitral tribunal is appropriate. The answer to this issue, it is submitted, is that given in the Consultation Paper – that where both parties have participated in the arbitral proceedings, they are accepting the competence of the tribunal at least for the limited purpose of accepting the tribunal's positive competence-competence – its power to determine its own jurisdiction. In these circumstances, giving deference to the determination of the tribunal while allowing for the possibility of a review by way of appeal does appear to strike an appropriate balance between the competing policy considerations.

21. A significant concern that might be raised with the proposed rule relates to the proposition that the test for whether judicial proceedings are by way of rehearing or appeal depends on whether a party has 'participated in arbitral proceedings'. Whether a party has 'participated in' proceedings may be straightforward in some cases, but not in others. It should not, for example, be sufficient to satisfy this test that a party nominated an arbitrator, if this is the limit of their participation in proceedings and they are disputing the jurisdiction of the tribunal. Where a party has made some limited submission on the tribunal's jurisdiction, for example by way of a letter to the arbitrators explaining that party's non-appearance, it may be difficult to decide whether this should constitute 'participation'. In practice, this is a complex fact-dependent question, and it is probably best left to the courts to determine on a case by case basis, but it is important to note that judicial clarification of the threshold for 'participation' is likely to be necessary.

22. One effect of this uncertainty is that parties are likely to be advised that they should either fully participate in arbitral proceedings, or not participate at all (so as to preserve a full hearing before the courts – as provided by the combination of section 67 and section 72). The former would ensure that all arguments are aired before the tribunal, which is the intended effect of the proposed reforms (and consistent with the policy considerations discussed below). The latter is a potentially unintended effect of the proposed reforms, but it is submitted would be no worse than the present situation (parties may have little incentive to incur costs arguing on jurisdiction before the tribunal, if there is to be a later full rehearing before the court), and in fact would reduce the costs that might be wasted in participation before an arbitral tribunal whose jurisdiction is ultimately denied by the court. A risk does arise that a tribunal, without the benefit of argument on its jurisdiction, goes ahead with hearing the merits of a dispute, only to have its jurisdiction ultimately rejected in judicial proceedings. This risk, however, also arises under the present law, and is best addressed through tribunals themselves making preliminary jurisdictional awards (which may be subject to section 67 challenge) or through the use of the section 32 procedure discussed below.

23. The Consultation Paper expresses the additional concern that, under the present position:

> *the hearing before the arbitral tribunal becomes a dress rehearsal; the arbitral award (by effect, not design) becomes a form of "coaching" for the losing party. In those circumstances, it is not an impossible consequence that the court might come to a decision on the evidence as to jurisdiction which is diametrically opposed to the original decision of the arbitral tribunal.*[9]

[9] Paragraph 8.31.

24. This point adds to the concerns noted above with regard to costs, as it increases the likelihood that a decision by the courts (rejecting the tribunal's jurisdiction) will render the costs incurred before the tribunal wasted, a particular concern if the tribunal has only determined its jurisdiction in a single award in conjunction with the merits. It also, however, raises the question as to whether there are measures which might be adopted by the courts to prevent this practice. The Consultation Paper notes, as a possible argument against the proposal, that the courts have the ability to exercise control over the evidence adduced in proceedings brought under section 67,[10] and have exercised that control in some cases to exclude the presentation of new evidence.

25. There is an additional argument here worth considering, but not addressed in the Consultation Paper, which is the possible application of another legal doctrine known as *Henderson v Henderson* estoppel. This doctrine typically applies in the context of cases in which the English courts are deciding on whether a foreign judgment should be recognised and enforced.[11] It provides that a party who fails to raise an argument in proceedings before a foreign court which lead to a judgment against that party, where they had the opportunity to do so, may in some cases be estopped from raising that same argument before the English courts. To quote from *Henderson v Henderson* itself:

> *where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of [a] matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.*[12]

26. This principle and the reasons for it given above have been affirmed and endorsed by the Supreme Court in *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* (2013).[13] The doctrine is justified as it assists 'to bring finality to litigation and avoid the oppression of subjecting a defendant unnecessarily to successive actions',[14] or as 'limiting abusive and duplicative litigation'.[15]

27. Although this principle is generally applied in the context of foreign judicial proceedings, it is submitted that there are good reasons why it could be extended to cases in which the initial proceedings are in the form of an arbitration, particularly an arbitration conducted in England. The principle has indeed recently been recognised as applicable within the context of sequential arbitral proceedings in England and Wales (preventing litigation in later arbitral proceedings of issues which ought to have been addressed in earlier arbitral proceedings).[16]

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[10] Paragraphs 8.35-8.36.
[11] See generally eg *Dicey, Morris and Collins on the Conflict of Laws* (Sweet & Maxwell, 16th edition, 2022), para 14-047.
[12] *Henderson v Henderson* (1843) 67 ER 313, 319.
[13] [2013] UKSC 46.
[14] *Johnson v Gore Wood & Co* [2000] UKHL 65.
[15] *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46, [25].
[16] *Union of India v Reliance Industries Ltd and another* [2022] EWHC 1407 (Comm). See further eg David Williams and Mark Tushingham, 'The Application of the Henderson v Henderson Rule in International Arbitration' (2014) 26 Singapore Academy of Law Journal 1036.

The same objective of ensuring finality and avoiding duplicative successive actions applies in this context – where a party may seek to litigate issues concerning the substantive jurisdiction of a tribunal which ought to have been previously raised in arbitral proceedings.

28. On one approach, this doctrine could be seen as reducing the need for reform in this area, as it provides an additional technique through which the courts could address the risk that the hearing before the arbitral tribunal becomes a 'dress rehearsal', by effectively requiring all issues to be raised before the tribunal. On the other hand, it also supports the general policy of avoiding duplicative litigation, and in particular the argument that it may be appropriate for the courts to defer to decisions reached by an arbitral tribunal where the issues have been argued before that tribunal by the parties – that if issues must be raised before the tribunal, the tribunal's determination of those issues ought to be given some weight. On balance, the existence of this form of estoppel arguably supports the Law Commission's proposal that hearings under section 67 of the Arbitration Act 1996 should be by way of appeal rather than rehearing.

29. If this proposal were adopted, it is important to note that it ought not to preclude entirely the possibility for the parties to raise additional arguments or produce additional evidence before the court, where for some reason it was not possible to do so before the tribunal. Indeed, it is well established that it is possible in some circumstances to raise additional evidence in appellate proceedings before the English courts. The applicable principles were traditionally set out in *Ladd v Marshall* (1954),[17] in which the court held that:

> *In order to justify the reception of fresh evidence or a new trial, three conditions mast be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence most be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive: thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.*[18]

30. Although this decision was in the context of fresh evidence before the Court of Appeal of England and Wales, the same principles ought to apply if proceedings were taking place in a court of first instance, by way of appeal from the decision of an arbitral tribunal. It may be beneficial for the Law Commission to ensure that this issue is clarified as part of its recommendations – that a hearing under section 67, although (as proposed) conducted by way of appeal rather than rehearing, may nevertheless receive fresh evidence if the court exercising appellate jurisdiction considers that to be appropriate in the circumstances.

Consultation Question 23

31. This question asks whether, if the proposed change to section 67 of the Arbitration Act 1996 is adopted, a similar change should be made in relation to section 32 of the Act. Section 32 relates to the possibility that an application may be brought before the courts for a preliminary determination of the jurisdiction of the arbitral tribunal. As noted above, it requires either the consent of all the parties to the proceedings or the permission of the arbitral tribunal.

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[17] [1954] EWCA Civ 1; [1954] 1 WLR 1489. See also *Muscat v Health Professions Council* [2009] EWCA Civ 1090 (holding that although the Civil Procedure Rules give the Court of Appeal a more flexible discretion to allow evidence which was not before the lower court (CPR 52.21(2)(b)), the *Ladd v Marshall* principles remain at the heart of the discretion).

[18] Per Lord Denning.

32. The Consultation Paper notes that it is possible that a party may pursue proceedings under section 32 after the tribunal has ruled on its jurisdiction, although there is some uncertainty as to whether this was the legislative intention.[19] If this is indeed a possibility, it creates a potential overlap between the procedures under section 32 and sections 67 – either section might be relied on to invoke the jurisdiction of the court after a tribunal has determined its own jurisdiction. One possible reform which would eliminate the issue under consideration would be to amend section 32 to clarify that it should not apply after the tribunal has made a determination as to its own jurisdiction. But if this is not adopted (and it does not seem to be proposed), it is important to note that section 32 would only permit proceedings to be brought with the agreement of the parties or the tribunal.

33. If section 32 were to allow for a full hearing of the question of the tribunal's jurisdiction, and were to allow this after a determination by the tribunal of its own jurisdiction, the effect of this would be to make the proposed reforms in section 67 of the Act (as discussed above) optional rather than mandatory. They could, in effect, be departed from (i) by agreement of the parties, or (ii) by order of the tribunal, if the court is also satisfied that certain conditions are met. This is because the parties would (by agreement, or by order of the tribunal) have the option of using section 32 in order to achieve a full rehearing, as an alternative to the (proposed) section 67 'appellate' procedure.

34. Section 67 of the Act is understood to be non-derogable, in the sense that it is not possible for parties to waive by contract the right to challenge the jurisdiction of an arbitral tribunal.[20] However, if section 67 were reformed as proposed, the current understanding of section 32 would open up the possibility that section 67 would be derogable in the sense that the parties could (by agreement) *expand* the scope of review to encompass a full rehearing, by making use of the alternative procedure in section 32 of the Act. Although there is a risk that allowing the parties this possibility would increase the expense of litigation, it is in practice unlikely that parties will be willing to reach such an agreement, and in the rare circumstances in which they might consider it appropriate, it is likely to be desirable that the court should give their agreement effect.

35. On balance, it is submitted that it is not necessary or desirable to reform section 32 to bring it in line with the proposed reforms to section 67 of the Act, but it may be worth considering whether section 32 should be amended to clarify whether or not it applies after the tribunal has ruled on its own jurisdiction.

Consultation Question 24

36. This questions asks whether the proposed changes to section 67 should be mirrored in section 103, which concerns the recognition and enforcement of foreign arbitral awards (those which do not have their seat in England and Wales). At present, the application of section 103, like section 67, involves a full rehearing of questions concerning the jurisdiction of the arbitral tribunal. If the change under consideration were adopted, the effect would be that the deference given to an arbitral tribunal's determination of its own jurisdiction under section 67 (through providing that judicial proceedings are by way of appeal rather than rehearing) would also be extended to decisions of foreign arbitral tribunals.

37. At first glance, it might indeed be questioned why different arbitral tribunals should be given different levels of deference (in relation to decisions on their own jurisdiction), depending on

[19] Consultation Paper, para 8.49.
[20] Consultation Paper, para 8.41, n.47.

their seat. Those who argue in favour of a delocalised or transnational model of arbitration, which de-emphasises the significance of the seat of the arbitration,[21] might particularly question whether this is appropriate.

38. This is not a straightforward question, but on balance it is submitted that the better approach is that proposed in the Consultation Paper, which is that the proposed changes to section 67 need not be extended to section 103. This is arguably also supported by the fact that, as noted above, the 2010 Supreme Court decision in *Dallah v Pakistan* is direct authority on the interpretation of section 103 (but not on section 67).

39. Where arbitral proceedings are conducted in a foreign seat, they will be subject to the arbitral law of that seat, which will regulate a range of matters regarding the conduct of the arbitration and the role of the courts in supervising the proceedings. It may be that in some circumstances foreign arbitral proceedings will be conducted on the same basis as those in England, and where the parties have participated in the arbitral proceedings it would indeed be principled to give the determination of the tribunal the same deference as that given under section 67.

40. However, if a rule were adopted allowing full review in some circumstances, and appellate review in others, it would create a boundary which would itself require regulating. There would be a risk of decreasing the efficient resolution of the dispute, because the parties would have to litigate a prior question as to whether the determination of the tribunal as to its own jurisdiction should be given deference (by analogy with cases under the proposed approach to section 67) or whether a full rehearing would be more appropriate (to ensure the rights of the parties are protected).

41. This is arguably a context in which a rule which is simple to apply – leaving section 103 unchanged – is more desirable than a rule which could more flexibly adapt to the circumstances under which specific foreign arbitral proceedings were conducted, which would add complexity and expense to judicial proceedings under section 103.

Professor Alex Mills

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[21] For discussion of different 'models' of arbitration, see further Alex Mills, 'Arbitral Jurisdiction', in T. Schultz and F. Ortino (eds.), *Oxford Handbook on International Arbitration* (Oxford University Press, 2020); Alex Mills, *Party Autonomy in Private International Law* (Cambridge University Press, 2018), Chapter 6.