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The Law Commission's Recommendations on Jurisdictional Challenges: Playing Your Cards Right

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On 6 September 2023, the Law Commission of England and Wales issued its final report and draft Bill proposing amendments to the Arbitration Act 1996 (the **Act**). In this post we focus on the Law Commission's recommendations regarding jurisdictional challenges in respect of English-seated arbitrations and in particular how its two recommendations (assuming that they are passed into law) might impact on party behaviour in practice.

The Existing Framework for Jurisdictional Objections

The fundamental philosophy of the Act is that where there is a jurisdictional dispute, the party who wishes to arbitrate must simply start an arbitration. They can also bring an application under s9 to stay any court proceedings that have been commenced in breach of an arbitration agreement. A party cannot, however, approach the court for a declaration that there is a binding arbitration agreement before it commences arbitration proceedings – see *HC Trading Malta Ltd v Tradeland Commodities SL [2016] EWHC 1279 (Comm*).

It is then up to the party with a jurisdictional objection to decide how to play their hand, including whether or not to participate in the arbitration, where to bring an objection, and at what stage of the proceedings. Whilst a tribunal has the jurisdiction to decide its own jurisdiction ("*competence-competence*"), the English court retains jurisdictional oversight under the Act: a party who objects to jurisdiction has the right to put the question to the courts.

Under the Act as currently drafted, s67 allows a party to apply to the court to challenge an arbitral award on the basis that the tribunal lacked substantive jurisdiction. Developed through case law, the procedure for a s67 challenge involves a full rehearing. This is the case even if there has already been a full hearing on the same jurisdictional question before the arbitral tribunal, since any ruling of the tribunal does not bind the court. The Act also contains two other important provisions that enshrine the English court's power to oversee jurisdiction. S32 allows a party to ask the English court to determine whether a tribunal has substantive jurisdiction. In order to utilise this provision, a party requires the agreement of the other parties or the permission of the tribunal. Alternatively, a non-participating party can apply to the court under s72(1) of the Act for a declaration of lack of jurisdiction or an injunction.

The Law Commission's Proposals

The Law Commission has made two key proposals to reform this regime.

First, the Law Commission has recommended restricting the availability of a full rehearing on jurisdiction under s67 where a party has taken part in the arbitration, already raised a jurisdictional challenge before a tribunal and the challenge has been ruled on by the tribunal and dismissed. Under the Law Commission's recommendation the court "will not entertain any new grounds of objection, or any new evidence, unless even with reasonable diligence it could not have been put before the tribunal" and "evidence will not be reheard, save in the interests of justice." The intention is to limit the scope of a challenge under section 67, such that a full rehearing of jurisdictional arguments in the court is no longer available to parties who have had the opportunity to argue their full jurisdictional case before the arbitral tribunal, on the basis that this would be "wasteful and unfair."

Second, the Law Commission has proposed to amend the Act to confirm that s32 is available only as an alternative to the tribunal ruling on its jurisdiction. Under the Law Commission's recommendation, the tribunal can rule on jurisdiction first, and then be challenged under section 67, or otherwise the court can rule directly under section 32, provided that either the parties agree on this way forward or the tribunal gives permission to do so. However, s32 will only be available where the tribunal has not yet ruled on its jurisdiction.

What Are the Pathways That Will Be Available to Parties Who Wish to Bring a Jurisdictional Objection?

The Law Commission's recommendations do not change the fundamental philosophy of the Act. However, if they are passed into law, they do change the pathways that will be available to parties who wish to make a jurisdictional objection to an English-seated arbitration. The new recommendations make the binary choice as to whether or not to participate in the arbitration increasingly important. Accordingly, we have analysed participation and non-participation separately.

Participating in the arbitral process (provided that the objecting party registers their objection at the time specified under s31(1) or 31(2) of the Act) leaves the objecting party with the following routes:

1. **Challenge jurisdiction before the court using s32**: The s32 route is only available to a participating party (see *Armada Ship Management (S) Pte Ltd v Schiste Oil and Gas Nigeria Ltd [2021] EWHC 1094 (Comm)*). The Law Commission has proposed limiting this provision to cases where the tribunal has not already ruled on its jurisdiction. It is therefore an alternative to seeking the tribunal's ruling on jurisdiction and it also precludes a s67 application. Applying to the court under s32 will not necessarily derail the arbitration – the two processes can proceed in parallel (s32(4)). Indeed, the Law Commission has expressed the opinion that it would be possible for a tribunal to rule on one jurisdictional ground, while the court rules on another. However, pursuant to section 32(2)(b)(i), applications will only be considered if the determination is likely to "produce substantial savings in costs." Historically, the "substantial

saving in costs" has been the avoidance of both a jurisdictional hearing before the tribunal but also a challenge under s67. This latter cost saving will remain a factor following the changes recommended by the Law Commission.

2. **Challenge jurisdiction before the Tribunal and then apply under s67 if unsuccessful:** A party can choose to participate in the arbitration and make their jurisdictional objection before the tribunal. If they lose, they can still choose to apply to the court to challenge an award, but this is, of course, where the new recommendation regarding s67 will bite. The challenging party will no longer be entitled to a full rehearing of that challenge before the court. Instead, the court will undertake a "review" as outlined above.

Academic commentary also refers to a common law right to seek an injunction or declaratory relief from the court for want of jurisdiction, at any time. However, we have not come across any reported examples of this in practice, and it is unclear how this right might be affected by the new proposals.

There is also a route for resisting enforcement on jurisdictional grounds. Whether it is possible to do so for an English-seated arbitral award will depend on whether the right to raise the challenge has been lost under s73 of the Act.

Non-participation in the arbitral process provides the objecting party with the following two alternatives:

1. **Apply under s72 while the arbitration is ongoing**: A respondent party can choose to take no part in the proceedings and seek a declaration or injunction from the court under s72. This application can be made at any time. According to the Law Commission's final report (which does not recommend any change in respect of this section), the purpose of s72 is for the objecting party "to stop" the arbitration without having to await an award. The courts have indicated that s72 provides an important protection for parties to ensure that they are not obliged to participate in arbitration proceedings. If an application is made under s72 at an early stage in the putative arbitration, it could have the advantage of flushing out the jurisdictional issue early on, and potentially avoids the cost of arbitrating. It is not possible to bring an application either under s32 or s67 once a s72 application has been made, as it creates an estoppel. Accordingly, if the court rules that a valid arbitration agreement exists, this will prevent the prospect of a subsequent challenge to an award from a non-participating party. However, in practice, s72 applications made in advance of a tribunal's award are often met with corresponding stay applications, which will be granted if the court is satisfied that an arbitration agreement exists between the parties. Nonetheless, successful s72 applications are a means of terminating the arbitration.
2. **Wait to the end of the putative arbitration and challenge under s67 and s72(2)**: A party can take no part in the arbitration proceedings, wait until an award is rendered and then make a challenge under both s67 and s72(2). Such a challenge will be a full rehearing, in line with the previous position, as the new recommendations do not apply to parties who have opted not to participate in the arbitration proceedings.

Contesting jurisdiction at the enforcement stage is also available for a non-participating party bringing a s72 application – see *Sino Channel Asia Ltd v. Dana Shipping and Trading PTE Singapore and Anor [2016] EWHC 1118 Comm*.

Potential Impact on Party Strategy

The Law Commission's recommendations have narrowed the scope of sections 32 and 67 respectively. But what does this mean in practice?

First and foremost, it means more upfront tactical decision-making. We may, for example, see an increased number of non-participating parties. Whilst this could be a brave strategy (because it requires letting the arbitral proceedings run their course), there are some cases where it could be advantageous. For example, a respondent party might be able to preserve the right to bring both a s72 and a s67 application without revealing their position through participation in the arbitration.

For claimants who are worried about facing a jurisdictional objection, the recommendations might bring more certainty as to what strategy they might face (i.e., the pathways outlined above). They may also take comfort that their counterparty cannot have two bites at the cherry with a full rehearing under s67, which should hopefully reduce the costs and time that they can expect to incur.

It will also be interesting to see if there is any impact on the number of s32 applications. This is historically not a heavily-utilised provision. It is intended to be an exceptional procedure rather than the ordinary method for challenging jurisdiction (and not one on which the Commercial Court reports in its annual statistics). The provision requires participation of the party who objects to jurisdiction as well as the permission of either the counterparty or the tribunal. It will be interesting to see (i) whether there is an increase in the number of parties applying for the permission of the tribunal for a s32 application and (ii) how tribunals (and other parties) respond to such applications.

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