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Should Section 67 of the English Arbitration Act 1996 Be Reformed?

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The UK Law Commission recently proposed drastic reform to section 67 of the English Arbitration Act 1996 that deals with the challenge of an award on the ground of lack of substantive jurisdiction in an English seated arbitration. The Law Commission's First Consultation Paper published in September 2022 initially recommended the challenge under section 67 to take the form of an appeal. Subsequently, it revised its proposal in the Second Consultation Paper in March 2023 by providing certain guidelines as to how the section 67 challenge should be restricted by acknowledging some measure of deference due to the doctrine of competence-competence. These reform proposals entirely contradict with the spirit of *Dallah Real Estate and Tourism Holding Company v Pakistan* [2010] UKSC 46. In *Dallah*, the UK Supreme Court held that the court had the power under section 67 to conduct *de novo* review (rehearing) showing no deference to the tribunal's determination as to its jurisdiction. If the Law Commission's proposals are implemented, this will essentially result in the taking away of the court's extensive power under section 67 following *Dallah*. This post suggests that the reform proposals of the Law Commission are completely undesirable in the light of the settled principle of *Dallah*. After analysing *Dallah* and the Law Commission's respective proposals, the undesirability of such recommendations shall be evaluated.

Dallah and Section 67

Although *Dallah* was concerned with an enforcement proceeding respecting a French seated arbitration involving the application of section 103(2)(b), the Supreme Court analysed section 67, amongst other provisions. Despite acknowledging the competence-competence doctrine, the Supreme Court held that the court at the place of enforcement was entitled to revisit the issue of tribunal's jurisdiction in the same manner as the seat court. Then, the Supreme Court discussed the aspects of: (a) deference from the perspective of competence-competence, and (b) the standard of review in challenges under section 67.

(a) Competence-Competence and Deference

The Supreme Court held that the last word always remained with the court of the seat and/or the enforcement court. It also noted that the tribunal did not have exclusive power to determine its own jurisdiction. The Supreme Court further found similarities between the English and US approaches

towards competence-competence, both focusing on independent determination by the courts while pointing out the differences in treatment of the principle in different jurisdictions. The settled principle of English law to the effect that the tribunal's decision on jurisdiction had "no effect whatsoever" upon the parties' rights was endorsed by the Supreme Court. With specific reference to Article V(1)(a) of the New York Convention as incorporated in section 103(2)(b), the Supreme Court expressly rejected Dallah's concept of "deference" to the tribunal's decision.

(b) Standard of Review

While endorsing *Azov Shipping Co v Baltic Shipping Co* [1999] 1 Lloyd's Rep 68, the Supreme Court held that the entitlement of a participating party to full review under section 67 was equal to the right given to the non-participating party under section 72. The standard of factual enquiry that the court could exercise is dependent on the national law of the respective jurisdiction. Finding striking similarity between the English and French approaches in this regard, the Supreme Court held that the seat courts at France had the "widest power to investigate the facts" without considering the tribunal's determination. The treatment to be given to competence-competence and the weight to be attached to the tribunal's determination are matters of national law. *Dallah*'s reasoning is entirely consistent with the earlier case laws and other pro-arbitration jurisdictions.

Law Commission: First Consultation Paper

In its First Consultation Paper, the Law Commission considered the context where a participating party has raised objection to arbitral jurisdiction before the tribunal. It took the view that the subsequent challenge under section 67 respecting the tribunal's ruling as to its own jurisdiction should be by means of a limited appeal. Through introducing the appellate mechanism, the Law Commission aimed at avoiding double hearing by precluding *de novo* review. The purpose of proposing this reform is to reduce cost and delay through repetition. It also recommended that section 103 does not require similar changes.

Unsurprisingly, strong reaction came in the form of "Formal Response" by the Members of the Brick Court Chambers including Lord Mance (author Judge/*Dallah*/Supreme Court) and Sir Bernard Rix (author Judge/*Dallah*/Court of Appeal and *Azov Shipping*). The Formal Response argued that the "re-hearing rule in *Dallah*" reflected the underlying principle of section 67 enabling the court to conduct *de novo* review gaining universal recognition. This proposed reform would cause an unjustifiable inconsistency in the standard of review to be applied as between challenges to domestic awards and challenges to the enforcement of foreign awards respectively under sections 67 and 103. Respecting cost and delay, it was stated that a *de novo* review does not inevitably result in a full hearing in every case as the court has wider flexibility to manage its procedure.

Law Commission: Second Consultation Paper

The Law Commission in its Second Consultation Paper considered the responses to the First Consultation Paper acknowledging that its position has evolved following different reactions. It explicitly rejected the term "appeal" due to the controversies as to its potential meaning. It clarified that the reform proposal is restricted only to the participating parties wishing to have a "second bite

of the cherry." The Law Commission recommended that a measure of deference to the tribunal's decision as to jurisdiction can be justified. While the Law Commission criticised *Dallah*'s minimalist attitude towards competence-competence, it recommended that its proposal would give the doctrine some substance. It provisionally recommended that where an objection regarding jurisdiction has been raised on which the tribunal ruled, then in any subsequent challenge under section 67 by a participating party: (1) the court will not entertain any new grounds with limited exception; (2) evidence will not be reheard except for in the interests of justice; (3) the court will allow the challenge where the tribunal's decision was wrong. Further, the Law Commission provisionally proposed that the English Arbitration Act 1996 be amended to confer the power to make rules of court to implement its proposals. It also claimed that its approach is not inconsistent with *Dallah* because *Dallah* was not a decision on section 67. However, as already demonstrated, the Law Commission's recommendation of giving some deference to the tribunal's decision completely goes against the *Dallah* principle.

The Reform's Undesirability

The Law Commission's preference for deference certainly came from the competence-competence doctrine. Some points are noteworthy in this context. Firstly, whereas section 30 is not compulsory, section 67 is. While the tribunal has the power to rule on its jurisdiction, this principle can be displaced by parties' agreement. Secondly, domestic courts do always have the last word on tribunal's jurisdiction (section 30(2)). Therefore, competence-competence merely aims at ensuring procedural efficiency giving no meaningful effect to the tribunal's determination. Hence, the aspect of deference was rightly rejected in *Dallah*, which formed the basis of the Law Commission's report disregarding the clear and settled aspect of English law. The court may give no weight at all to tribunal's finding by conducting a *de novo* review. Thirdly, the treatment of competence-competence is not universally consistent and hence the principle is controversial. The Law Commission's attempt to base its reform proposal on such a controversial doctrine by departing from the settled position of *Dallah* is undesirable. Furthermore, *Dallah* is being consistently applied by the English Courts which the Law Commission itself acknowledged. Fourthly, the interpretation of vague terms like "interests of justice" and "wrong" as contained in the Second Consultation Paper may give rise to unwanted inconsistencies in an area which does not require any amendment in light of *Dallah*. Finally, in the absence of any reform being proposed towards making section 30(1) compulsory, the Law Commission's provisional recommendation to reform the mandatory provision of section 67 based on the doctrine of competence-competence is unnecessary and unwelcome.

Concluding Remarks

In conclusion, competence-competence, deference and *de novo* review are interconnected concepts. *Dallah* has developed a coherent relationship among these doctrines while concluding that section 67 permits full review. This principle aligns with the overall scheme of the English Arbitration Act 1996 and is consistent with the past and present English practice. The focus on deference in the Law Commission's proposals precluding rehearing has the potential to cause controversies in this stable field of law. Therefore, no such change is either required or necessary because *Dallah* represents the correct approach to follow.

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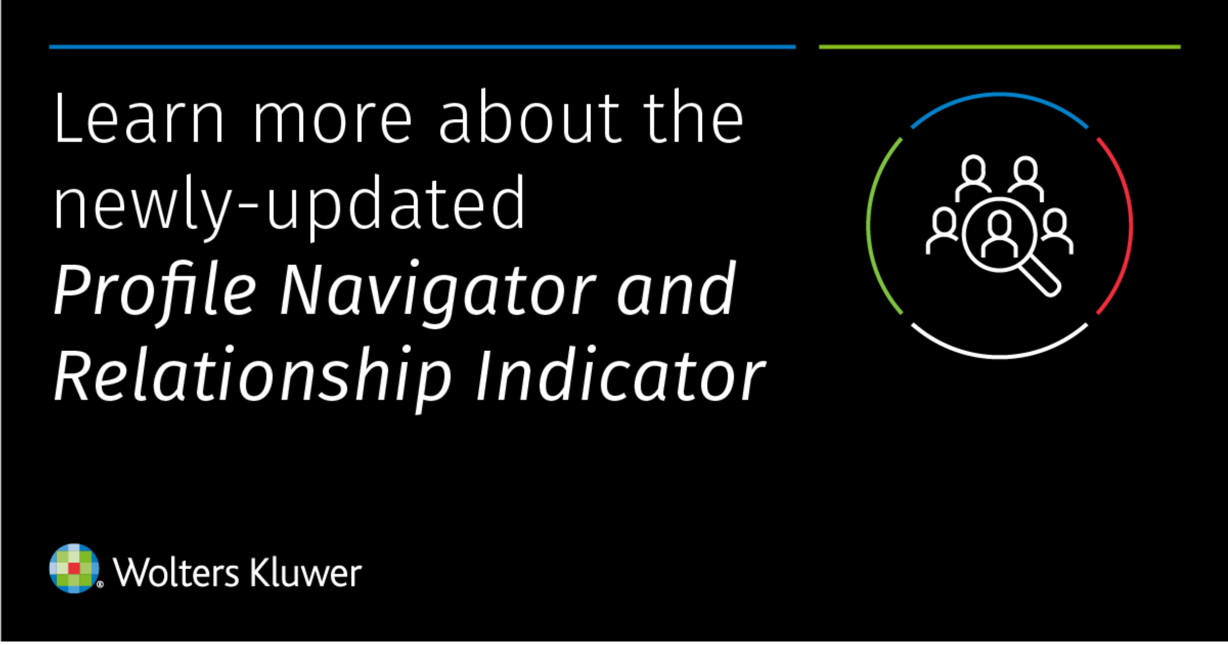

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