Jurisdictional Disputes under the Arbitration Act 1996: A Procedural Route Map

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IT IS some years since the Arbitration Act 1996 ('AA 1996' or 'the 1996 Act') introduced into the arbitral law of England and Wales[1] principles of Kompetenz-Kompetenz largely derived from the UNCITRAL Model Law on Arbitration ('Model Law').[2] It did so by providing that, unless otherwise agreed by the parties, and subject to challenge by any available arbitral process of appeal or review or in accordance with the provisions of Part I of the 1996 Act, an arbitral tribunal may rule on its own substantive jurisdiction,[3] that is, as to whether there is a valid arbitration agreement, whether the tribunal is properly constituted and whether the matters in question have been submitted to arbitration in accordance with the arbitration agreement.[4]

There is, now, a significant body of case law concerning this new regime and its relationship with the court's power to consider jurisdictional issues whether under express provisions of the 1996 Act or at common law. This article written in early 2004, and revised for publication in mid 2005, considers, in the light of that case law and the provisions of the 1996 Act, the options available to the

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1 The 1996 Act also applies in Northern Ireland, thus the principles discussed in this article are applicable there. The 1996 Act does not apply in Scotland.

2 There is no single doctrine of Kompetenz-Kompetenz (compétence-compétence). Rather, these words embody a range of concepts, which differ between jurisdictions, concerning the relationship between the arbitral tribunal and the court in deciding questions concerning the tribunal's jurisdiction and, where the tribunal has determined its own jurisdiction, the manner and timing of any recourse to the court in respect of the tribunal's determination, and the circumstances in which the tribunals' determination may become final. *See* W. Park, 'The Arbitrability Dicta in *First Options v. Kaplan*' in (1996) 12 *Arb. Int'l* 137 at p. 149.

3 AA 1996, s. 30; note also s. 7 (giving effect to the doctrine of separability). These provisions are analogous to, although differently worded from, art. 16(1) of the Model Law. Unlike art. 16(1), they can be excluded by agreement of the parties; *see* AA 1996, s. 4.

4 AA 1996, s. 30(1). Compare art. 36(1)(a)(i), (a)(iii) and (iv) of the Model Law.

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parties and the tribunal for dealing with questions concerning the tribunal's substantive jurisdiction where the seat (the legal place) of an arbitration is in England and Wales.

Part I of this article considers how jurisdictional objections raised by a respondent or intended respondent to arbitral proceedings are addressed.[5] Part II considers how jurisdictional objections to arbitration are dealt with if raised in the context of proceedings to stay or restrain a court action on the grounds that the claims in that action should be arbitrated. Part III discusses a number of procedural matters relevant to proceedings in the courts of England and Wales concerning arbitration. Part IV considers how the manner in which objection to an arbitral tribunal's jurisdiction are determined may impact the enforcement of its award on the merits, both in England and Wales and internationally.

I. JURISDICTIONAL OBJECTIONS RAISED BY A RESPONDENT

The 1996 Act provides two alternative procedures for dealing with jurisdictional objections by a respondent or intended respondent to arbitral proceedings. One envisages recourse to the court without the respondent's participation in the arbitration. The other envisages the respondent's participation in the arbitration, albeit subject to its jurisdictional objection, with certain rights of recourse to the court thereafter.

a. Jurisdictional Challenges by a Non-Participant in the Arbitration

AA 1996, s. 72(1) provides that a person alleged to be a party to arbitral proceedings but who takes no part in the proceedings may challenge the tribunal's substantive jurisdiction by proceedings in court for a declaration, injunction or other appropriate relief.[6] This codifies, in substance, the common law regime under which, prior to the 1996 Act, an arbitral tribunal's jurisdiction could be challenged in court;[7] but with one significant change. Unlike at common law, recourse to the court under s. 72(1) is only available to those who take no part in the arbitral proceedings. This right is lost by appointing or participating in the appointment of an arbitrator, or by appearing before or corresponding with the tribunal with a view to it exercising any power, even if such steps are expressly stated to be subject to a jurisdictional objection.[8] Thus, particular care must be taken when advising the tribunal, or any arbitral institution responsible for its constitution, that its jurisdiction is disputed, to ensure that the communication, considered objectively in the light of any rules alleged to be incorporated into the

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5 Respondent, for the purpose of this article, includes a respondent to a counterclaim.

6 In *Law Debenture Trust Corp PLC* v. *Elektrim Finance BV* [2005] EWHC 1412 (ch), an attempt was made to stay s. 72 proceedings to arbitration, on the grounds that the tribunal should deal with the jurisdictional dispute. Not surprisingly the court rejected this argument.

7 As discussed in cases such as *Brown (Christopher) Ltd* v. *Genossenshaft and others* [1954] 1 QB 8.

8 Contrast the position under AA 1996, s. 31(1), discussed *infra*.

arbitration agreement, cannot be interpreted as a request that the tribunal or institution exercise any power; for instance a power to consider and rule on its jurisdiction.[9] If it is, the right of recourse to the court under s. 72(1) will be lost.

i. The court's powers under section 72(1)

In proceedings claiming relief under s. 72(1), the court will determine, on oral evidence if necessary, the jurisdictional objection referred to it, dismissing the claim if it concludes that the tribunal has jurisdiction, or granting the declaration or injunction sought if it concludes that the jurisdictional objection is well founded. As with any other judgment of the court, its decision will, subject to appeal, be final and conclusive between the parties in any subsequent action or arbitration in England and Wales under the doctrine of *res judicata*.[10] If an arbitral tribunal, having been advised that an action is pending under s. 72(1), does not stay the proceedings before it pending the outcome of that action, it may be possible to obtain an interim injunction from the court to restrain the respondent or, if appropriate, the tribunal, from prosecuting the arbitration pending the final determination of the jurisdictional objection.[11]

ii. Timing of a section 72 application

In practice, an alleged party to arbitral proceedings who takes no part in the arbitration because of jurisdictional objections should bring those objections before the court under s. 72(1) promptly. Declarations and injunctions are equitable remedies and may be refused on the grounds of delay[12] irrespective of the merits of the application, leaving the jurisdictional question to be determined by the tribunal. Furthermore, the risk for the non-participant of having an award on the merits made against it in default of its case, only for the court to conclude, on enforcement proceedings, that the tribunal did have jurisdiction is, generally,

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[9] *See Caparo Group Ltd* v. *Fagor Arrasate Sociedad Cooperativa* [2000] ADRLJ 254, which concerned an alleged arbitration agreement incorporating the ICC Rules. Clarke J. considered that had Caparo (the party disputing jurisdiction) written to the ICC asking the ICC Court to reject Fagor's application for arbitration under art. 8(3) of the ICC Rules, this would have been sufficient participation to bar recourse to s. 72(1); In *Law Debenture Trust Corp PLC* v. *Elektrim Finance BV* [2005] EWHC 1412 (ch) there was no participation as the alleged respondent to the arbitration did not appoint an arbitrator and did not seek to advance arguments in the arbitration for the benefit of the arbitrators.

[10] For an introduction to the relevant principles *see Fidelitas Shipping Co. Ltd* v. *V/O Exportchleb* [1965] 1 Lloyd's Rep. 222 at 229, 300.

[11] As was done in *Zaporozhye Production etc. Society* v. *Ashly Ltd* [2002] EWHC 1410 (Lawtel). In that case, the application for an interim injunction was dismissed, not because the court considered that it had no power to grant such relief, but because the balance of convenience was strongly in favour of allowing the arbitration to continue. But note the contrary view, that an interim injunction should not be available in such circumstances, in Mustill and Boyd, *Commercial Arbitration* (2nd edn, 2001), p. 362.

[12] In *Zaporozhye Production etc. Society* v. *Ashly Ltd* [2002] EWHC 1410 (Lawtel) an interim injunction to restrain arbitral proceedings, applied for the day before the arbitral hearing, was refused on the grounds that it was not appropriate to grant the relief claimed at such a late stage, the balance of convenience being overwhelmingly against doing so. The court considered that the applicant's misfortune (in being faced with a hearing in an arbitration in which it had not participated) was of its own making in that it could have, but had not taken the opportunity to raise its jurisdictional objections in the arbitration.

too great to justify allowing the arbitration to progress without the jurisdictional question being determined.

iii. Non-participant's right to challenge an arbitral award under section 67

If, despite these risks, the non-participant does not bring its jurisdictional objection to the court under s. 72(1) before the tribunal makes an award, or it is denied relief under that section for procedural reasons, such as delay, not concerned with the merits of the objection,[13] it may question the tribunal's award on jurisdictional grounds under AA 1996, s. 67. The right to do so is subject to the 28-day timescale provided for in AA 1996, s. 70(3).[14] But, unlike a participant in the arbitration, the non-participant need not first exhaust any available arbitral process of appeal or review, or recourse to the tribunal, under s. 57, to correct its award or make an additional award.[15]

b. Can a Party Commencing Arbitral Proceedings have Recourse to Section 72?

A party commencing arbitral proceedings who faces or anticipates jurisdictional objections from its opponent cannot, itself, have recourse to the court under s. 72(1) to have the jurisdictional dispute resolved. Rather, it should proceed with the appointment of the tribunal and have the jurisdictional dispute determined by that tribunal.[16] If the appointment of the tribunal, as in the case of a two or three-person tribunal where each party appoints an arbitrator, involves the respondent's cooperation, and that cooperation is not forthcoming, the claimant may be able to overcome the impasse by recourse to ss. 17 or 18 of the 1996 Act, if available.[17]

i. Constituting the tribunal under section 17

Section 17 provides, unless otherwise agreed by the parties, a mechanism for constituting the tribunal where each of two parties to an arbitration agreement is to appoint an arbitrator and one party refuses to do so or fails, within the specified time,[18] to appoint its arbitrator. In such a case, the party who has duly appointed its arbitrator may give written notice to the party in default that it proposes to appoint its arbitrator to act as sole arbitrator. If the party in default does not make and notify an appointment within seven days of being given that notice, the other may (presumably, although, this is not stated, by notice to the

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13 *See* the discussion on this point in *Zaporozhye Production etc. Society* v. *Ashly Ltd* [2002] EWHC 1410 (Lawtel).

14 AA 1996, ss. 67 and 70 are considered in greater detail *infra*.

15 AA 1996, s. 72(2).

16 *Vale de Rio Doce Navegaçao SA* v. *Shanghai Bao Steel Ocean Shipping Co. Ltd* [2000] 2 Lloyd's Rep. 1.

17 AA 1996, ss. 17 and 18 are non-mandatory, *see* s. 4. Thus, they will be excluded if the parties agree arbitral rules that provide for an arbitral institution to make the necessary appointment. *See e.g.*, art. 7.2 of the 1998 LCIArb Rules, art. 8(4) of the 1998 ICC Rules and art. 6 of the UNCITRAL Arbitration Rules.

18 This period is usually stated in the arbitration agreement. If not, the period is 14 days after service of a written request to make the appointment, AA 1996, s. 17(4), (5), (6). If the parties' arbitration agreement includes provisions dealing with this problem, s. 17 will be excluded and its machinery will not be available to challenge the sole arbitrator's appointment; see *Minermet SpA Milan* v. *Luckyfiled Shipping Corp SA* [2004] 2 Lloyd's Rep 348.

other party and to the arbitrator, he having agreed to act as sole arbitrator)[19] appoint its arbitrator as sole arbitrator; the awards of the sole arbitrator being binding on both parties as if he had been appointed by agreement.[20] The party in default can, however, apply to the court to set aside the party arbitrator's appointment as sole arbitrator, but must do so promptly.[21] If the court allows the application and sets aside the appointment as sole arbitrator, the tribunal will, in so far as necessary, be constituted by the court exercising its powers under s. 18.[22]

ii. Possible difficulties with section 17

The mechanism in s. 17 is premised on the assumption that there is an arbitration agreement between the parties. It may be because the respondent disputes this that it is unwilling to appoint an arbitrator. If so, the respondent should, in order to avoid the jurisdictional objection being determined by the claimant's arbitrator as sole arbitrator, apply to the court to have the jurisdictional objection determined under s. 72(1). The respondent should couple that application with a protective application to set aside the appointment of the other party's arbitrator as sole arbitrator in case the court rejects its case on jurisdiction.

A further difficulty with s. 17 is that an administrative mechanism that enables one party to unilaterally appoint its arbitrator as sole arbitrator, could, in some jurisdictions, be regarded as contrary to the parties' agreement, or to public policy requirements for equality between the parties in designating arbitrators to a three person tribunal.[23] Furthermore, there may be relationships between an arbitrator and the party which, while acceptable in the case of a party arbitrator appointed to a tribunal of arbitrators, are unacceptable for a sole arbitrator.[24] In consequence, reliance on s. 17 to constitute the tribunal may, in some jurisdictions, provide grounds for refusing recognition and enforcement of the

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19 *See* Mustill and Boyd, *supra* n. 10 at p. 182, considering the equivalent provision in the Arbitration Act 1950, s. 7 (now repealed). Unlike its predecessor, AA 1996, s. 17 is not limited to tribunals comprising two arbitrators, such as those where party arbitrators are replaced, in the event of disagreement, by an umpire. It also encompasses tribunals of three, where each party appoints an arbitrator to the tribunal.

20 AA 1996, s. 17(1), (2).

21 If not, the court may refuse to exercise its discretion. *See Durtnell* v. *Secretary of State for Trade and Industry* [2000] BLR 771 (considering the court's discretion under s. 18 but equally applicable to s. 17).

22 AA 1996, ss. 17(3), 18(1).

23 *BKMI Industrieanlagen GmbH* v. *Ducto Co. (Pty) Ltd* (France, Cour de Cassation) reported in English at [1994] ADRLJ 36. Although the issue in that case was whether two respondents could be required by the ICC to appoint a single party arbitrator to a three arbitrator tribunal, while the claimant remained entitled to appoint its own arbitrator, it is difficult to see that a procedure which enabled one party to appoint its party arbitrator as sole arbitrator would be viewed with any greater favour. But note, *Shipowner (Netherlands)* v. *Cattle and Meat Dealer (Germany)*, Germany, Bundesgerichtshif (Federal Supreme Court), 1 February 2001, *XXIX YB Comm. Arb* 700, where it was held that the appointment of a party arbitrator as sole arbitrator in default of a nomination by the other party, under the GLENCON rules, did not violate public policy such that his award would not be enforced under article V(2) of the New York Convention. The Court refused to consider allegations that the sole arbitrator was biased because of his connection with the party appointing him, because the award had not been challenged on such grounds at the seat (England).

24 For a discussion of the somewhat anomalous position of party appointed arbitrators, *see* Redfern and Hunter, *Law and Practice of International Commercial Arbitration* (4th edn, 2004), pp. 199–201.

sole arbitrator's award.[25] Thus, if it is anticipated that the award will need to be recognised or enforced outside England and Wales, it may be safer to disregard the machinery in s. 17 and, instead, to apply to the court under s. 18 to appoint an arbitrator for the defaulting party.

iii. Constituting the tribunal under section 18

Section 18 provides that any party to an arbitration agreement may apply to the court to constitute the arbitral tribunal in a case where the procedure for the appointment of arbitrators has failed.[26] Although there is no such failure where an appointment is duly made under s. 17, unless that appointment is set aside,[27] an application under s. 18 does not appear to be precluded merely because s. 17, although available, is not used.

On a s. 18 application, the court can constitute the tribunal by giving directions as to the making of any necessary appointments, by directing that the tribunal shall be constituted by such appointments (or any of them) as have been made, by revoking any appointments made, and/or by making any necessary appointments itself. Appointments made by the court, but not, apparently, otherwise, take effect as if made with the agreement of the parties.[28] Thus, where a s. 18 application is made because the respondent has failed to appoint its arbitrator to the tribunal, the appropriate relief will generally be the appointment of the respondent's arbitrator by the court.[29]

iv. Jurisdictional objections on a section 18 application

It is unclear whether, on a s. 18 application, the court must be satisfied that the parties have concluded an arbitration agreement and must, in consequence, finally determine any dispute as to the validity of the alleged agreement before

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[25] *See* Arts V(1)(d) and V(2)(a) of the New York Convention. In *Rederi Aktiebolaget Sally* v. *Srl Temarea* (Italy, Corte di Appello di Firenze, 13 April 1978) IV *YB Comm. Arb.* 294, the court held that a tribunal constituted in accordance with AA 1950, s. 9(1) which provided that a tribunal of three takes effect as a tribunal of two with an umpire, was not in accordance with the parties' agreement, which required three arbitrators. Thus, it contravened Art. V(1)(d) of the Convention since, under that article, the curial law was only relevant in the absence of party agreement. Similar arguments have, however, been rejected in a number of other jurisdictions on the grounds that English curial law concerned with the constitution of the tribunal, in particular AA 1950, s. 7 (the predecessor of AA 1996, s. 17) and s. 9(1) take effect as part of the parties' agreement since they have chosen to arbitrate in England and Wales. *See X* v. *Naviera YSA* (Spain, Tribunal Supremo, 3 June 1982) XI *YB Comm. Arb.* 527; *Associated Bulk Carriers* v. *Mineral Import Export* (USA, District Court, Southern District of NY, 30 January 1980) IX *YB Comm. Arb.* 462. Possible objections to a tribunal constituted under s. 7 of the 1950 Act under Art. V(2)(a) of the Convention (public policy) were considered, but rejected, in *Efxinos Shipping* v. *Rawi Shipping* (Corte di Appello of Geneva) VIII *YB Comm. Arb.* 381. The were rejected on the grounds that a sole arbitrator appointed under that provision did not lack impartiality, *per se*, and s. 7 provided a safety valve in that a court could set aside the appointment. But since only the party seeking enforcement appeared at the hearing in that case, the arguments were not fully explored.

[26] The application should be made promptly, *Durtnell* v. *Secretary of State for Trade and Industry* [2000] BLR 771.

[27] *See* s. 18(1).

[28] AA 1996, s. 18(3), (4).

[29] The advantage is that this preserves the tribunal structure agreed by the parties and most closely mirrors the equivalent power under art. 11(4) of the Model Law.

considering its discretion to constitute the tribunal.[30] It was said by Thomas J. in *Vale de Rio Doce Navegaçao SA* v. *Shanghai Bao Steel Ocean Shipping Co Ltd*[31] that this was not the case. He considered that the court need only be concerned with whether there was sufficient on the material before it to enable it to appoint an arbitrator. It was for the arbitral tribunal to give a definitive ruling on the validity of the arbitration agreement under s. 31, or for the court to deal with that question on an application under s. 32. On the other hand, in *Atlanska Plovidba* v. *Consignaciones Asturianas SA*[32] it was held that before the court could exercise its jurisdiction under s. 18 it had to be satisfied that there was a valid arbitration agreement between the parties and that an effective notice of arbitration had been served.

There was a similar debate about how the court should deal with disputes about the existence of an arbitration agreement on an application under s. 9 of the 1996 Act to stay court proceedings said to have been brought in contravention of that agreement.[33] But, after some initial uncertainty, the Court of Appeal concluded that, where a court was acting under this statutory power, rather than its inherent jurisdiction, it has to find that there was a valid arbitration agreement binding the parties before it could stay the proceedings before it.[34] Applying similar reasoning to s. 18 which, like s. 9 is predicated on their being an arbitration agreement between the parties, suggests that the court cannot exercise its discretion under s. 18 without first concluding that the parties have agreed to arbitration. Moreover, it is difficult to see why a person who disputes that it has agreed to arbitration should have an arbitrator foisted on it by the court on a s. 18 application so that the issue can be decided by an arbitral tribunal prior to the matter coming back to the court on a s. 67 challenge. It is also difficult to see why, since the matter is already before the court, it is not cost effective and in the interest of good litigation management for the court to deal with the question at that time. Thomas J.'s suggestion that the court need not do so because, in appointing an arbitrator, it is doing no more than the party in default should have done[35] begs the question of why a party who disputes the

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30 This was the position under s. 7 of the 1950 Act, *Mark Rich and Co. AG* v. *Societa Italina Impianti* [1989] 1 Lloyd's Rep. 548 at 549.

31 [2000] 2 Lloyd's Rep. 1 at 11. Thomas J. found support for his view in the opinion of the Advocate-General in ECJ reference *Mark Rich and Co. AG* v. *Societa Italina Impianti* [1991] 1 ECR 3855 at 3874, para. 27. But it is difficult to see the relevance of the Advocate-General's opinion to this question. The issue in that case was whether an application to a court to appoint an arbitrator ceased to be within the arbitration exception in Art. 1(4) of the Legano Convention if, on that application, the respondent disputed the existence of the arbitration agreement. The Advocate-General was not concerned with whether, on such an application, the existence of the arbitration agreement should be determined by a national court or by an arbitral tribunal. It was, in any case, common ground between the parties that, on an application under Arbitration Act 1950, s. 7 (the then relevant provision), the court had to find that they had concluded a valid arbitration agreement before it could consider its discretion to make an appointment; *see* [1991] 1 ECR 3855 at 3873, para. 25.

32 [2004] 2 Lloyd's Rep. 109. An effective notice of arbitration was necessary because in that case, the appointment process only commenced after the notice of arbitration was served, thus it could not be said to have broken down if an effective notice of arbitration had not been served.

33 AA 1996, s. 9 gives effect to Art. II of the New York Convention.

34 *Al-Nami* v. *Islamic Press Agency* [2000] 1 Lloyd's Rep. 522 at 524 and 528 (CA).

35 [2000] 2 Lloyd's Rep. 1 at 12.

existence of an arbitration agreement has, nevertheless, agreed to that dispute being resolved by an arbitral tribunal!

In practice, however, uncertainties over the ambit of s. 18 can be readily avoided, as was done in *Sinochem* v. *Fortune Oil Ltd*,[36] if the respondent to an application under s. 18 makes a cross-application under s. 72(1) for a declaration that it is not a party to the arbitration agreement. In *Sinochem* v. *Fortune Oil Ltd*, the court gave directions for a trial of a preliminary issue concerned with the validity of the arbitration agreement and, having decided that question in the respondent's favour, dismissed the s. 18 application.

c. Jurisdictional Objections by a Participant in the Arbitration

A participant in arbitral proceedings is not barred from raising jurisdictional objections in the course of the arbitration merely because it has appointed or participated in the appointment of an arbitrator.[37] But, thereafter, and irrespective of whether or not the tribunal has power to rule on its own jurisdiction, it has only a limited period in which to raise objections to the tribunal's substantive jurisdiction, albeit the tribunal can admit late objections if it considers the delay is justified.[38]

An objection to the tribunal's jurisdiction will be concerned with whether there is a valid arbitration agreement, whether the tribunal is properly constituted and whether the matters in question have been submitted to arbitration in accordance with the arbitration agreement.[39] A contention that a contract containing an arbitration clause is void is not, of itself, a challenge to the tribunal's jurisdiction. Under the doctrine of separability, the arbitration agreement may not be affected by the contract's invalidity. If the validity of the arbitration clause is disputed as well, this should be made clear; otherwise the right to challenge the tribunal's award on jurisdictional grounds may be lost.[40]

i. Objections to the tribunal's jurisdiction at the outset

Under s. 31(1) of the 1996 Act, an objection that the tribunal lacks substantive jurisdiction at the outset must be raised not later than the time that the objecting party takes its first step in the arbitral proceedings to contest the merits of any matter in relation to which it challenges the tribunal's jurisdiction.[41]

This requirement was considered in *Athletic Union of Constantinople* v. *National Basketball Association*.[42] The court held that initial communications between the

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36 [2000] 1 Lloyd's Rep 682.

37 AA 1996, s. 30(1).

38 AA 1996, s. 31(2), (3). The tribunal's powers under s. 30 can be excluded by agreement of the parties. The procedures in s. 31 are mandatory, *see* s. 4(1).

39 AA 1996, s. 30(1).

40 *Vee Networks Ltd* v. *Econet Wireless International Ltd* [2005] 1 Lloyd's Rep. 192.

41 Based on, but more ambiguously worded than, art. 16(2) of the Model Law.

42 [2002] 1 Lloyd's Rep. 305 (Deputy Judge Field QC). The arbitration was being conducted under the UNCITRAL Model Rules, which give the respondent the right to serve a defence.

parties and the arbitral tribunal concerned with administrative and early preparatory matters did not constitute 'a step in the arbitral proceedings to contest the merits of any matter' and concluded that, on the facts of the case, the first such step was the service of a defence on the merits. The wording of s. 31(1) does, however, seem to envisage that a first step to contest the merits might be taken before service of a defence. Thus, in *Capital Trust Investments Ltd* v. *Radio Design AB*[43] which concerned the somewhat similar wording of s. 9 of the 1996 Act (which provides that an application for a stay of legal proceedings cannot be made by a person after it has 'taken any step in those proceedings to answer the substantive claim'), the Court of Appeal held that a step in the proceedings to answer a substantive claim was one that demonstrated an election to abandon the right to a stay in favour of allowing the action to proceed and which had the effect of invoking the jurisdiction of the court.

If similar principles apply to s. 31(1), communications with the tribunal or attendance at a meeting called by it would not, of themselves, bar a later objection to the tribunal's jurisdiction at the outset. But a request to the tribunal to exercise its discretion, for instance to give directions for service of a defence, would be a step in the proceedings to contest the merits. Assuming the applicable arbitral rules did not give a right to serve a defence, such a request would not only evidence an intention to abandon any objection to the tribunal's substantive jurisdiction at the outset, but would invoke the tribunal's jurisdiction.[44]

ii. Objections that the tribunal is exceeding its jurisdiction

Under s. 31(2) of the 1996 Act, an objection arising during the course of arbitral proceedings that the tribunal is exceeding its substantive jurisdiction 'must be made as soon as possible after the matter alleged to be beyond the tribunal's jurisdiction is raised'.[45]

These words were considered in *Hussman (Europe) Ltd* v. *Al Ameen Development & Trade Co*,[46] where the court considered that they focused on when the objecting party knew, or could with reasonable diligence have discovered, the grounds for the objection. Thus, it held that the respondent was not barred from raising a

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43 [2002] 2 All ER 150 (CA).

44 *See* comment to this effect in *Patel* v. *Patel* [2000] QB 551 (CA) (also concerned with AA 1996, s. 9). *Patel* v. *Patel* was cited in *Athletic Union of Constantinople* v. *National Basketball Association*, but the Athletic Union does not appear to have sought the tribunal's permission to serve a defence, presumably because art. 19 of the UNCITRAL Model Rules gave it the right to do so.

45 Based on art. 16(2) of the Model Law.

46 [2001] 2 Lloyd's Rep. 83. The objection was that the company in whose name the arbitration was being conducted was not a party to the arbitration agreement. Such an objection might, conceptually, be regarded as concerned with a lack of substantive jurisdiction at the outset (s. 31(1)), since it suggests that the tribunal had no jurisdiction at all, rather than as being concerned with an excess of jurisdiction (s. 31(2)), which implies that the tribunal has some jurisdiction. But it appears to have been assumed by those involved in the case, or at any rate by the applicant, that the difference in wording between s. 31(1) and (2) was only concerned with the time at which the grounds of the objection arose, not with whether the objection went to the whole or only part of the tribunal's jurisdiction. This assumption was shown to be erroneous when the matter came back to the court as *Hussman (Europe) Ltd* v. *Ahmed Pharam* [2003] EWCA (Civ) 266 (Lawtel), discussed *infra*.

jurisdictional objection on the first day of the hearing of the merits when it was only on that day that the claimant disclosed previously requested information that provided the basis for that objection.

iii. Statutory waiver (AA 1996, s. 73(1))

The need for objections to the tribunal's substantive jurisdiction to be raised within the periods provided for in s. 31, or to persuade the tribunal to admit the objection late, is reinforced by the statutory waiver in s. 73(1). This provides that a party to arbitral proceedings who takes part or continues to take part in those proceedings without making, either forthwith or within such time as allowed by the arbitration agreement[47] or by the tribunal or by any provision of Part I of the 1996 Act (which includes s. 31), any objection that the tribunal lacks substantive jurisdiction, may not raise that objection later, either before the tribunal or the court, unless it shows that, at the time it took part or continued to take part in the proceedings, it did not know and could not with reasonable diligence have discovered the grounds for the objection.[48]

It is for the party relying on the statutory waiver as a bar to an objection to show that the party raising that objection has taken part in the arbitration.[49]

A person takes part in arbitral proceedings if it commences those proceedings, if (query) it appoints or participates in the appointment of an arbitrator, if it attends before the tribunal, or if, having regard to any applicable arbitration rules, it invites the tribunal or any relevant institution to decide on any matter of procedure or substance.[50] Once a person has started to take part in the proceedings, it continues to do so merely by allowing the proceedings to continue, even if no further positive steps are required of or taken by it; for example, during the period when the tribunal is preparing its final award up to the date of publication of that award. A party who no longer wishes to take part in an arbitration must make clear that it is withdrawing from the proceedings.[51] But withdrawal does not, of itself, enable objections that are already barred by operation of the statutory waiver to be

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47 AA 1996, s. 73(1)(a). Section 73(1) is not concerned only with jurisdictional objections (see s. 73(1)(b)-(d)) but the other matters it covers are not relevant to this article. For an example of arbitral rules that provide for when jurisdictional objections must be taken, *see* art. 21(3) of the UNCITRAL Arbitration Rules, discussed in *Athletic Union of Constantinople* v. *National Basketball Association* [2002] 1 Lloyd's Rep. 305.

48 AA 1996, s. 73(1). The equivalent provision in art. 4 of the Model Law is significantly narrower in scope.

49 *Rustal Trading Ltd* v. *Gill & Duffus SA* [2000] 1 Lloyd's Rep. 16. But note *Vee Networks Ltd* v. *Econet Wireless International Ltd* [2005] 1 Lloyd's Rep. 192, where the court took the s. 73(1) point of its own motion.

50 Such conduct would be sufficient participation to deprive a person of recourse to the court under s. 72(1), even though appointing or participating in the appointment of an arbitrator does not affect a party's right to raise jurisdictional objections before the tribunal, s. 31(1). Compare *Caparo Group Ltd* v. *Fagor Arrasate Sociedad Cooperativa* [2000] ADRLJ 254 (where there was no participation) with *Rustal Trading Ltd* v. *Gill & Duffus SA* [2000] 1 Lloyd's Rep. 14, *Vale de Rio Doce Navegaçao SA* v. *Shanghai Bao Steel Ocean Shipping Co. Ltd* [2000] 2 Lloyd's Rep. 1, and *JT Mackley & Co. Ltd* v. *Gossport Marina Ltd* [2002] BLR 367; *Vee Networks Ltd* v. *Econet Wireless International Ltd* [2005] 1 Lloyd's Rep. 192 (where there was participation).

51 *Rustal Trading Ltd* v. *Gill & Duffus SA* [2000] 1 Lloyd's Rep. 16. But note *Wicketts* v. *Brine Builders* (2002) CILL 1805 (TTC) where (*Rustal Trading Ltd* v. *Gill & Duffus SA* not being cited) the judge in an extempore judgment, said, somewhat tentatively, that a party who expressed resistance to directions which it (and the court subsequently) considered misconceived did not, by doing so, continue to take part in the proceedings.

revised. It merely prevents the statutory waiver barring objections where grounds for those objections arose at the time of the withdrawal or subsequently.[52]

If participation is shown, it is for the party seeking to avoid the effect of s. 73(1) to show, by adducing evidence as necessary, that it raised its objection in due time or, if it did not do so, that the reason for the failure was that it did not know and could not with reasonable diligence have discovered the grounds for that objection.[53] Reasonable diligence may, in this context, involve the obtaining of appropriate legal advice.[54]

Under s. 73(1), an objection is raised in due time if it is made forthwith, that is promptly, without unnecessary delay, this being a question of fact,[55] or if it is made within such time as is allowed in the arbitration agreement, the tribunal or by any provision of Part I of the 1996 Act. Compliance with any of these time limits sufficient. For example, an objection to the tribunal's jurisdiction that is not made before taking the first step in the proceedings to contest the merits, as required by s. 31(1) of the 1996 Act, will not be barred if it is made within the time allowed for such objections in the parties' agreement.[56]

An expression of general concern about the proceedings is not an objection for the purpose of s. 73(1). In the case of a jurisdictional objection, it is necessary to alert the tribunal and the other party to the flaw that the objecting party considers invalidates the arbitral process and to object to the tribunal continuing to act.[57] The objection need not be made in any particular form, for instance in writing or by commencing legal proceedings.[58] But writing is desirable to avoid later disputes about what was said.

iv. Relationship between AA 1996, ss. 31 and 73(1)

It is surprising that there is no equivalent, in s. 31, to the residual entitlement in s. 73(1) to raise objections out of time where the grounds for the objection were not previously known and could not, with reasonable diligence, have been discovered. In consequence, the right to raise jurisdictional objections is potentially wider under s. 73(1) than under s. 31, a difference that was raised in *Hussman (Europe) Ltd* v. *Al Ameen Development & Trade Co.*[59] but was not fully explored because the jurisdictional objection to Al Ameen's participation in the arbitration on the grounds that it was not a party to the arbitration agreement was regarded as concerned with an excess rather than a lack of substantive

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52 *cf. Wicketts* v. *Brine Builders* (2000) CILL 1805.

53 *Rustal Trading Ltd* v. *Gill & Duffus SA* [2000] 1 Lloyd's Rep. 16; *JSC Zestafoni G Nikoladze Ferroalloy Plant* v. *Ronly Holdings Ltd* [2004] 2 Lloyd's Rep. 335.

54 *Selina Mohsin* v. *Commonwealth Secretariat* [2002] EWHC 377 (Comm) (Lawtel).

55 *Wicketts* v. *Brine Builders* (2002) CILL 1805 (TTC).

56 *See* the discussion on this point in *Athletic Union of Constantinople* v. *National Basketball Association* [2002] 1 Lloyd's Rep. 305. But note paras 41, 42 where it was said that a party who disputes the validity of the arbitration agreement cannot rely on a term of that agreement as entitling it to raise jurisdictional objections outside the period for making such objections provided for in AA 1996, s. 31.

57 *Rustal Trading Ltd* v. *Gill & Duffus SA* [2000] 1 Lloyd's Rep. 16 at 20.

58 *Wicketts* v. *Brine Builders* (2002) CILL 1805 (TTC).

59 [2001] 2 Lloyd's Rep. 83.

jurisdiction. Thus, the court held that the objection was governed by s. 31(2) and could be taken as soon as possible after the matter alleged to be beyond the tribunal's jurisdiction was raised and equated this requirement with the reasonable diligence test in s. 72(1), the court saying that the purpose of both tests was the same, to ensure that a party did not keep a point 'up his sleeve' and wait and see what happened while considerable expense was incurred in the arbitration. If, however, the question of Al Ameen's participation in the arbitration had been characterised as an objection to the tribunal's substantive jurisdiction at the outset,[60] it would have had be raised under s. 31(1) before taking a step to contest the merits of the matter. If so, the court could not have so readily have elided the requirements of s. 31 with those of s. 73(1). It would have had to consider the status a jurisdictional objection barred under s. 31 but not under s. 73(1) of the 1996 Act. The relationship between s. 31 and s. 73(1) was recently considered in *Vee Networks Ltd* v. *Econet Wireless International Ltd*,[61] where it was said that a party wishing to challenge the tribunal's jurisdiction before the court had to bring itself within one section or the other.

In many cases, however, the difference between the available periods for raising jurisdictional objections under s. 31 and s. 73(1) is likely to be academic. The tribunal has, under s. 31(3), discretion to admit late objections and is likely to accept that a valid reason for doing so is that the grounds for the objection were not known and could not, with reasonable diligence, have been discovered earlier. Indeed, it is arguable that the tribunal would have to admit a late objection on this ground since s. 73(1) governs when objections can be raised, not just before the court, but also before an arbitral tribunal.

v. Obtaining the tribunal's ruling on its substantive jurisdiction

If the jurisdictional objection is raised in due time or is admitted late by the tribunal then, unless the parties have agreed to exclude its power to do so or have agreed which course of action it should take, the tribunal may either rule on the matter in an award as to jurisdiction or deal with the objection in its award on the merits.[62] Unlike under the old law, the tribunal is no longer impotent in the face of a party or alleged party who raises and then reserves a jurisdictional objection throughout the proceedings with a view to relying on that objection if the tribunal's award is unfavourable. Rather, it will be for the tribunal to decide when it rules on that objection by award. Once it has done so, its award will be final and binding on the parties unless, within the limited period available, it is questioned by proceedings in court under s. 67.[63]

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60 This being, apparently, how the court in *Hussman* viewed it. *See Hussman (Europe) Ltd* v. *Ahmed Pharam* [2003] EWCA (Civ) 266 (Lawtel).

61 [2005] 1 Lloyd's Rep. 192.

62 AA 1996, s. 31(4).

63 *See also* AA 1996, ss. 58, 70(3), 73. If this is not done, the jurisdictional objection cannot be relied on to resist the tribunal's award on the merits; *People's Insurance Company of China* v. *Vysanthi Shipping Corporation* [2003] 2 Lloyd's Rep. 617.

vi. Which course of action should the tribunal adopt?

In deciding whether to deal with the objection by separate award on jurisdiction or in an award, whether partial or final, on the merits, the tribunal must act fairly and impartially having regard to the circumstances of the case and the need to avoid unnecessary delay and expense.[64] The tribunal's decision on which course to follow will not, of itself, provide grounds for a challenge to the subsequent award for serous irregularity unless the decision is one that no reasonable tribunal, appraised of these principles and having regard to the relevant circumstances, could reach.[65]

If the objection is to the tribunal's jurisdiction at the outset it will usually, other than in simple matters, be appropriate to rule on that objection by award on jurisdiction or partial award on the merits. This minimises the risk of delays and wasted costs that might otherwise occur if the tribunal, having proceeded to a final award on the merits, is then found not to have jurisdiction. If the tribunal does decide to deal with the jurisdictional objection in this way, it will give directions for the exchange of evidence and submissions on the jurisdictional question and, if material facts are disputed, will have to consider how the evidence can be tested. This may require an oral hearing.

If the jurisdictional objection concerns whether the parties have agreed to arbitrate, it may be bound up with the question of whether the parties concluded a contract governing their commercial dealings, a major issue in the substantive dispute between them. If the tribunal concludes that it does have jurisdiction, its award will necessarily deal with the merits of that issue and there can be no objection to it doing so.[66] But if the tribunal concludes that it does not have jurisdiction, the award should not deal with any aspect of the merits of the parties' dispute, such as whether the parties did conclude a contract governing their commercial relationship. It should only deal with the jurisdictional question; did the parties agree to arbitrate.[67]

vii. Challenging the tribunal's ruling as to its substantive jurisdiction

Once the tribunal has ruled the jurisdictional objection by award, any party to the proceedings may question that ruling in court by application under AA 1996, s. 67.[68] On such an application, the court is not limited to reviewing the award, but may rehear the jurisdictional objection, with oral evidence if necessary,[69] nor is the evidence that can be adduced before the court limited to that submitted to the arbitral tribunal, although, if evidence is adduced late, it may attract a degree of scepticism and affect how the court deals with costs.[70]

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64 AA 1996, s. 33.
65 *Aoot Kalmneft* v. *Glencore International AG* [2002] 1 Lloyd's Rep. 128.
66 *ibid*.
67 *LG Caltex Gas Co. Ltd* v. *China National Petroleum Corp.* [2001] 2 All ER (Comm.) 97 at 117 (CA).
68 A mandatory provision that cannot be excluded by the parties, *see* s. 4(1).
69 *Azov Shipping Co.* v. *Baltic Shipping Co.* [1999] 1 Lloyd's Rep. 68.
70 *Electrosteel Castings Ltd* v. *Scan Trans Shipping & Chartering Sdn Bhd* [2003] 1 Lloyd's Rep. 190.

The right to bring the jurisdictional objection to the court under s. 67 is, also subject to the following restrictions. The application may not be brought before the applicant has exhausted any available arbitral process of appeal or review and any available recourse under s. 57.[71] If it has not done so, the application will be dismissed.[72]

The application must be brought within 28 days of the date of the award or, if there has been any arbitral process of appeal or review, within 28 days of the date on which the applicant was notified of the result of that process.[73] The court does, however, have a broad discretion to extend this 28-day period irrespective of whether or not it has already expired.[74] Moreover, if the tribunal has been asked, under s. 57, to correct slips, omissions or ambiguities in its award,[75] the 28 days runs from the date of the corrected award, not the date of the original award.[76]

Although, the evidence that can be adduced before the court is not limited to that submitted to the arbitral tribunal, a party cannot, ordinarily, raise new jurisdictional points before the court that, having regard to the pleadings and submissions in the arbitration, were not argued before the arbitral tribunal prior to its award.[77] It will only be able to do so if it can show that at the time it made submissions on the jurisdictional objection to the tribunal, it did not know and could not, with reasonable diligence, have discovered the ground for the new point.[78]

The court can, on an application under s. 67, order that monies payable under the award be brought into court or otherwise secured.[79] This power is somewhat anomalous since it is not expressly provided for where the jurisdictional objection comes before the court by any other route provided by the 1996 Act,[80] and it may be a matter of accident which route is adopted. Thus, the court is likely to be

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71 AA 1996, ss. 67(1), 70(2). The availability of an arbitral process of appeal or review will depend on the applicable arbitration rules. *See*, for examples of such procedures, arts 11 and 12 of 1998 ICC Rules and arts 10 and 11 of 1998 LCIA Rules.

72 *Groundshire* v. *VHE Construction* [2001] BLR 395 at 405.

73 AA 1996, ss. 67(1), 70(3).

74 The discretion arises under AA 1996, s. 80(5) and CPR Rules 3.1.3 and 62.9. *See Aoot Kalmneft* v. *Glencore International AG* [2002] 1 Lloyd's Rep. 128. In *People's Insurance Company of China* v. *Vysanthi Shipping Corporation* [2003] 2 Lloyd's Rep. 617, the court refused to extend time where the delay was very substantial, the decision not to challenge the tribunal's award earlier had been deliberate, neither the arbitrator nor the party seeking to enforce the tribunal's award on the merits had contributed to the delay, and the delay had caused prejudice to that party.

75 Section 57 (the slip rule) is concerned not just with the tribunal's power to correct its award so as to remove clerical mistakes or errors arising from accidental slips or omissions. It also enables the tribunal to clarify or remove any ambiguities, or make an additional award in respect of claims presented to it but not dealt with.

76 *Al Hadha Trading Co.* v. *Tradigrain SA* [2002] 2 Lloyd's Rep. 512.

77 AA 1996, ss. 67(1), 73(1); *Athletic Union of Constantinople* v. *National Basketball Association* [2002] 1 Lloyd's Rep. 305 (Deputy Judge Field QC). Since Athletic Union's arguments before the arbitral tribunal were concerned with whether the apparent arbitration agreement it had concluded with the NBA was enforceable, s. 73(1) barred it from arguing before the court that the parties had never concluded an arbitration agreement at all; *JSC Zestafoni G Nikoladze Ferroalloy Plant* v. *Ronly Holdings Ltd* [2004] 2 Lloyd's Rep. 335.

78 AA 1996, s. 73(1).

79 *ibid.* s. 70(1), (7).

80 *ibid.* s. 70 does not govern recourse to court in respect of a jurisdictional objection under either s. 32 or s. 72 of the Act.

cautious in its exercise, at any rate where the jurisdictional objection concerns whether the objecting party agreed to arbitrate a particular dispute at all for, in such a case, why should there be any presumption in favour of the award. It was for reasons such as these that in *Peterson Farms Inc.* v. *C&M Farming Ltd*,[81] Tomlinson J. suggested that the party seeking such an order had to show, as a threshold condition, that the jurisdictional objection was flimsy or otherwise lacked substance.

viii. Types of award that can be the subject of a section 67 application

Somewhat oddly, the remedies that the court can grant on a s. 67 application differ depending on whether the award being challenged is an award as to the tribunal's substantive jurisdiction or an award on the merits. Thus, when making a s. 67 application, it is necessary to categorise the award either as one concerning the tribunal's substantive jurisdiction or one concerned with the merits. This can create difficulties if the jurisdictional objection on which the tribunal has ruled interrelates with part of the substantive dispute between the parties. In such a case, the nature of the tribunal's award depends on whether or not it concludes that it has jurisdiction. If the tribunal rules that it does not have jurisdiction, its award is an award as to its substantive jurisdiction, since the tribunal is precluded from dealing with any aspect of the merits of the parties' dispute.[82] If the tribunal rules that it has jurisdiction, its award will be an award on the merits since, in reaching its conclusion, it will have determined the related substantive issue.[83]

ix. The remedies available on a section 67 application[84]

In the case of an award as to the tribunal's substantive jurisdiction, the court can confirm the award, vary the award (in which case the variation takes effect as part of the award), or set the award aside in whole or in part.[85] In the award is on the merits, the court can declare the award to be of no effect in whole or in part because the tribunal did not have substantive jurisdiction.[86]

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81 [2004] 1 Lloyd's Rep. 614.

82 *LG Caltex Gas Co. Ltd* v. *China National Petroleum Corp.* [2001] 2 All ER (Comm.) 97 (CA).

83 As was, *e.g.*, the award considered in *Aoot Kalmneft* v. *Glencore International AG* [2002] 1 Lloyd's Rep. 128.

84 Apart from failing to provide recourse to the court to challenge a tribunal's ruling declining jurisdiction, a serious oversight, the Model Law provides a simpler and more rational procedure bringing jurisdictional objections to the court. Thus, where a tribunal rules on its own jurisdiction, the relevant court can, under art. 16(3), be requested to 'decide the matter', *i.e.* to decide whether the tribunal has jurisdiction. If the matter is dealt with in an award on the merits, then, under art. 34, the relevant court can, on application, set aside the award if it is proved (making it clear that this is a matter to be decided by the court) that the tribunal did not have jurisdiction (*see* art. 34(2)(a)(i), (iii) and (iv)). For a consideration of how negative decisions on jurisdiction are dealt with in other jurisdictions, see S Kröll, 'Recourse against Negative Decisions on Jurisdiction' in (2004) 20 Arb. Int'l 155.

85 AA 1996, ss. 67(1)(a), (3), 71(3).

86 *ibid.* s. 67(1)(b).

It was said in *Hussman (Europe) Ltd* v. *Ahmed Pharam*,[87] that there is no difference in principle or effect between a declaration that an award is of no effect in whole or in part and an order setting aside an award in whole or in part. In either case, the tribunal is no longer *functus officio* as regards the matters decided in the invalid award, and the arbitration continues or revives as necessary.[88] The revival of the tribunal's jurisdiction is not dependent on the invalid award being remitted to it for reconsideration.[89] In one respect, however, the two remedies are different. In the former case, the court can, if satisfied that the tribunal did not have jurisdiction to make the award in question, grant a declaration determining the jurisdictional question and that will, ordinarily, be the end of the jurisdictional dispute. In the latter case, the court has no express power to grant such a declaration. It can only set aside the tribunal's award, a remedy which, considered in isolation, leaves the question of the tribunal's jurisdiction in a state of uncertainty[90] since, ordinarily, as in the case of a successful challenge for serious irregularity or appeal on a question of law, the setting aside of its award would necessitate the tribunal reconsidering the matter in the light of the court's determination, and making a new award – it being that award which binds the parties.

It is difficult to believe that it was Parliament's intention that the tribunal would do this where the award set aside concerned its substantive jurisdiction, particularly if the reason why the award was set aside was because the court concluded that the tribunal did not have substantive jurisdiction. But, if not, why was the court not empowered on all s. 67 applications to grant the remedies normally associated with its determination of jurisdictional questions, declarations and injunctions? This could have been done by giving any party to arbitral proceedings the right to challenge either an award of the tribunal as to its substantive jurisdiction or an award on the merits by proceedings in court for a declaration as to the existence or extent of the tribunal's substantive jurisdiction, giving the court power, on such an application, to grant injunctions or other appropriate relief.[91]

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87 [2003] EWCA (Civ) 266 (Lawtel). The tribunal's earlier award was set aside in previous proceedings, not declared to be of no effect.

88 This means that a tribunal that has wrongly determined that it did not have jurisdiction, will be seized of the reference. For a discussion of the other possibilities, see S Kröll, 'Recourse against Negative Decisions on Jurisdiction' in (2004) 20 Arb. Int'l 155.

89 If this is right, s. 71(4) of the 1996 Act (which provides that, where an award is set aside or declared of not effect, the court may order that any provision that an award is a condition precedent to the bringing of legal proceedings is of no effect) does not appear to have any function. Since remedies granted against an award do not effect the validity or otherwise of the parties' arbitration agreement, or proceedings commenced under it, it is difficult to see what would be achieved by an order under s. 71(4), since the parties would still be obliged to arbitrate their dispute. There was a similar provision in the 1950 Act but that Act, unlike under the 1996 Act, also gave the court power to order that an arbitration agreement was to cease to have effect. *See* AA 1950 s. 25(2)(b) (now repealed).

90 It may be that the court's determination of the jurisdictional question, even though not the subject of its judgment, will bind the parties under the doctrine of issue estoppel per *res judicata* discussed in *The Sennar (No. 2)* [1985] 1 WLR 490 (HL). Note also *Fidelitas Shipping Co. Ltd* v. *V/O Exportchleb* [1965] 1 Lloyd's Rep. 223 (CA).

91 This suggestion is modelled on s. 72(1) of the 1996 Act.

It may be that, in the absence of such a reform, the court could deal with the uncertainties over the remedies available under s. 67 and their effect by granting declarations as to the tribunal's jurisdiction and, if appropriate, injunctions under its inherent powers. But it is by no means clear that it will do so, since the 1996 Act enjoins the court from intervening in arbitral proceedings except as provided by Part I of the 1996 Act and, in consequence from granting relief other than that expressly provided for in s. 67.[92]

The other two remedies available to the court on a s. 67 challenge to an award as to the tribunal's substantive jurisdiction, variation or confirmation of the award, do not assist in overcoming these difficulties.

It is possible that Parliament considered that there was no need for the court to grant declaratory or injunctive relief on a challenge to a tribunal's award as to its substantive jurisdiction since it had power to vary that award to give effect to its own findings on the jurisdictional question. But this remedy, which is peculiar to English arbitral law, merely creates uncertainty about whether the determination is that of the court or the tribunal, and over where the determination is recorded; there being no mechanism for the award to be physically rewritten to give effect to the court's variation.[93] Courts in other jurisdictions may find difficulty in understanding how an award, which is the composite product of the deliberations of the tribunal and the court, could be recognised or enforced under the New York Convention.[94] Moreover, how, in the case of an award varied by the court, can a duly authenticated original or a certified copy be provided as required by that Convention?[95]

As for the alternative option, confirmation of the award, it is difficult to see why this remedy was considered necessary or, if necessary, why it was not also provided for in the case of an unsuccessful application to declare an award on the merits of no effect. If dismissal of the application is sufficient in the latter case, why is it not sufficient in the former case? Confirmation of the award by the court also raises the same conceptual problems as variation of the award by the court. On proceedings for recognition, is it the court's judgment or the award that is

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92 *See* AA 1996, s. 1(c); *Welex AG* v. *Rosa Maritime Ltd* [2003] 2 Lloyd's Rep. 509, para. 30 (CA).

93 These criticisms were made some 15 years ago, *see* Mustill and Boyd, *supra* n. 10 at pp. 617–618. They appear to have been overlooked by the Departmental Advisory Committee, the body responsible for drafting the 1996 Act.

94 The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. *See Nidera Handelscompagnie BV* v. *Moretti Cereali SpA* (Italy, Corte di Appello, Florence, 1 December 1980) X *YB Comm. Arb.* 450. In that case the Italian court held that the New York Convention did not apply to an English award that had been subject to the (now repealed) special case procedure under which a tribunal rendered alternative awards stating that one would be valid depending on how the court decided the various questions asked of it. The Italian court's reasoning was that, although arbitration was involved as an indispensable premise to the second juridical phase, the intervention of the court was the last and final stage. Thus, it was the court's judgment that was the subject of the enforcement proceedings, not an arbitral award. This reasoning appears to be equally, if not more, applicable where an arbitral award is varied by the court since the court's decision is an indispensable part of what is to be enforced. Furthermore, it is implicit in the Italian court's reasoning that the question, 'What is an award?' is a matter for the enforcing state, not for the arbitral law of the seat. If so, the deeming provision of AA 1996, s. 71(2) may not have the intended effect where recognition or enforcement is sought outside England and Wales.

95 Article IV(1)(a).

being recognised and enforced, particularly where the court agrees that the tribunal has jurisdiction but for different reasons to those given by the tribunal?[96]

x. Relationship between section 67 and the statutory waiver, section 73(2)

Section 73(2) of the 1996 Act provides that where an arbitral tribunal rules that it has substantive jurisdiction and a party to the proceedings, who could have questioned that ruling by any available arbitral process of appeal or review, or by challenging the award, does not do so or does not do so within the time allowed by the arbitration agreement or any provision of Part I of the 1996 Act (which includes s. 67), it may not object later to the tribunal's substantive jurisdiction on any ground which was the subject of that ruling.

It is unfortunate that s. 73(2) refers to an award being challenged, since this leads to uncertainty as to whether the statutory waiver only applies where the tribunal's ruling is embodied in an award as to its substantive jurisdiction and not where that ruling is embodied in an award on the merits. This is because, under s. 67, it is only awards as to the tribunal's substantive jurisdiction that are expressly subject to challenge.[97] Furthermore, s. 31(4) distinguishes between a tribunal ruling on jurisdictional objections by award as to its substantive jurisdiction, and dealing with such objections in an award on the merits. Since only rulings on jurisdiction are referred to in s. 73(2) this may be regarded as supporting the view that the statutory waiver was only intended to apply to awards as to the tribunal's substantive jurisdiction.[98]

It is to be hoped that a court, faced with these uncertainties, would construe s. 73(2) broadly as concerned with ensuring that once the tribunal has, under its power in s. 30, ruled that it has substantive jurisdiction, whether by award as to its substantive jurisdiction or in an award on the merits, a party cannot, subsequently, object to the tribunal's substantive jurisdiction on a ground that was the subject of that ruling other than by application under s. 67 or by any available arbitral process of appeal or review. If necessary, a similar result could be achieved by applying the common law principle that enforcement of an award cannot be resisted on any ground that could have been relied on to question that award after it was made.[99] This principle may also provide an answer to the other lacunae in s. 73(2), that is, where the jurisdictional objection is duly made, or the tribunal has admitted it out of time, but the tribunal does not then rule on (or

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96 *See Nidera Handelscompagnie BV* v. *Moretti Cereali SpA*, discussed *supra*.

97 *Compare* AA 1996, s. 67(1)(a) with s. 67(1)(b).

98 The reason for the use of different terminology in s. 31(4)(b) and (4)(a) is difficult to fathom. Both are concerned with the exercise of the tribunal's power under s. 30, this being a power to rule on its own substantive jurisdiction.

99 *Scrimaglio* v. *Thornett & Fehr* [1924] 18 LlL Rep. 148 (CA), *Termarea SRL* v. *Rederiaktibolaget Sally* [1979] 2 Lloyd's Rep. 439; Mustill and Boyd, *supra* n. 10 at 546. At the time when these cases were decided, the principal statutory ground for challenging an award was misconduct and the court's concern was to prevent a party circumventing the statutory time limits for such a challenge by alleging misconduct as a defence to enforcement. It remains to be seen whether this principle will be extended to all the statutory grounds for disputing an award available under the 1996 Act (*see* ss. 67, 68 and 69), all of which are subject to a 28-day time limit, *see* s. 70.

deal with) the objection by award. Other than through oversight, this could occur where the parties, by agreement, exclude the tribunal's power to rule on its own jurisdiction. Section 73(2) does not deal with this possibility, but since the tribunal's award on the merits could still be questioned under s. 67 on jurisdictional grounds,[100] a party who failed to do so might, at common law, be prevented from contesting the tribunal's jurisdiction on enforcement proceedings.

xi. Implications of the statutory waiver for a non-participant

It is doubtful that the statutory waiver in s. 73(2) is intended to apply to a person alleged to be a party to arbitral proceedings but who takes no part in the proceedings. There is, however, some uncertainty about this since, although the words 'a party to the proceedings' are used widely in the 1996 Act, including in ss. 32, 67 and 73, they are not defined.

One possible interpretation is that 'a party to the proceedings' is someone who participates in arbitral proceedings, this being a question of fact which is not concerned with the legal question of whether that person is a party to a valid arbitration agreement or with whether the proceedings have been validly commenced against it.[101] If so, s. 73(2) has, like s. 73(1), no implication for a person alleged to be a party to the proceedings but who takes no part in those proceedings.[102] However, if 'a party to the proceedings' includes a person who is a party to the arbitration agreement out of which the proceedings arise, or a person against whom arbitral proceedings are properly commenced, this is a question of law. Thus, a person may, in consequence of the tribunal's jurisdictional ruling, be a party to the proceedings even if they take no part in the proceedings. If so, that person will be subject to the statutory waiver in s. 73(2) since s. 73(2) is not, like s. 73(1), restricted to parties to the proceedings who participate in them.

xii. Allocating the costs of invalid arbitral proceedings

There is conceptual difficulty with an arbitral tribunal having power to allocate costs in circumstances where that tribunal or a court, on a s. 67 application, concludes that the tribunal does not have substantive jurisdiction. If the tribunal rules that it does not have jurisdiction, then the usual cost award will be that the party initiating the arbitration, ordinarily the claimant, should bear and pay its opponent's costs. It is unlikely that, faced with such an order, the claimant could successfully argue that the tribunal, having found that it did not have jurisdiction in regard to the substantive dispute, had no jurisdiction to award costs against it. Nevertheless, the conceptual basis for rejecting such an argument is problematic.

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[100] AA 1996, s. 67(1)(b).

[101] This was the approach adopted in *Svenska Petroleum Exploration AB* v. *Lithuania [2005] 1 Lloyd's Rep. 515*, where it was said that the expression 'a party to arbitral proceedings' included a person who took part in arbitral proceedings for the purpose of contesting the substantive jurisdiction of the tribunal.

[102] Mustill and Boyd favour this interpretation, *see supra* n. 10 at p. 363.

One possibility is that, by initiating and pursuing the purported arbitration in the face of jurisdictional objections, the claimant is estopped from or has waived its right to argue that the tribunal was not entitled to act as arbitrator for the purpose of ruling on the jurisdictional objection under s. 31 and exercising all the ancillary powers of the 1996 Act consequent on it doing so, including making an award of costs. Another possibility is that the claimant cannot seek the benefit of a ruling on jurisdiction under s. 31 without the burden of the tribunal's award on ancillary matters, in particular costs, associated with that ruling. A further possibility, apparently favoured by the German courts, is that the power to order costs in such circumstances is an incident of the tribunal's Kompetenz-Kompetenz.[103]

These conceptual difficulties are compounded if recognition or enforcement of the tribunal's costs award is sought under the New York Convention, since that Convention requires there to be a written agreement to arbitrate binding the parties and that agreement, or a duly certified copy, to be provided to the enforcing court.[104] It may be the absence of such an agreement that resulted in the tribunal concluding that it had no jurisdiction. This problem arose in *Montague* v. *Commonwealth Development Corp*,[105] which concerned the enforcement in Queensland, Australia, of a New Zealand award of costs made against the referring party by an ICC tribunal which had ruled that it did not have jurisdiction over the parties' dispute. However, the court was able to avoid resolving it, since both parties had signed terms of reference and the court concluded that these, in themselves, were a sufficient written arbitration agreement for the purpose of Article II of the New York Convention.[106]

There may also difficulties in allocating costs where the court, on a successful application under s. 67, sets aside the tribunal's award as to its substantive jurisdiction or declares an award on the merits to be of no effect on the ground that the tribunal did not have jurisdiction. The court does not have jurisdiction to deal with the costs of the abortive arbitration. Thus, the party who has been successful on the s. 67 application will, if it wishes to recover the costs expended by it in the arbitration, have to contend that the tribunal retains sufficient jurisdiction to allocate those costs, even though it has been held by the court not to have jurisdiction over the substantive dispute.[107]

It might be thought, following the reasoning in *Montague* v. *Commonwealth Development Corp.*,[108] that a solution to these uncertainties would be for the tribunal

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[103] See S Kröll, 'Recourse against Negative Decisions on Jurisdiction' in (2004) 20 *Arb. Int'l* 155.

[104] New York Convention, Arts II and IV(1)(b).

[105] (Australia, Supreme Court of Queensland, 27 June 2000) XXVI *YB Comm. Arb*. 744. The relevant provision, s. 3 of the Commercial Arbitration Act, follows Art. II of the New York Convention.

[106] The court's conclusion that terms of reference in an ICC arbitration constitute an ad hoc arbitration agreement is controversial. *See* S. Greenberg and M. Secomb, 'Terms of Reference and Negative Jurisdictional Decisions: A Lesson from Australia' in (2003) 18(1) *Arb. Int'l* 125.

[107] The starting point for such an argument could be the reasoning in *Hussman (Europe) Ltd* v. *Ahmed Pharam* [2003] EWCA (Civ) 266 (Lawtel), that the orders made by the court do not, in themselves, affect what jurisdiction the tribunal has. It could then be argued that the party initiating the invalid arbitration is subject to the arbitrator's jurisdiction on costs for one of the reasons discussed in this article.

[108] (Australia, Supreme Court of Queensland, 27 June 2000) XXVI *YB Comm. Arb.* 744.

to obtain, before determining a jurisdictional objection, the parties' agreement, whether by signed document, similar to the ICC terms of reference, or by exchange of correspondence, to it doing so. The difficulty with this approach is that such an agreement may be interpreted as an ad hoc agreement to arbitrate the jurisdictional objection as a separate dispute before the tribunal. If so, the parties' right to question the tribunal's award under s. 67 would be lost. This is because the award would not concern a ruling of the tribunal on its own jurisdiction in respect of the parties' substantive dispute under s. 31 of the 1996 Act. It would be an award made under a separate arbitration agreement and would be concerned not with ruling on the validity of that agreement, but with the tribunal's jurisdiction in other proceedings.[109]

xiii. Obtaining the court's determination of a preliminary question of jurisdiction

The 1996 Act includes a procedure, which has no equivalent in the Model Law, under which a party to arbitral proceedings may apply to the court to determine any question as to the substantive jurisdiction of the tribunal, provided that the application is made either with the agreement in writing of all the other parties to the proceedings or with the permission of the tribunal, provided, in the latter case, that the court is satisfied that the determination of the question is likely to produce substantial savings in costs, the application was made without delay, and there is good reason why the matter should be decided by the court.[110]

An agreement in writing can, for this purpose, be made either before or after the parties' dispute arises. It may, for instance, be embodied in the applicable arbitration rules.[111] If there is such agreement then, irrespective of whether or not the tribunal has also given its permission to the application, the court has no choice but to deal with the merits of the application.[112]

The situation where a s. 32 application is made with the permission of the tribunal, not by agreement of the parties, was considered in *Belgravia Property Ltd* v. *S&R Ltd*.[113] The court considered that the tribunal had been right to give its permission to the application since the question raised, which concerned the circumstances in which a party under a standard form contract providing for name borrowing arbitration could begin an arbitration in the borrowed name, went directly to the tribunal's jurisdiction and should be determined at the outset of the proceedings. Furthermore, the question was not dependent on and would

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[109] *LG Caltex Gas Co. Ltd* v. *China National Petroleum Corp*. [2001] 1 WLR 1892 (CA).

[110] Under s. 32 of the 1996 Act, the side heading to which reads 'Determination of Preliminary Point of Jurisdiction'.

[111] *Taylor Woodrow Civil Engineering Ltd* v. *Hutchison IDH Development Ltd* [1999] ADRLJ 83. The case concerned AA 1996, s. 69(2), but the reasoning is equally applicable to s. 32(2). If the existence of the arbitration agreement is disputed, it will not be possible for the applicant to rely on its terms as an agreement for the making of a s. 32 application. *See Athletic Union of Constantinople* v. *National Basketball Association* [2002] 1 Lloyd's Rep. 305 (Deputy Judge Field QC), paras 41, 42.

[112] *See Gebr. Broere BV* v. *Saras Chimica SpA* [1992] 2 Lloyd's Rep. 436, considering the similarly worded regime in s. 2(1) and (2) of the 1979 Act (now repealed).

[113] [2001] BLR 424.

not be affected by the outcome of any investigation into the substantive claims. Although these are all good reasons for the jurisdictional question to be dealt with promptly, it is not clear why the court considered that they amounted to good reasons why it should be dealt with by the court under s. 32, rather than the tribunal under s. 31; nor did the court indicate why it considered that the determination of the jurisdictional question, one which was, apparently, decided without oral evidence, by the court rather than the tribunal, was likely to produce substantial savings in costs. The possibility that, if the tribunal dealt with the matter under s. 31, it might come before the court on a s. 67 challenge, with the extra costs that would involve, cannot be sufficient. A possibility is not the same as a likelihood.[114] Furthermore, if such a concern is sufficient to justify the court's consideration of a jurisdictional question, it would mean that recourse to the court under s. 32 would be the norm not, as envisaged by the Departmental Advisory Committee, an exceptional remedy.[115]

A further hurdle that has to be overcome before making a s. 32 application is that the right to do so is subject to the statutory waiver in s. 73(1).[116] Thus, a preliminary question of jurisdiction cannot be brought before the court on a s. 32 application unless the objection to the tribunal's substantive jurisdiction, which that question concerns, has been duly raised within the time limits provided for in s. 31, the tribunal has admitted the objection out of time, or the party raising the objection can show that, at the time it took part or continued to take part in the arbitral proceedings without having raised the objection, it did not know and could not with reasonable diligence have discovered the grounds for that objection.[117]

xiv. Purpose and effect of a section 32 determination

The purpose of s. 32 and the reasons for its inclusion in the 1996 Act is difficult to fathom.[118] The wording is derived from s. 2 of the Arbitration Act 1979 ('the 1979 Act'). This provided, under a side heading 'Determination of preliminary points of law by the court', that the High Court could, on application of a party, determine any question of law arising in the course of the reference, the right to

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[114] The equivalent wording in s. 2(2)(a) of the 1979 Act (now repealed) was 'might produce substantial savings in costs'. These words were considered in *The 'Vassso'* [1983] 2 Lloyd's Rep. 356. The court considered that, since what had to be established was that the application *might* result in a substantial saving in costs, it was sufficient that, if the question was determined one way rather than the other, it would either determine the result altogether or at least shorten the hearing. The fact that the question might be decided the other way and not have either of these consequences, did not prevent the court having jurisdiction to consider the application. It is doubtful that this reasoning applies to the more onerous 'is likely to produce substantial savings in costs' test in s. 32(2)(b)(i) of the 1996 Act.

[115] The body responsible for drafting the 1996 Act. *See* Departmental Advisory Committee Report (February 1996), para. 141.

[116] *See* AA 1996, s. 32(1).

[117] AA 1996, s. 73(1). The interrelationship between s. 73 and s. 31 is discussed *supra*.

[118] The Departmental Advisory Committee said s. 32 was only intended for exceptional cases, but might be appropriate where a claimant in arbitral proceedings wished to obtain the court's determination of a jurisdictional objection raised by a respondent who refused to participate in the arbitration: Departmental Advisory Committee Report (February 1996), paras 141, 147.

make such an application being subject to similar restrictions to those now found in s. 32 of the 1996 Act.[119] Section 2 of the 1979 Act was considered by the Court of Appeal in *Babanaft International Co. SA* v. *Avanti Petroleum Inc*.[120] Donaldson L.J., with whom the other members of the court agreed, viewed it as the successor to the old consultative case. It was a procedure under which 'put colloquially, the … parties nip down the road to pick the brains of one of Her Majesty's judges and, thus enlightened, resume the arbitration'. He considered that a decision under s. 2, like the court's determination of a consultative case, was not *res judicata*. Thus, subject to obtaining leave to appeal, if necessary, a party could appeal a subsequent award of the tribunal on the basis that it had erred in law, even though the law the tribunal had applied was that decided by the High Court on a s. 2 application in the same arbitration.[121] If the award was not appealed or, at any rate, not successfully, then it was the tribunal's award, not the decision of the court on the s. 2 application, that under the doctrine of *res judicata*, barred the parties from relitigating or re-arbitrating the issues decided.[122]

It appears that Parliament was aware that a determination of the court on a s. 32 application might not be *res judicata* and thus not amenable to appeal to the Court of Appeal since, as was done in s. 2 of the 1979 Act, s. 32(6) provides that the decision of the court on a preliminary question of jurisdiction shall be treated as if it were a judgment of the court for the purpose of any appeal.[123]

A further curiosity of s. 32, which supports this analysis, is that it does not provide for the court to do more than determine the preliminary point of jurisdiction. Unlike s. 72, it does not empower the court to grant any relief consequent upon that determination, in particular a declaration or injunction, the usual relief granted by a court when determining the jurisdiction of an arbitral tribunal prior to the 1996 Act. This has not, however, stopped the court granting such relief on a s. 32 application.[124] Nevertheless, the jurisdiction for doing so is problematic[125] as are the implications of the court's determination for the parties, should the same jurisdictional issues arise in subsequent proceedings,

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[119] The 1979 Act was repealed by the 1996 Act, but a similar provision to s. 2, concerned with questions of law, is now found in s. 45 of the 1996 Act.

[120] [1982] 1 WLR 871, per Donaldson LJ at 881–883.

[121] As happened in *British Westinghouse Electric and Manufacturing Co. Ltd* v. *Underground Electric Railways Co. of London Ltd* [1912] AC 673 (HL), where an award incorporating the decision of the Divisional Court on certain questions of law answered by it on a consultative case was subsequently set aside for error of law on the face. *See* discussion in Mustill and Boyd, *supra* n. 10 at 618.

[122] *Fidelitas Shipping Co. Ltd* v. *V/O Exportchleb* [1965] 1 Lloyd's Rep. 223 (CA).

[123] The source of these words can be traced back to Arbitration Act 1934, s. 9. They were introduced in response to *Re Knight and Tabernacle Permanent Building Society* [1892] 2 QB 613 where it was held that, since the court's opinion on a consultative case was not an order of the court, it could not be appealed to the Court of Appeal.

[124] *See e.g.*, *Belgravia Property Ltd* v. *S&R Ltd* [2001] BLR 424 (TCC) where the court, having determined the jurisdictional question referred to it under s. 32, indicated that it would grant a declaration that the arbitrator did not yet have jurisdiction in respect of the matters referred to him. The court also granted declarations on applications under s. 2 of the 1979 Act (now repealed), but without casting doubt on Donaldson L.J.'s reasoning in *Babanaft International Co. SA* v. *Avanti Petroleum Inc. See e.g.*, *Prudential Assurance Co. Ltd* v. *99 Bishopsgate Ltd* [1992] 1 EGLR 119, where *Babanaft* was cited.

[125] *Welex AG* v. *Rosa Maritime Ltd* [2003] 2 Lloyd's Rep. 509, para. 30 (CA).

whether in court or in arbitration, particularly where, as will generally be the case, the court's decision on the s. 32 application is not subsequently embodied in an award of the tribunal.

Thus, although the Departmental Advisory Committee considered that a s. 32 application might be appropriate where a claimant in arbitral proceedings was concerned to have an immediate determination by the court of a jurisdictional objection raised by a non-participating respondent, s. 32 is, because of its uncertain meaning and effect, unsuitable for this purpose. Furthermore, if this was the principal purpose of s. 32, it is surprising that the requirement to give notice of the application does not extend to alleged parties, as well as to parties to the proceedings.[126] As has been noted above, it is not clear whether a non-participant who disputes the tribunal's jurisdiction can be properly regarded as a party to the arbitration, at any rate until the tribunal has been held to have jurisdiction over it.

d. Court's Inherent Power to Determine Jurisdictional Objections

Prior to the 1996 Act, a tribunal could enquire into its jurisdiction but, unless given the power to do so by agreement of the parties, could not determine its own substantive jurisdiction.[127] Subject to questions of waiver and estoppel, a party or alleged party to arbitral proceedings could, at any time, seek a determination of the tribunal's jurisdiction from the court by action for a declaration or injunction or, unless the right to do so was lost by waiver or estoppel, could rely on that objection to resist enforcement of the tribunal's award.

The procedures in Part I of the 1996 Act for bringing jurisdictional objections before the tribunal or the court are intended to curtail a party's common law right of recourse to the court to determine the tribunal's jurisdiction. This is reinforced by s. 1(c) of the 1996 Act which provides that, in matters governed by Part I of the Act, the court should not intervene expect as provided in that Part.[128] This is a somewhat weaker restriction on court intervention than article 5 of the Model Law, which provides that in matters governed by the Model Law, no court *shall* intervene except where so provided in that Law. It has lead to arguments that, despite the wording of s. 1(c) of the 1996 Act, the court retains its inherent jurisdiction to determine, by declaration and injunction, an arbitral tribunal's jurisdiction at any time and irrespective of whether the party seeking such relief satisfies the retirements for recourse to the court under ss. 32, 67 or 72 of the 1996 Act.

Such an argument was rejected in *ABB Lummus Global Ltd* v. *Keppel Fils Ltd.*[129] The court said that the intention of the 1996 Act was to restrict the role of the

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[126] AA 1996, s. 32(1). *cf.* s. 72.

[127] *Brown (Christopher) Ltd v. Genossenshaft and others* [1954] 1 QB 8.

[128] *See Shorter Oxford English Dictionary*: 'Shall: 20. … In a hypothetical clause relating to the future, should takes the place of shall … when the supposition, though entertained as possible is viewed as … less welcome than some alternative'.

[129] [1999] 2 Lloyd's Rep. 24. There was no application under AA 1996, s. 72 because the respondent to the arbitration had participated in the arbitration.

court at an early stage of the arbitration and held that, because of s. 1(c), it had no jurisdiction to determine the tribunal's jurisdiction on the application of a participant in the arbitration unless the pre-conditions for a s. 32 application were met. *ABB Lummus Global Ltd* v. *Keppel Fils Ltd* was considered but not followed on this point in *Vale de Rio Doce Navegaçao SA* v. *Shanghai Bao Steel Ocean Shipping Co. Ltd.*[130] In that case, the court held that the restriction on court intervention in s. 1(c) was not, like article 5 of the Model Law, expressed as an absolute prohibition. It did not remove the court's inherent power to determine jurisdictional questions concerning arbitral proceedings, rather, it expressed a general intention that the courts should not usually intervene except in the circumstances specified in Part I of the 1996 Act. In this case, which concerned an application by a claimant who had initiated arbitration to determine a jurisdictional objection raised by a non-participating respondent, the court refused to intervene under this inherent power since it considered that such circumstances must have been anticipated by Parliament. It said that the proper course was for the claimant to procure the appointment of the tribunal and have the jurisdictional objection dealt with by it under s. 31. The court rejected the argument that, as a matter of general convenience, it should deal with the jurisdictional objection immediately rather than wait for it to come back to the court on a s. 67 challenge. It observed that one of the underlying principles of the 1996 Act was that the parties should resolve their dispute by the method they had chosen: arbitration.

In *JT Mackley & Co. Ltd* v. *Gossport Marina Ltd*,[131] counsel conceded that s. 1(c) did not exclude the court's inherent power to grant declaratory relief in respect of a question concerning the tribunal's jurisdiction. Rather, it was submitted that the court should be cautious in exercising that power. The court accepted this proposition, observing that in the ordinary way it should not be troubled with disputes as to the validity of a reference to arbitration since such questions should, in the first instance, be determined by the tribunal. Nevertheless, the court concluded, albeit with some hesitation, that it should determine the application for a declaration, despite the preconditions in s. 32, or for that matter s. 72, not being satisfied. It did so because it regarded the question, which concerned whether, under the Institute of Civil Engineers' Standard Form Contract, the conditions precedent to a reference to arbitration following an adjudicator's decision in the same matter had been satisfied, as of general importance and because the answer to that question had implications for validity of the reference to arbitration.

Thus, in the absence of any higher authority, it appears that, despite the comprehensive code for dealing with jurisdictional objections provided for in the 1996 Act and the policy against court interference embodied in that Act, the court retains an inherent jurisdiction to determine jurisdictional questions by declaration or injunction, albeit this jurisdiction will only be exercised in

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[130] [2000] 2 Lloyd's Rep. 1.
[131] [2002] BLR 367.

exceptional circumstances.[132] The cases do not support the wider proposition that the court retains an unfettered jurisdiction to determine, on application, questions concerning the tribunal's substantive jurisdiction at any time before, during or after arbitral proceedings.[133]

II. JURISDICTIONAL OBJECTIONS TO ARBITRATION BY AN INTENDED CLAIMANT

An intended claimant who disputes its opponent's contention that the claim is subject to an agreement providing for arbitration in England and Wales will, ordinarily, call the latter's bluff. This is done by commencing an action in the appropriate court with a view to resisting any application to stay that action or injunct its prosecution on the grounds that the matters being litigated should be arbitrated.

a. Raising Jurisdictional Objections on a Section 9 Application

If a claim, or counterclaim, is brought in the High Court or a county court in England and Wales, the defendant to it has a limited period in which to apply to that court under s. 9 of the 1996 Act for a stay of those proceedings on the ground that they concern matters governed by an arbitration agreement.[134] The application cannot be made before taking the appropriate procedural step (if any) to acknowledge the proceedings or after the defendant has taken any step in those proceedings to answer the substantive claim.[135] A step in the proceedings to answer the substantive claim is one that demonstrates an election to abandon the right to a stay in favour of allowing the action to proceed and has the effect of invoking the court's jurisdiction.[136] If the application is made after such a step is taken, the right to seek a stay of the court action is lost.

Court's approach to jurisdictional objections on a section 9 application

If the application is duly made, and is resisted on the ground that the parties did not agree to arbitration, the court will, ordinarily, decide that question and, if

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[132] One such case would be where the parties had agreed that the tribunal would not have s. 30 powers, otherwise there would be no way of obtaining a final determination of the tribunal's jurisdiction prior to its award on the merits, with a resulting risk of wasted costs and time. Somewhat curiously, this appears to be the position under Indian law, even where the tribunal has ruled on its jurisdiction, *see Nirma Ltd* v. *Lurgi Energie un Entsorgung GmbH* (India, High Court, Gujarat, 19 December 2002) XXVIII *YB Comm. Arb.* 790.

[133] *See Bernstein's Handbook of Arbitration and Dispute Resolution Practice* (4th edn, 2003), para. 2–333 and Merkin, *Arbitration Law*, paras 7.20, 7.25. Professor Merkin's view that if a party withdraws from an arbitration in which it has previously participated then, provided it had lodged its jurisdictional objection in accordance with s. 31(1) or (2), it can seek injunctive or declaratory relief at any stage up to the making of an award, is not supported by the authority cited, *Al Midani v. Al Midani* [1999] 1 Lloyd's Rep. 923 (mis-cited as 2000). *Al Midani* was decided under the old law.

[134] AA 1996, s. 9 gives effect, in England and Wales, to Art. II(3) of the New York Convention.

[135] AA 1996, s. 9(1), (3). Note also s. 9(2).

[136] *Capital Trust Investments Ltd* v. *Radio Design AB* [2002] 2 All ER 150 (CA).

necessary, will fix an oral hearing of disputed evidence. For, unless satisfied that the parties have agreed to arbitration, it has no power to grant a stay under s. 9.[137] The court has, however, an inherent power to stay its own proceedings and may be willing to do so, without finally determining whether claims before it are subject to an arbitration agreement, if it can see that good sense and litigation management make it desirable for an arbitral tribunal to consider the whole matter first, for example, where some matters are indisputably within the arbitral tribunal's jurisdiction and a consideration of those matters about which there is doubt will be but a short step to deciding the real issues in dispute between the parties. A stay under the court's inherent jurisdiction is most likely to be granted if the court considers that it is virtually certain that the proceedings before it are encompassed by a valid arbitration agreement or the only issue concerns the ambit or scope of that agreement. In deciding whether to finally determine, under s. 9 of the 1996 Act, if the parties have agreed to arbitrate the claims, or grant a stay under its inherent power without doing so, the court will be concerned about the likelihood of a s. 67 challenge to the tribunal's subsequent award leading to two hearings on the same matter, one before the arbitral tribunal and one before the court. It is not in the parties' interest, or conducive to avoiding unnecessary delay or expense, for the parties to have to return to the court to get a definitive answer to a jurisdictional question that could and should be decided by the court before the tribunal embarks on the meat of the reference.[138]

b. Raising Jurisdictional Objections on an Application for an Anti-suit Injunction

Section 9 does not apply where the action is commenced in a court other than the High Court or a county court of England and Wales. If the action is brought in the courts of another country, there may be an equivalent remedy in that court, particularly if the country is a contracting state to the New York Convention.[139] But, irrespective of whether or not that is the case,[140] the

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[137] *Birse Construction Ltd* v. *St David Ltd* [2000] BLR 57 (CA). Unless the parties consent to the question of whether they agreed to arbitration being determined on written evidence, the court should, if there is a genuine dispute of relevant fact, give directions for a trial of that question.

[138] *Al-Nami* v. *Islamic Press Agency* [2000] BLR 150 at 153 (CA). Waller L.J. also considered that the court should, in deciding which course to adopt, have regard to the likelihood of an appeal, for which leave might be given if needed, from the tribunal's award on a point of law connected with the existence of the arbitration agreement, his example being an issue as to its proper law. But it is difficult to see why, in the face of an arbitration agreement, questions of law that do not go to the existence or validity of that agreement would ever be a matter for a court to decide on an application to stay the proceedings before it.

[139] See Art. II of the New York Convention.

[140] But note the doubt expressed about this by Phillips L.J. in *Toepfer International GmbH* v. *Société Cargill France* [1998] 1 Lloyd's Rep. 379 at 386 (CA). His concern was that where the overseas action was prosecuted in the court of a country subject to the New York Convention, it would, as a matter of comity and in the interests of procedural simplicity, be better if the defendant to the overseas action was left to seek a stay of the action in that court.

respondent to the foreign action may, if the alleged agreement provides for arbitration in England and Wales, bring proceedings in the High Court for an anti-suit injunction to restrain the claimant from prosecuting that action on the grounds that it has been brought in breach of the parties' arbitration agreement; the court's jurisdiction to grant such an injunction deriving from s. 37(1) of the Supreme Court Act, not from any provision of the 1996 Act.[141] Provided this remedy is sought promptly, before the overseas action is too far advanced, the court will not be unduly diffident in granting an injunction in these circumstances. Strong reasons must be shown for not doing so since, without it, the applicant will be deprived of its contractual rights in a situation in which damages are manifestly an inadequate remedy.[142]

Court's approach to jurisdictional objections on an action for an anti-suit injunction

Prior to the 1996 Act the court would, on an action for an anti-suit injunction in support of arbitration, finally determine whether or not the parties had agreed to arbitration as a prelude to deciding whether or not to grant an injunction to restrain its breach.[143] The position is now less clear. In *XL Insurance Ltd* v. *Owens Corning*,[144] Toulson J. considered that, for the court to have discretion to grant an anti-suit injunction to restrain a party from prosecuting an action in an overseas court until the conclusion of an arbitration, it was sufficient for the court to be satisfied that there was an *apparent* arbitration agreement providing for arbitration in England and Wales. It was for the arbitral tribunal, or a court on a s. 32 application, to finally rule on validity of the arbitration agreement, if the tribunal's jurisdiction was subsequently challenged on the basis that there was no such agreement. It may be that Toulson J. felt able to reach this conclusion because he was concerned with granting an interim, not a final injunction. Thus, he did not need to finally determine that the action was being prosecuted in breach of an arbitration agreement.[145]

It is not clear how matters would proceed if, following the grant of the interim injunction, an application was made for the matter to be set down for full trial of the claim for a final injunction. One possibility would be for the court to stay its own proceedings, pending the tribunal's ruling on whether the parties had agreed to arbitrate, continuing the interim injunction meantime. If the court was not prepared to do this and did proceed to a full trial, it probably remains the case that, as under the old law, it would have to find that the parties were bound by a

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141 *Welex AG* v. *Rosa Maritime Ltd* [2003] 2 Lloyd's Rep. 509, para. 39 (CA).

142 *Aggeliki Charis Compania Maritima SA* v. *Pagnan SpA* [1995] 1 Lloyd's Rep. 87 at 96 (CA), per Millett L.J.; *Donohue* v. *Armco Inc.* [2002] 1 Lloyd's Rep. 425 (HL), in particular, per Lord Bingham, para. 24.

143 *Aggeliki Charis Compania Maritima SA* v. *Pagnan SpA* [1995] 1 Lloyd's Rep. 87 (CA).

144 [2001] 1 All ER (Comm.) 530.

145 It is arguable that since, in reality, the grant of the interim injunction will determine the issue before the court, a strong case for the existence of a valid arbitration agreement must be shown, not merely an arguable case. *cf. Cambridge Nutrition Ltd* v. *BBC* [1990] 3 All ER 523 (CA).

valid agreement to arbitrate, or the point would have to be conceded, before it was able to consider its discretion to grant a final injunction.[146]

III. ANCILLARY MATTERS CONCERNING COURT PROCEEDINGS

This part considers three matters relating to proceedings in the courts of England and Wales concerning an arbitral tribunal's jurisdiction: the possibility of counterclaims being advanced in those proceedings in respect of the substantive issues in dispute (the *Scrap Trade* problem), the court's jurisdiction where one or more of the parties is domiciled outside of England and Wales, and the availability of appeals to the Court of Appeal from the decisions of the court.

a. The Scrap Trade Problem

There was, under the old law, a risk that the defendant to a court action for a declaration or injunction as to validity of an arbitration agreement would advance a counterclaim in those proceedings concerned with the substantive dispute between the parties. If the arbitration agreement was found to be invalid, the counterclaim founded the jurisdiction of the courts of England and Wales to determine the substantive dispute even if there was no connection between the parties or their transaction and England and Wales, unless the court could be persuaded not to exercise its jurisdiction, for instance, on grounds of *forum non conveniens*. This was because a person who invoked the jurisdiction of the English court by seeking a declaration or injunction concerned with the validity of an alleged arbitration agreement could not claim any special immunity from liability to a counterclaim in those proceedings, there being a right under the then Rules of Court[147] to make a counterclaim in that action without the permission of the court even if, had the counterclaim been commenced by separate action, it could not have been prosecuted because process could not have been served out of the jurisdiction.[148]

The 1996 Act is silent on this question, but the effect of the procedural rules now in force, the Civil Procedure Rules (CPR),[149] is that a defendant to court proceedings for a declaration or injunction concerned with an arbitral tribunal's substantive jurisdiction, whether under s. 72 or the court's inherent jurisdiction, must now obtain the court's permission to serve a counterclaim in those proceedings. It no longer has a right to do so. If there is no connection between the parties or their transaction and England and Wales, other than the alleged

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[146] As was done in *Welex AG* v. *Rosa Maritime Ltd* [2003] 2 Lloyd's Rep. 509 (CA) although, in the case, the court did so on a cross-application under s. 72 of the 1996 Act (*see* para. 34). *See also* the discussion on this point in *Navigation Maritime Bulgare* v. *Rustal Trading* [2002] 2 Lloyd's Rep. 106.

[147] *See* RSC Order 28 Rule 7 and Order 15 rules 2 and 5 (now repealed).

[148] *Metal Shipping Co. Ltd* v. *Kate Shipping Co. Ltd* [1990] 1 Lloyd's Rep. 297 at 299, 307 (HL) (but note dissent by Lord Goff at 309).

[149] CPR Parts 8 and 62. *See in particular* Rules 8.7, 62.1, 62.3 and 62.8.

agreement providing for arbitration in England and Wales, it is difficult to see that the court would give its permission merely to enable the defendant to found jurisdiction and thus force the claimant, if the arbitration clause is invalid, to litigate the substantive issues in a forum which it would not otherwise have chosen, England and Wales.[150]

b. Serving Process out of the Jurisdiction

The courts of England and Wales exercise an exorbitant jurisdiction over the parties to actions concerning arbitrations whose seat is in England and Wales even if neither is domiciled in and, apart from the arbitration, has any connection with England and Wales. Thus, the court may give permission for service of process claiming relief from the court under any provision of the 1996 Act, including under ss. 18, 32, 66, 67 and 72, out of the jurisdiction.[151] This is the case irrespective of whether the defendant is domiciled in a contracting state to the Brussels or Legano Conventions, both concerned with jurisdiction and the recognition and enforcement of judgements, or the Council Regulation on Jurisdiction and the Recognition and Enforcement of Judgments ('the Judgments Regulation').[152] Proceedings commenced in court under the provisions of the 1996 Act, even if they involve consideration of the validity of the arbitration agreement as a preliminary issue, come within the arbitration exception to those treaties.[153]

This exorbitant jurisdiction is also exercised where the action is for an anti-suit injunction to restrain the defendant from prosecuting an action elsewhere in breach of an agreement providing for arbitration in England and Wales. Thus, the court may give permission for service of proceedings claiming such relief out of the jurisdiction on any person alleged to be a party to that agreement.[154]

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[150] Lord Goff's dissenting judgment in *Metal Shipping Co. Ltd* v. *Kate Shipping Co. Ltd* [1990] 1 Lloyd's Rep. 297 (HL) provides strong arguments against giving permission. In *Tongyuan (USA) International Trading Group* v. *Uni-Clan Ltd*, 19 January 2001 (Lawtel), one of the grounds on which the defendant sought, unsuccessfully, to set aside the court's order giving permission for a CITAC award to be enforced in England and Wales was that the claimant should be required to commence an action on the award so that the defendant's cross-claim concerning damage to the goods which the tribunal had ordered to be returned to it, could be taken into account. It seems to have been assumed that the defendant could not have obtained the court's permission under CPR Rule 8.7 to serve a counterclaim in proceedings commenced under CPR Part 8 for summary enforcement, but that, in an action on the award, commenced under CPR Part 7, the defendant would have the right to do so under CPR Rule 20.4.

[151] CPR Rule 62.5.

[152] The Brussels and Legano Conventions on Jurisdiction and the Recognition and Enforcement of Judgments, now largely superseded by the Council Regulation on Jurisdiction and the Recognition and Enforcement of Judgments ('the Judgments Regulation'). The relevant states are those who are members of EFTA or of the EU and states who are in the process of becoming members of the EU.

[153] Art. 1(4) in the Conventions, art. 1(2)(d) of the Judgments Regulation; *Mark Rich and Co. AG* v. *Societa Italina Impianti* [1991] 1 ECR 3855, [1992] 1 Lloyd's Rep. 342 (judgment only).

[154] Under CPR Rule 62.5(1)(c)(i) (note also Rule 6.20(5)(c)); *Navigation Maritime Bulgare* v. *Rustal Trading* [2002] 2 Lloyd's Rep. 106 (considering para. 8.1 of the Arbitration Practice Direction, now superseded by the similarly worded Rule 62.5). The court has no power to permit service on a person not alleged to be a party to the agreement, *Vale de Rio Doce Navegaçao SA* v. *Shanghai Bao Steel Ocean Shipping Co. Ltd* [2000] 2 Lloyd's Rep. 1. Merkin, *Arbitration Law*, para. 6.64, citing *Sokana Industries Inc.* v. *Freyre & Co. Inc.* [1994] 2 Lloyd's Rep. 57, suggests that the court has no such power, but *Sokana* was concerned with the court's powers to permit service out of the jurisdiction under the more narrowly worded RSC Order 72 Rule 7(1) (now repealed).

Although the point remains open for determination by the European Court of Justice (ECJ),[155] the courts of England and Wales regard such proceedings as also falling within the arbitration exception provided for in the Brussels and Legano Conventions and the Judgments Regulation, since their essential focus or essential subject matter is arbitration.[156] If the courts of England and Wales are right about this, the question of incompatibility between the grant of such an injunction in respect of proceedings in another Convention or Regulation country and the Conventions or Judgments Regulation does not arise.[157] This is because the court in which the anti-suit injunction is sought will have to reach its own conclusion on whether the parties have agreed to arbitrate and, thus, whether the proceedings before it fall within the arbitration exception. If they do, then the court cannot be required to stay the proceedings before it under article 21 of the Conventions (article 27 of the Judgements Regulation).

c. Appeals from a Decision of the Court to the Court of Appeal

Once an application concerning existing or proposed arbitral proceedings has been determined by the court, whether under a provision of the 1996 Act or under the court's inherent jurisdiction, there may be the possibility of an appeal from that decision to the Court of Appeal, subject to obtaining permission to appeal from the relevant court. Decisions of the court made under ss. 9 and 72 of the 1996 Act can be appealed with the permission of either that court or the Court of Appeal,[158] as can decisions made under the court's inherent jurisdiction or a jurisdiction derived form the Supreme Court Act 1981.[159] Decisions of the court under ss. 18, 32 and 67 of the 1996 Act can only be appealed with the permission of the first instance court. The Court of Appeal cannot give itself leave

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155 *Welex AG* v. *Rosa Maritime Ltd* [2002] 2 Lloyd's Rep. 701, para. 16 (Steel J.); [2003] 2 Lloyd's Rep. 509, para. 52 (CA). For a review of the issues, *see* D. Hascher, 'Recognition and Enforcement of Judgments on the Existence and Validity of an Arbitration Clause under the Brussels Convention' in (1997) 13(1) *Arb. Int'l* 33; J-P Beraudo, 'The Arbitration Exception in the Brussels and Legano Conventions: Jurisdiction, Recognition and Enforcement of Judgments' in (2001) 18(1) *J Int'l Arb.* 13; J van Haersolte-van Hof, 'The Arbitration Exception in the Brussels Convention: Further Comment' in (2001) 18(1) *J Int'l Arb.* 27.

156 *Navigation Maritime Bulgare* v. *Rustal Trading* [2002] 2 Lloyd's Rep. 106, rejecting the contrary conclusion in *Partenreederei M/S 'Heidberg'* v. *Grovsner Grain and Feed Co. Ltd* [1995] 2 Lloyd's Rep. 287. As noted in *Bulgare*, support for the view taken by the English courts can be found in the judgments of the ECJ in *Van Uden Maritime BV* v. *Kommanditgesellschaft in Ferma Deco-Line* [1998] ECR 7091, paras 31 and 32 and in *Mark Rich and Co. AG* v. *Societa Italina Impianti* [1991] 1 ECR 3855.

157 See Art. 21 of the Conventions (art. 27 of the Regulations). The ECJ regards anti-suit injunctions in support of exclusive jurisdiction clauses as incompatible with the regime in the Brussels and Legano Conventions and the Judgments Regulation, *see* Case C-116/02 *Erich Gasser GmbH* v. *MISAT Srl*, 9 December 2003, [2004] 1 Lloyd's Rep. 222 (a second seized court must, even if seized under an alleged exclusive jurisdiction agreement, stay the proceedings before it unless and until the first seized court determines that it does not have jurisdiction; it cannot enquire into the jurisdiction of a first seized court). *See also* the Advocate-General's opinion in Case C-159/02 *Turner*, 20 November 2003 (unreported) (anti-suit injunctions are incompatible with Convention principles), now *Turner* v. *Grovit*, ECJ 24 April 2004 (the Convention precludes the grant or an injunction whereby a court of a Contracting State prohibits a party to proceedings pending before it from commencing or continuing legal proceedings before a court of another Contracting State.

158 *Inco Europe Ltd* v. *First Choice* [2000] 1 Lloyd's Rep. 497 (HL).

159 *Welex AG* v. *Rosa Maritime Ltd* [2003] 2 Lloyd's Rep. 509, para. 34 (CA).

to hear an appeal from such a decision, or consider an appeal from the first instance court's refusal to give permission to appeal,[160] other than in the exceptional case were there has been misconduct or unfairness in the first instance court's refusal to give permission to appeal, for instance, because it failed to give reasons for that refusal.[161]

IV. RESISTING RECOGNITION AND ENFORCEMENT OF AN AWARD ON JURISDICTIONAL GROUNDS

The right to resist recognition and enforcement of an award made in arbitral proceedings governed by the 1996 Act on jurisdictional grounds may depend on whether recognition and enforcement is sought in England and Wales or in some other jurisdiction.

a. Recognition in England and Wales

An award made in arbitral proceedings governed by the 1996 Act will, unless otherwise agreed by the parties or successfully challenged or appealed, be recognised in England and Wales as final and binding on the parties or any persons claiming though or under them.[162] Furthermore, the award creates an issue estoppel *per res judicata* such that nether party can relitigate or re-arbitrate any issue raised in the arbitral proceedings which was necessary for the determination of the whole case, and which was determined by that award.[163]

b. Enforcement in England and Wales

Enforcement of English arbitral awards in England and Wales is governed by s. 66 of the 1996 Act.[164] This provides that an award made by an arbitral tribunal pursuant to an arbitration agreement may, with the permission of the court, be enforced in the same manner as a judgment or order of the court to the same effect. Although the court is obliged not to give permission where, or to the extent that, the person against whom the award is sought to be enforced shows that the tribunal lacked substantive jurisdiction to make the award, the right to raise such an objection may be lost by operation of the statutory waiver in ss. 73(1) and 73(2).[165]

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[160] *See* ss. 18(5), 32(5) and (6), 67(4) and 105(1); *Henry Boot Construction* v. *Malmaison Hotel* [2000] 2 All ER (Comm.) 960 (CA); *Athletic Union* v. *NBA* [2002] 1 Lloyd's Rep. 305.

[161] *North Range Shipping* v. *Seatrans Shipping* [2002] 1 WLR 2397 (CA).

[162] AA 1996, s. 58, a non-mandatory provision, *see* s. 4(1).

[163] *Fidelitas Shipping Co.* v. *V/O Exportchleb* [1965] 1 Lloyd's Rep. 223 (CA); *see also Carl-Zeiss Stiftung* v. *Rayner and Keeler ltd (No. 2)* [1967] 1 AC 853 (HL), principally per Lord Reid at 609–617 and Lord Wilberforce at 963–697. If the tribunal's determination of the issue is not necessary for its decision, it does not give rise to an issue estoppel, *Lincoln National* v. *Sun Life* [2005] 1 Lloyd's Rep 606.

[164] The proceedings can, if necessary, be served out of the jurisdiction, *see* Part III *supra.*

[165] AA 1996, s. 66(1), (3).

i. Implications of the statutory waiver for enforcement of an award against a participant in the arbitration

Where the party against whom enforcement of an award is sought has participated in the arbitral proceedings leading to that award, it cannot resist enforcement by relying on a jurisdictional objection that was not raised in due time before the tribunal during the course of the arbitration unless the tribunal has admitted the objection out of time,[166] or the party resisting enforcement can establish that, at the time it took part or continued to take part in the arbitral proceedings, it did not know and could not with reasonable diligence have discovered the grounds for the objection.[167] If the jurisdictional objection has been ruled on and rejected by award of the tribunal, enforcement of that or subsequent awards of the tribunal cannot be resisted by reference to that objection.[168] If the objection is to be pursued, this must be done by application under s. 67 or, if available, by agreed process of appeal or review of that award.

Even in those cases where the statutory waiver does not apply,[169] the right to resist enforcement of an award on jurisdictional grounds may be lost at common law, if, as will generally be the case, those grounds could have been relied on to question the award under s. 67.[170]

ii. Implications of the statutory waiver for enforcement against a non-participant in the arbitration

Where the party against whom enforcement of an award is sought has taken no part in the arbitral proceedings leading to that award, it is not precluded from raising jurisdictional objections to enforcement merely because these were not raised in due time during the course of the arbitral proceedings.[171] It is not clear whether a non-participant, who was aware of the proceedings and of an award being made in which the tribunal ruled that it had jurisdiction, but did not question that award by application under s. 67, will be barred, under s. 73(2) or at common law, from resisting enforcement of that award, or other awards of the tribunal, on any ground that was the subject of the tribunal's ruling.[172]

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166 Under *ibid.* s. 31(3).

167 *ibid.* s. 73(1).

168 *ibid.* s. 73(2); *People's Insurance Company of China* v. *Vysanthi Shipping Corporation* [2003] 2 Lloyd's Rep. 617.

169 The lacunae in the statutory waiver are discussed in Part I *supra*.

170 By extension of the reasoning in *Scrimaglio* v. *Thornett & Fehr* [1924] 18 LIL Rep 148 (CA) and *Termarea SRL* v. *Rederiaktibolaget Sally* [1979] 2 Lloyd's Rep. 439.

171 AA 1996, s. 73(1) only applies to those who participate in the proceedings.

172 *ibid.* s. 73(2). This part of the statutory waiver is not expressly limited to those who participate. Its uncertain implications for those who do not participate in the arbitration are considered in Part I of this article. It is not clear whether the principles in cases such as *Scrimaglio* v. *Thornett & Fehr* [1924] 18 LIL Rep. 148 (CA), *Termarea SRL* v. *Rederiaktibolaget Sally* [1979] 2 Lloyd's Rep. 439 apply to non-participants.

c. Enforcement and Recognition in the Courts of Another Country

Where enforcement or recognition of an award in proceedings governed by the 1996 Act is sought outside England and Wales, it will be a matter for the law of the enforcing state whether recognition and enforcement can be resisted on the basis of jurisdictional objections that have been rejected by award of the tribunal or by the courts of England and Wales, or which would be regarded as waived under the law of England and Wales. Since, in most cases, the enforcing state will be a contracting state to the New York Convention, this will depend, principally, on the way in which that law interprets the Convention; in particular, Articles IV and V.

Under Article IV(1)(b) of the Convention, it is for the party seeking recognition and enforcement of an award, to provide at the time of its application for enforcement, along with the award, the original or a certified copy of the 'agreement referred to in article II', Article II being concerned with agreements in writing, including an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams, that provides for arbitration of present or future differences in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.[173] Provided that these threshold requirements are satisfied, it is for the party resisting recognition and enforcement to prove one of the grounds for doing so under Article V of the Convention, the grounds in Articles V(1)(a), (c) and (d) equating to objections to the tribunal's substantive jurisdiction, as defined in s. 30(1) of the 1996 Act.[174]

One view is that, since the New York Convention does not expressly deal with the matter, an arbitral tribunal's decision on its jurisdiction can be of no weight on recognition and enforcement proceedings under the Convention, nor does a party's failure to challenge the tribunal's decision on its jurisdiction in the courts at the seat of the arbitration bar it from contesting the tribunal's jurisdiction on enforcement proceedings.[175] But a review of cases reported in the *Year Books of Commercial Arbitration* shows that, in certain circumstances, enforcing courts have given weight to a tribunal's award on its jurisdiction or to party's failure to challenge that decision in the courts at the seat of the arbitration. As for judgments of a court at the seat of the arbitration concerning the tribunal's jurisdiction, the status of such judgments on enforcement proceedings in another

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[173] Art. II(1) and (2).

[174] Art. V(1)(a): 'the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereof, under the law of the country where the award was made'; *cf.* AA 1996, s. 30(1)(a). Article V(1)(c): 'where the award deals with a difference not contemplated by or not falling with the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration'; compare AA 1996, s. 30(1)(c). Article V(1)(d): 'where the composition of the arbitral authority was not in accordance with the agreement of the parties or, failing such agreement was not in accordance with the law of the country were the arbitration took place'; *cf.* AA 1996, s. 30(1)(b).

[175] Van den Berg, *The New York Convention of 1958* (1981), p. 286.

jurisdiction depends on the enforcing court's attitude to foreign judgments, not on the wording of the New York Convention.[176]

i. Threshold criteria for enforcement[177]

The enforcing court's interpretation of the threshold criteria for enforcement in Article IV(1) (b) of the Convention has a direct bearing on whether it will be prepared to give weight to decisions of the tribunal or of the courts of England and Wales that the parties had agreed to arbitration.

In many jurisdictions, the requirement to provide the original or a copy of the 'agreement referred to in article II' is regarded as requiring the party seeking enforcement to prove the formal validity of the arbitration agreement on which it relies.[178] But, since neither Article II, nor Article IV of the Convention identifies an applicable law, there is uncertainty over which law should apply in deciding this question,[179] the possibilities being the law of the enforcing state, the law of the arbitration agreement or, in the absence of any indication of the law of the arbitration agreement, the law of the country where the award was made?[180]

If the law of the enforcing state is applied, decisions upholding the arbitration agreement made by the tribunal or by the courts at the seat of the arbitration are of no weight since these will have applied the law of the arbitration agreement or of the seat of the arbitration. Thus, in *Peter Cremer GmbH & Co.* v. *Co-operative Molasses Traders Ltd*,[181] which concerned the enforcement of an English award in the Republic of Ireland, the Supreme Court of Ireland held that, if disputed, the court had to be satisfied that there was a binding arbitration agreement between the parties before entering on the application to enforce the award. It was not barred from considering this question by the tribunal's decision that a contract had been concluded. A similar view appears to have been taken by the Swiss Federal Supreme Court in *A Ltd* v. *BAG*,[182] where one of its grounds for refusing an application to enforce a London arbitral award in Switzerland was that the documents provided by the applicant did not satisfy the formal requirements of

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[176] C. Kessedjian, 'Court Decisions on Enforcement of Arbitration Agreements and Awards' in (2001) 18(1) *J Int'l Arb.* 1.

[177] These principles also apply where recognition is sought.

[178] Van den Berg, *supra* n. 167 at pp. 286, 312.

[179] *See* (although more concerned with Art. II(1) and (3), than with Arts II(2) and IV(1)), J. Paulsson, 'Arbitrability: Still Through a Glass Darkly' in *ICC Bulletin*, Special Supplement (1999), p. 95; H. Arfazadeh, 'Arbitrability under the New York Convention: the Lex Fori Revisited' in (2001) 17(1) *Arb. Int'l* 73.

[180] This question is far from academic as legal systems differ over the interpretation of the requirement for writing. Some regard the Art. II(2) definition as exhaustive. Others, as is allowed for in Art. VII(1), take a more relaxed view, accepting that an arbitration agreement is in writing if there is some written evidence of that agreement, even though it is not contained in a document signed by the parties or in an exchange of correspondence between them. *See* Redfern and Hunter, *Law and Practice of International Commercial Arbitration* (4th edn, 2004), pp. 134–137; G. Alvarez, 'Article II(2) of the New York Convention and the Courts' in *ICCA Congress Series No. 9* (Kluwer, 2000), p. 67. The more relaxed view accords with the view of the Secretariat of the United Nations: *Possible Future Work in the Area of International Commercial Arbitration* (6 April 1999), Part B (available at www.uncitral.org).

[181] [1985] ILRM 564 (Ireland, Supreme Court).

[182] Switzerland, Bundesgericht, 31 May 2002, XXVIII *YB Comm. Arb.* 835.

Article II(2). These documents were, principally, an unsigned charterparty, which referred to the applicant's general conditions of contract, the general conditions themselves, which contained an arbitration clause, and correspondence concerning the charterparty which did not mention the general conditions or the arbitration clause. In reaching its conclusion, the court appears to have applied Swiss law since it did not consider whether the reference in the charterparty to the general conditions would have been sufficient, under the law of England and Wales, to incorporate the arbitration clause in those conditions.[183] It is not clear whether the tribunal had ruled on its own jurisdiction, but there is nothing in the reported extracts to suggest that the Swiss court regarded this as relevant to the question it had to decide.

It is possible, however, to distinguish between what documents must be provided for the purpose of Article IV(1)(b), something ordinarily determined by the law of the enforcing state,[184] which may take a liberal or a restricted view of the necessary formalities,[185] and establishing that the parties had agreed to the evidenced terms, something to be decided under the law applicable to the alleged agreement[186] and, in respect of which, decisions of the tribunal or the courts at the seat may be of weight.

In *Planavergne SA* v. *Kalle Bergander*,[187] which concerned enforcement of a French award in Sweden, the Swedish Court of Appeal held that, under s. 58 of the Swedish Arbitration Act 1999 (the equivalent of Article II of the Convention) it was for Planavergne, the party seeking enforcement, to show that the arbitration agreement on which it relied had been entered into in accordance with the law applicable to that agreement, in this case French law. The court considered that Planavergne had established this because, according to the findings of the arbitral tribunal, it must be assumed to have established that an agreement to arbitrate existed between the parties. A similar distinction seems to have informed the reasoning of the Spanish Supreme Court in *Actival Internacionale SA* v. *Conservas El Pilar SA*,[188] when it refused to enforce an award rendered in France on the grounds that the arbitration agreement was invalid, despite a ruling by the Court of Appeal in Paris that the agreement as valid under French law. One of the

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183 This possibility could not have been ignored had the issue of validity been dealt with under Art. V(1)(a), not under Art. II.

184 Consider *X* v. *Y* (Germany, Court of Appeal of Bavaria, 17 September 1998) XXVIa YB *Comm. Arb*. 645, which concerned the enforcement of an English award in Germany. The court rejected an argument that the arbitration was not in writing on the basis that it was valid under English law, in particular s. 5(2) of the 1996 Act, the law on which the parties had agreed. In reaching this conclusion, the court appears to have regarded questions as to the required form of an arbitration agreement as matters to be considered under Art. V(1)(a), not Arts IV or II of the Convention.

185 This possibility is allowed for in Art. VII(1) of the New York Convention.

186 This result can be achieved either directly, by concluding that the relevant law must, for consistency, be that referred to in Art. V(1)(a) or indirectly, by application of the enforcing states' conflict of law rules.

187 Sweden: Svea Court of Appeal, 7 September 2001, XXVII *YB Comm. Arb*. 554, considering Swedish Arbitration Act 1999, ss. 48, 54, and 58, which, unlike Art. II of the New York Convention, deal separately with questions of agreement, capacity and validity and with the laws applicable to each of these three questions.

188 Spain, Tribunal Supremo, 16 April 1996, XXVII YB *Comm. Arb*. 528.

court's reasons for this conclusion was that Actival, the party seeking enforcement, had not supplied evidence of the foreign (French) law governing the validity of the arbitration agreement, suggesting that the court considered that this was the relevant law for deciding whether the threshold requirements in Article IV(1) had been satisfied. If the court had been concerned with validity under Article V(1)(a), the onus of proof would have been on the party resisting enforcement. As for the decision of the Paris court, the enforcing court did not disregard this because it was considered irrelevant, but because the Paris court's decision had not been recognised in the Spanish legal system and no request had been made for its enforcement in Spain.

A distinction between satisfying the formal requirements of Article IV(1)(b) by providing a copy of the purported arbitration agreement and, if disputed, establishing that the parties actually agreed to the evidenced terms, a matter to be determined under the law of contract, not by reference to Article II(2), was also made by the US Court of Appeal (Third Circuit) in *China Minmetals* v. *Chi Mei Corp.*,[189] a case concerning the enforcement of a Chinese award in New Jersey. However, the court held that, where enforcement was resisted on the grounds that the alleged arbitration agreement had never been made, was void *ab initio*,[190] the allegation in this case being that the documents provided were forged, the enforcing court should, unless the parties had agreed to the tribunal deciding arbitrability, or the objecting party had waived its objection, make an independent determination, applying the law of the state, in the United States, where the party was domiciled, of whether the parties had agreed to arbitrate. It was not bound by the tribunal's decision on that question, even if, as was the case here, the tribunal had, under the applicable CIETAC rules, power to rule on its own jurisdiction, since the issue was whether the parties had ever agreed to the arbitration clause incorporating those rules. The court found support for this conclusion in what it found to be the generally accepted view that the doctrine of Kompetenz-Kompetenz restricted but did not exclude the court's power to review the tribunal's jurisdiction.

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189 *China Minmetals Materials Import and Export Co. Ltd* v. *Chi Mei Corp.* (2003) 334 F 3d 274; applying the reasoning in *First Options of Chicago Inc.* v. *Kaplan* 514 US 938 (US Supreme Court). The majority view appeared to be that this was a principle of US public policy to which the court could give effect under of Art. V(2). Alito C.J. dissented on this saying that the party seeking enforcement had not merely to provide, under Art. IV(1)(b), a document purporting to be an arbitration agreement, but to prove that the document was, in fact, an agreement in writing within the meaning of Art. II(2). I am grateful to Ms June McLaughlin-Cheng for drawing this case to my attention. Now also reported at XXIX YB Comm. Arb. 1003. The US Court of Appeals, 11th Circuit applied similar reasoning in *Czarina LLC* v. *WF Poe Syndicate*, 4 February 2004, *XXIX YB Comm. Arb.* 1200, but, like Alito C.J., regarded Art. IV(1)(b) as embodying a requirement to prove that the exhibited terms had been agreed. The advantage, for the enforcing court, of using either Art. IV or Art. V(2) as the basis for this review is that it avoids the presumption in favour of enforcement in Art. V and the requirement to apply, under Art. V(1)(a), the law to which the alleged agreement was subject, or failing any indication of what that was, the law of the country were the award was made.

190 It may be that had the issue been subsequent invalidity, that the arbitration agreement was voidable, not void, a US court would have considered this to be a matter for the tribunal to decide, *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.* 388 US 395 (US Supreme Court); cited in *China Minmetals Materials Import and Export Co. Ltd* v. *Chi Mei Corp.* (2003) 334 F 3d 274. If this is right it suggests that the determination of the tribunal has weight on an Article V(1)(a) challenge.

While similar principles are applied in other jurisdictions,[191] the reasoning of the court appears to have overlooked that, under most developed systems of arbitral law, such a review is, under the curial law of the arbitration (the *lex arbitri*), primarily a matter for the courts at the seat of the arbitration with recourse having to be sought within a limited period of the tribunal's determination, if it is not to become final.[192] Thus, the question, which lies at the heart of the court's reasoning, did Chi Mei agree to arbitrate arbitrability (arbitrability encompassing, in American law, the existence and validity of an arbitration agreement),[193] should not be looked at in a procedural vacuum but, at any rate where the objecting party has participated in the arbitration, even if only to contest jurisdiction, in the context of the *lex arbitri*. Looked at in this wider context, the question becomes not whether a party has waived its jurisdictional objection, but whether a party who has unsuccessfully contested jurisdiction before the arbitral tribunal should be allowed to ignore, on enforcement proceedings in another jurisdiction, provisions of the *lex arbitri* that impose time limits on disputing the tribunal's decision on its jurisdiction in a court of competent jurisdiction at the seat and whether, if a court of competent jurisdiction at the seat has determined the objection, its determination of that question can, itself, be recognised in the enforcing state or, otherwise, gives rise to an issue estoppel binding the parties?[194]

In those jurisdictions where the threshold conditions to enforcement in Article IV(1)(b) of the Convention are satisfied by providing documents that show an apparent agreement to arbitrate, validity, including the existence of the apparent agreement, is usually regarded as a matter to be dealt with under Article V(1)(a),

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[191] See, for example, Germany. In *X (UK)* v. *Y (Germany)*, Oberlandesgericht (Court of Appeal), 22 November 2001, *XXIX YB Comm. Arb.* 732, concerning enforcement of an English Award, the Rostock Court of Appeal, having concluded, contrary to the tribunal's award on the point, that the parties had not agreed to arbitration, said, referring to Art. V(2), that it was contrary to German public policy to enforce an award made in the absence of an arbitration agreement. It said, further, that the objecting party's failure to dispute the tribunal's award on jurisdiction at the seat, did not rule out there being such a violation of German public policy. But, in *Manufacture (Slovina) v. Exclusive distributor (Germany)*, Oberlandesgericht (Court of Appeal), 24 June 1999, *XXIX YB Comm. Arb.* 687 concerning enforcement of an ICC award made in Paris, the Court of Appeal of Schleswig held that, by identifying the jurisdictional dispute in the tribunal's terms of reference, the parties had agreed that the tribunal would decide whether the parties had agreed to arbitrate, thus, the point could not be taken on proceedings for recognition and enforcement.

[192] *See e.g.*, the 30-day time limit for questioning a tribunal's ruling on its jurisdiction under art. 16(3) of the Modal Law and the three-month period for applying to set aside an award on the merits on, *inter alia*, jurisdictional grounds under art. 34, *see* art. 34(3).

[193] The question posed in *First Options of Chicago Inc.* v. *Kaplan* 514 US 938 (US Supreme Court) to decide whether the courts or the arbitral tribunal has primary power to decide whether the parties agreed to arbitrate.

[194] *See* W. Park, 'The Arbitrability Dicta in *First Options* v. *Kaplan*' in (1996) 12 *Arb. Int'l* 137 at 147. Park considers that it is 'voodoo jurisprudence' to suggest that an arbitral tribunal can finally determine its own jurisdiction in respect of the identity of the parties or the existence of an arbitration agreement. But, in saying this, he does not consider the importance of the curial law in giving finality to the tribunal's decision. But note the view in *X (UK) v. Y (Germany)*, Germany, Oberlandesgericht (Court of Appeal), 22nd November 2001, *XXIX YB Comm. Arb.* 732, that the curial law should be ignored, in this respect, on grounds of German public policy. It seems, however, that other challenges, such as concerning the impartiality of the tribunal, cannot be pursued if not taken before the courts at the seat; *Shipowner (Netherlands)* v. *Cattle and Meat Dealer (Germany)*, Germany, Bundesgerichtshif (Federal Supreme Court), 1 February 2001, *XXIX YB Comm. Arb* 700.

the relevant law being the law of the alleged agreement or, if not indicated, of the place where the award was made. In such jurisdictions, the enforcing court may, when considering whether the documents provided do show a *prima facie* agreement to arbitrate, be influenced by decisions concerning the existence of that agreement by the tribunal or the courts at the seat of arbitration, since they will be decisions under the applicable law. Thus, in *Dardana Ltd* v. *Yukos Oil Co.*,[195] which concerned the enforcement of a Swedish award in England and Wales, the Court of Appeal held that all that the applicant had to provide was apparently valid documentation containing an arbitration clause by reference to which the arbitrators had accepted that the parties had agreed to arbitration; documentation that the arbitrators had accepted recorded an agreement to arbitrate made with the parities' authority. There was no additional requirement to provide evidence that these documents embodied an agreement between the parties. Challenges to the existence or validity of the arbitration agreement had to be pursued simply and solely under AA 1996, s. 103(2)(b) (equivalent to that part of Article V(1)(a) of the New York Convention concerned with the validity of the alleged agreement). This principle was applied in *Svenska Petroleum Exploration AB* v. *Government of Lithuania*, which concerned the recognition of an award on jurisdiction in England and Wales. The court held, further, that a party could not, in proceedings for recognition and enforcement, challenge the validity of an award on jurisdictional grounds if, having lost that argument before the tribunal, it failed to avail itself of a right to challenge the award in the courts at the seat. A similar approach was taken by a New York District Court in *Sarhank Group* v. *Oracle Corp.*,[196] which concerned the enforcement of an Egyptian award in New York State. The court held that since it was not being asked to compel arbitration under Article II of the Convention, but, rather, enforce a Convention award, its jurisdiction to consider the application was not dependent on it first deciding that the parties had concluded a written agreement to arbitrate within the meaning of Article II of the Convention. The court had jurisdiction to consider the application because it had been established by the arbitral tribunal and affirmed by an Egyptian court that, under the laws of Egypt, the party resisting enforcement had concluded an arbitration agreement by agency, a finding that was concerned with the construction of the parties' agreement.[197] This decision was, however, overturned on appeal,[198] the principles in *First Options of Chicago Inc.*

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[195] [2002] 2 Lloyd's Rep. 327 (CA).

[196] USA, District Court, Southern District of New York, 9 October 2002, XXVIII *YB Comm. Arb.* 1043.

[197] It is not clear to what extent this decision can stand with *China Minmetals Materials Import and Export Co. Ltd* v. *Chi Mei Corp.* 334 F.Ed 274 (USA, Court of Appeals for the Third Circuit). It may be that different considerations apply were the initial existence of an arbitral agreement is in dispute, rather than its scope.

[198] *Sarhank Group* v. *Oracle Corporation* 404 F. 3d 657 (US Court of Appeals, 2nd Cir.), 14 April 2005. The court said that the it was Fedral law of contract and agency, not Egyptian law that was to be applied in deciding whether an American non-signatory was bound to arbitrate. Presumably, if the party against whom enforcement and recognition was sought, was not domiciled in the USA, it would be the law of its place of domicile that applied? *See also* JM Hosking, 'Non-Signatories and International Arbitration in the United State, the Quest for Consent' in 20 Arb Int'l 28, published before the Court of Appeals decision in *Sarhank*.

v. *Kaplan*[199] being applied as a matter of public policy to which the enforcing court could give effect under Article V(2) of the New York Convention.

These alternative approaches to the interpretation of Article IV(1) and its relationship with Article II were considered by the Italian Supreme Court in *De Maio Giuseppe* v. *Interskins Ltd*,[200] which concerned the enforcement of an English award in Italy. However, the court did not have to chose between them since it concluded that, irrespective of whether compliance with Article II was a relevant consideration on enforcement proceedings or whether all questions as to validity, including the non-existence and form of the alleged arbitration agreement, fell to be considered only under Article V(1)(a), the question of whether the parties' arbitration agreement had been terminated by a later contract between them was a matter for the arbitrators since it did not concern an initial defect in the arbitration agreement. Thus, the arbitral tribunal's decision on that question could not be re-opened to resist enforcement of the tribunal's award.

ii. Jurisdictional grounds for resisting recognition and enforcement under Article V of the New York Convention

Provided that the Article IV threshold requirements are satisfied, the enforcing court may only refuse to recognise and enforce an award if the party against whom enforcement is sought establishes one of the grounds for resisting enforcement in Article V of the Convention.

iii. Enforcing court's attitude to the tribunal's determination of its substantive jurisdiction

It is clear from the cases concerned with the threshold criteria to enforcement, discussed previously, that there are a number of jurisdictions in which an enforcing court will give weight to the tribunal's determination of its substantive jurisdiction where a jurisdictional objection is raised under Article V of the Convention because the enforcing court is, under Article V, concerned with the validity of that objection under the same law as the tribunal has applied to decide that question.[201] Thus, although in *Planavergne SA* v. *Kalle Bergander*,[202] the Swedish Court of Appeal's conclusion that the enforcing party must, according to the findings of the arbitral award, be assumed to have established that an arbitration agreement existed between the parties under French law concerned the Swedish equivalent of Article II, its reasoning would appear to be equally applicable had the validity of the arbitration agreement been questioned under s. 54 of the

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[199] 514 US 938 (US Supreme Court).

[200] Italy, Corte di Cassazione, 21 January 2000, XXVII *YB Comm. Arb.* 492.

[201] Art. V(1)(a), concerned with the validity of the arbitration agreement, provides that this is to be determined in accordance with the law of that agreement or, in the absence of any indication of that law, under the law of the country were the award was made. Art. V(1)(c), concerned with what matters have been submitted to arbitration, does not identify an applicable law, but the only relevant laws are the law of the arbitration agreement or the law of the place of the award; *see* Van den Berg, *supra* n. 167 at pp. 312–313. Art. V(1)(d), concerned with the composition of the tribunal, refers to the law of the place of the award.

[202] Sweden, Svea Court of Appeal, 7 September 2001, XXVII *YB Comm. Arb.* 554.

Swedish Act 1999, equivalent to Article V of the Convention. In *Sarhank Group* v. *Oracle Corp.*,[203] the New York District Court, having concluded that the validity of the arbitration agreement could only be challenged under Article V(1)(a) of the Convention, held that the arbitral tribunal's conclusion that, under Egyptian law, it was in partnership with a signatory to the arbitration agreement and thus bound by that agreement, could not be reviewed by the enforcing court in the absence of extraordinary circumstances, there being no such circumstances in this case.

The possibility that weight will be given to an arbitral tribunal's determination of its own jurisdiction has also been recognised in other jurisdictions, albeit not in the context of an Article V(1) challenge to enforcement. Thus, the Supreme Court of Switzerland in *Compañía Minera_Condesa SA* v. *RGM-Pérou SAS*,[204] in the context of an application to annul a Swiss award on the grounds that the tribunal should have stayed the proceedings before it under the rule of *litispendence*, since the dispute was already pending before the Peruvian courts, observed that a decision that a tribunal lacked jurisdiction could be recognised if made by the tribunal itself or, in the context of a review, by a state court. In *Merck & Co. Inc.* v. *Tecnoquímicas SA*,[205] the Supreme Court of Columbia, while it refused to 'enforce' an ICC award on jurisdiction on the ground that it was not an award within the meaning of the New York Convention, since it did not finally decide a dispute concerning the subject matter of the action, accepted that the 'award' was a final decision on the jurisdictional question. As such, it may be that the court, while not prepared to 'enforce' that award, would not, ordinarily, allow the jurisdictional question it decided to be reopened in proceedings to enforce the tribunal's subsequent award on the merits.[206]

iv. Implications for the enforcing court of a determination of the tribunal's substantive jurisdiction made by a court at the seat of arbitration

The enforcing court's attitude to decisions by a court at the seat of the arbitration concerning the tribunal's substantive jurisdiction raises issues that fall outside of the ambit of the New York Convention, including consideration of treaties entered into by the enforcing state concerned with the recognition and enforcement of foreign judgments and whether such treaties exclude court decisions on arbitration matters from their ambit.[207]

If, aside from such treaty obligations,[208] the law of the enforcing state is generous towards the judgments of foreign courts, the enforcing court may be

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[203] USA, District Court, Southern District of NY, 9 October 2002, XXVIII *YB Comm. Arb.* 1043.

[204] Switzerland, Bundesgerichtshof, 19 December 1997, XXIVa *YB Comm. Arb.* 727.

[205] Columbia, Corte Suprema de Justicia, 26 January and 1 March 1999, XXVI *YB Comm. Arb.* 755. Contrast *Svenska Petroleum Exploration AB* v. *Lithuania [2005] 1 Lloyd's Rep. 515*, where such an award was recognised although, having been recognised was held, because not final at the seat, not to create an estoppel.

[206] *See* XXVI *YB Comm. Arb*. 755 at pp. 757 and 762.

[207] *See e.g.*, Brussels and Legano Conventions and the Judgments Regulation, considered in Part III *supra*.

[208] Because of the arbitration exception neither the Brussels or Legano Conventions nor the Judgments Regulation are likely to apply.

prepared to recognise final and binding decisions concerning an arbitral tribunal's jurisdiction made by a foreign court of competent jurisdiction; the likely courts of competent jurisdiction being those at the seat of the arbitration. Thus, as noted above, in *Compañía Minera Condesa SA* v. *RGM-Pérou SAS*,[209] the Supreme Court of Switzerland considered that a decision of a foreign court that an arbitral tribunal lacked jurisdiction, made in the course of a review of the tribunal's decision on that question, could be recognised under Swiss law. The reference to the reviewing function of the court indicates that the court in question is that at the seat of the arbitration, since it is that court which has supervisory jurisdiction over the arbitral proceedings. But if, as in the case under consideration, the foreign court had decided that the parties were not bound to arbitrate their dispute as a prelude to accepting jurisdiction over that dispute, the Swiss court would not recognise that decision without enquiring into its merits. This is because the Swiss court, in deciding whether the foreign court was a court of competent jurisdiction, had to form its own view on whether or not the parties were bound to arbitrate their dispute. If they were, then the foreign court had no jurisdiction in the matter and its decision would not be recognised in Switzerland.[210]

Where the enforcing state requires specific procedures to be followed to obtain recognition and enforcement of a foreign court's determination of the jurisdictional issue, it will be necessary to comply with these procedures before seeking to rely on that determination on enforcement proceedings. Thus, in *Actival Internacionale SA* v. *Conservas El Pilar SA*,[211] the Spanish Supreme Court gave no weight to a decision of the Paris Court of Appeal upholding the validity of the arbitration agreement because that decision had not been recognised in the Spanish legal system and its enforcement had not been requested in Spain.

v. Implications for the parties of a determination concerning the tribunal's jurisdiction made by a court at the seat of arbitration

If the law of the enforcing state is rooted in English common law, there are two related principles under which the enforcing court may regard decisions of a court at the seat of the arbitration concerning the tribunal's jurisdiction as

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209 Switzerland, Bundesgerichtshof, 19 December 1997, XXIVa *YB Comm. Arb.* 727, considering art. 25(a) of the Swiss Private International Law Act (PILA).

210 *Compañía Minera Condesa SA* v. *RGM-Pérou SAS* (Switzerland, Bundesgerichtshof, 19 December 1997) XXIVa *YB Comm. Arb*. 727. The courts of England and Wales apply a similar approach; *see Tracomin SA* v. *Sudan Oil Seeds Ltd (No. 1)* [1983] 1 WLR 662; affirmed [1983] 1 WLR 1036 (CA). It is not clear whether such an argument would be effective to resist enforcement of a judgment under the Brussels or Legano Conventions or the Judgments Regulation, *see* Beraudo, *supra* n. 147; van Haersolte-van Hof, *supra* n. 147. But note *Phillip Alexander v. Banhergen* [1997] 1 Lloyd's Rep. 79 at 115 (CA). In that case the English Court of Appeal refused to recognise and enforce a foreign judgement under Art. 28(3) of the Brussels Convention obtained in disobedience of an English anti-suit injunction restraining the prosecution of those proceedings on the grounds that the parties had agreed to arbitration, the ground of public policy issue which enabled the court to refuse recognition and enforcement being that the judgment was obtained in breach of the arbitration agreement and in contravention of an anti-suit injunction.

211 Spain, Tribunal Supremo, 16 April 1996, XXVII *YB Comm. Arb.* 538.

binding on the parties, even if the enforcing court will not, in the absence of a treaty obligation to do so, recognise or enforce foreign judgments or regard them as binding on itself.

The first of these concerns that aspect of the doctrine of *res judicata* under which a final and conclusive judgment on the merits by a foreign court of competent jurisdiction may give rise to an issue estoppel binding on the parties and their privies in other proceedings between them, provided that it would do so under the law of the country were the judgment was given.[212]

The principle was accepted by the High Court of Hong Kong in *Karaha Boas Co.* v. *Perusahaan Pertambangan and others*,[213] a case that concerned the enforcement in Hong Kong of a Swiss award that had been set aside by a court in Jakarta, Indonesia, on jurisdictional and other grounds. However, the Hong Kong court, having found that the *lex arbitri* was Swiss, held that the decision of the Jakarta court did not bind the parties since the Jakarta court was not a court of competent jurisdiction.[214] The possibility of the decision of a foreign court, concerning an arbitral tribunal's jurisdiction, being binding on the parties, although not on the court, was also recognised, in *CTA International Pty Ltd* v. *Sichuan Changhong Electric Co. Ltd*.[215] This case concerned an application to restrain proceedings before a Melbourne court, *inter alia*, under s. 7(2) of the International Arbitration Act 1974 (equivalent to Article II(3) of the Convention), which was resisted on the ground that the parties had not concluded a valid arbitration agreement. This ground had previously been relied on to challenge parallel arbitral proceedings in China in the Mianyang City Intermediate People's Court, but had been rejected, that court finding that the arbitration agreement was valid. The Supreme Court of Melbourne, having said that it, as a Court, was not bound by that decision, held that the parties were bound by the finding of the Mianyang court that the arbitration agreement was valid under Chinese law. It is

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[212] *The Sennar (No. 2)* [1985] 1 WLR 490 (HL). See also *Desert Sun Loan Corporation* v. *Hill* [1996] 2 All ER 847.

[213] Hong Kong, High Court, 27 March 2003, XXVIII *YB Comm. Arb.* 752. The court was principally concerned with whether the Jakarta court was a court of competent authority for the purpose of Art. V(1)(e), but it is implicit in the reasoning that the Jakarta court's decision on the jurisdictional issues would have been given no weight on a challenge under Art. V(1)(a) of the Convention.

[214] The court also held that, since the jurisdictional and other objections to the award with which it was concerned had been argued unsuccessfully on enforcement proceedings in the USA, the respondent was precluded by issue estoppel from raising them again on enforcement proceedings in Hong Kong. But, if so, does this mean that the Hong Kong court would have accepted that the decision of the Jakarta court bound the parties by issue estoppel if that court had upheld the respondents' objections to the award in the context of an application to enforce it in Indonesia, rather than on an application to set it aside? The resolution of this conundrum lies outside the scope of this article, as does the debate about whether enforcement proceedings under the New York Convention can give rise to an issue estoppel. *See e.g.*, *Karaha Boas Co.* v. *Perusahaan Pertambangan and others* (US Court of Appeals Fifth Circuit, 18 June 2003) XXVIII *YB Comm. Arb.* 908, where it was said that, since the New York Convention envisages forum shopping, enforcement proceedings under its provisions in one jurisdiction do not necessarily have *res judicata* effect in other jurisdictions. On the other hand, in *Good Challenger Navegante SA* v. *Metalexportimport SA* [2004] 1 Lloyd's Rep. 67 (CA), the English Court of Appeal, although doubting that a foreign judgment concerning the enforcement of an arbitral award could give rise to a cause of action estoppel, accepted that, if the principles in *The Sennar (No. 2)* [1985] 1 WLR 490 (HL) were satisfied, such a judgement could give rise to an issue estoppel.

[215] Australia, Supreme Court of Melbourne (6 September 2002) XXVIII *YB Comm. Arb.* 739.

not clear, however, whether, in reaching that conclusion, the court was applying the doctrine of issue estoppel.

The second, related,[216] principle is that where a remedy for an alleged defect in an arbitral award has been sought from a court at the seat of the arbitration, but refused, leaving the award undisputed, then, as matter of public policy and in the interests of finality, the enforcing court should not, normally, refuse enforcement on that ground, since it has been conclusively determined by the courts of the agreed supervisory jurisdiction; with a possible exception where the powers of the supervisory court are so limited that it cannot intervene where there has been an obvious and serious disregard for basic principles of justice by the arbitral tribunal or where, for unjust reasons, such as corruption, the supervisory court has declined to intervene.[217]

Thus, in *Newspeed International Ltd* v. *Citus Trading Pte Ltd*,[218] which concerned the enforcement of a Chinese award, the Singapore High Court held that the respondent, having tried and failed to have the award set aside on various grounds in the Beijing court, the court at the seat of arbitration, was bound by the Beijing court's decision and could not rely on those grounds to resist enforcement.

vi. Enforcing court's attitude to waivers that bar objections to the tribunal's jurisdiction at the seat of arbitration

In some jurisdictions, the enforcing court may refuse to admit an objection to enforcement of an award under Article V of the New York Convention that is barred, for instance by waiver, under the arbitral law of the seat of arbitration.

In *Société d'Etudes* v. *Weyl Beef Products PV*,[219] enforcement of an English award in the Netherlands was resisted on the grounds that the arbitration agreement was invalid, despite no steps being taken in the courts of England and Wales to challenge the tribunal's ruling that it had jurisdiction. The Netherlands Court of First Instance concluded that since, under the curial law, s. 73 of the 1996 Act, the respondent had to exhaust all available remedies to challenge the tribunal's jurisdiction, and it had not done so, the validity of the arbitration agreement was final under English law and could not be reviewed by the enforcing court.

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[216] *See ABCI* v. *Banque Franco-Tunisienne* [2002] 1 Lloyd's Rep. 511. In that case, in the context of enforcement of a French award in England, no weight was given to a decision of a French court that the award was valid since it was not clear that the decision of the French court created an estoppel in French law. This is one of the tests for deciding whether the decision of a foreign court gives rise to an issue estoppel. *See The Sennar (No. 2)* [1985] 1 WLR 490 (HL).

[217] *Minmetals Germany GmbH* v. *Ferco Steel Ltd* [1999] 1 All ER (Comm.) 315 at 331 (Colman J.).

[218] Singapore, High Court, 4 June 2001, XXVIII *YB Comm. Arb*. 829. Although, in that case, the objections concerned want of due process, the reasoning of the court appears to be equally applicable where the objections concern the tribunal's jurisdiction.

[219] Netherlands, Arrondissementsrechtbank, 19 July 2000, XXVI *YB Comm. Arb*. 827; see also *Petroleum Exploration AB* v. *Lithuania* [2005] 1 Lloyd's Rep. 515. This can be contrasted with the approach of the German Court of Appeal in *X (UK)* v. *Y (Germany)*, Germany, Oberlandesgericht (Court of Appeal), 22 November 2001, *XXIX YB Comm. Arb.* 732, discussed previously.

Certain common law jurisdictions, while not applying the arbitral law of the seat, appear to be developing an analogous principle that, as a matter of public policy, a party cannot ordinarily resist enforcement of an award by complaining of a defect in that award unless it has pursued such remedies as are relevant to the alleged defect under the supervisory jurisdiction of the courts at the seat of the arbitration.[220]

In *Karaha Boas Co.* v. *Perusahaan Pertambangan and others*,[221] the Hong Kong High Court remarked that if a party failed to challenge a tribunal's ruling on a preliminary issue, in this case a ruling on a number of jurisdictional and other questions, in the supervisory courts at the seat of arbitration, and remained silent until enforcement, this might be construed as a waiver.[222] A similar point was made in *Hebei Import & Export Corp.* v. *Polytek Engineering Co. Ltd*,[223] by Mason N.P.J., with whom the majority of the Hong Kong Court of Final Appeal agreed, when observing that, other than in the case of an objection to an award on public policy grounds, a party might be precluded from raising a point before the court of enforcement if it had failed to take that point before the supervisory court at the seat, its failure to do so amounting to an estoppel or a want of bona fides such as to justify enforcing the award.

V. CONCLUSION: THE APPROPRIATE ROUTE FOR DEALING WITH JURISDICTIONAL ISSUES

Decisions about the appropriate route for dealing with jurisdictional issues under the 1996 Act involve both a domestic and an international perspective.

a. Domestic Perspective

From the domestic perspective, the principal question for a respondent who disputes the tribunal's jurisdiction at the outset will be whether to raise that objection before the tribunal, once constituted, or to stand back from the arbitral proceedings altogether and seek a determination of that objection in court. If the jurisdictional issue concerns the width of the tribunal's jurisdiction, rather than its very existence, or where the issue can be dealt with on documents only without oral evidence, it may be appropriate for the issue to be dealt with, at least initially, by the tribunal either by award on jurisdiction or award, or more usually partial (part) award, on the merits. If either party is dissatisfied with the tribunal's decision on its jurisdiction, the objection can then be brought before the court for a rehearing on a s. 67 application, subject to compliance with required time limits

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[220] *Minmetals Germany*, *supra* n. 205.

[221] Hong Kong: High Court, 27 March 2003, XXVIII *YB Comm. Arb.* 752, where Coleman J.'s dicta in *Minmetals Germany* at 331, about the need, in the first place, to pursue remedies for defects in an arbitral award through the courts at the seat of the award, was said to be persuasive.

[222] But note the contrary view in *Paklito Investment Ltd* v. *Klockner East Asia Ltd* (Hong Kong, High Court, 15 January 1993) XIX *YB Comm. Arb.* 664 at 672–673.

[223] Hong Kong, Court of Final Appeal, 9 February 1999, XXIVa *YB Comm. Arb.* 652.

and to the issues raised before the court having been put to the tribunal prior to its ruling.

If the jurisdictional issue concerns the very existence of the tribunal's substantive jurisdiction, or involves disputed facts and, thus, a hearing of evidence, it may be preferable for the respondent to stand back from the arbitration and bring the matter immediately before the court under s. 72. The advantage of doing so is that the risk of duplicated hearings, first before the tribunal and then before the court on a challenge to the tribunal's ruling on the jurisdictional issue, with the consequent delays and additional costs, is avoided,[224] and the risk of recourse to the court being curtailed because the full case was not argued before the tribunal is avoided.

The third possibility, of participating in the arbitral proceedings but seeking recourse to the court either under its inherent jurisdiction or under s. 32 of the 1996 Act, to determine the jurisdictional issue before the tribunal rules on that issue, will seldom be appropriate. In the case of the court's inherent jurisdiction, because the ambit of that jurisdiction is unclear and, other than in exceptional cases, the court will be reluctant to exercise it, even if persuaded that it has such a jurisdiction. In the case of the court's jurisdiction under s. 32 of the 1996 Act, because of the restrictions to bringing such an application contained in that provision and because of the uncertainty about the status of the court's determination of the issue referred to it.

It will not, ordinarily, be possible for a party participating in the arbitration to reserve a jurisdictional objection for consideration by a court on enforcement proceedings. Once raised before the tribunal, the tribunal will normally deal with that objection by award. Its determination of the objection will then be final and binding unless successfully questioned by proceedings under s. 67 of the 1996 Act. If the objection is not raised before the tribunal, the right to do so before the court will, ordinarily, be lost by operation of s. 73 of the 1996 Act, the statutory waiver. Neither, in practice, can a non-participant who is alleged to be a party to the proceedings await enforcement proceedings before raising its jurisdictional objection. If it does, it runs the risk that the enforcing court will reject its case on jurisdiction, and enforce an award made in default of its defence on the merits.

b. International Perspective

From an international perspective, a principal consideration in deciding, if there is a choice, whether to bring the jurisdictional objection before the tribunal or the court, is whether a decision of the court or of the tribunal is likely to be of more weight in enforcement proceedings.

If the law of the country of likely enforcement is generous towards the decisions of foreign courts, either as a matter of general law or as a result of applicable treaty obligations between that state and the United Kingdom, or accepts that such decisions may bind the parties by application of principles of or

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[224] *Azov Shipping Co.* v. *Baltic Shipping Co.* [1999] 1 Lloyd's Rep. 68.

akin to issue estoppel, it may be preferable to seek an English court's determination of the jurisdictional objection. This will avoid the uncertainties over how the enforcing court views the tribunal's determination of its own jurisdiction, when considering whether the threshold conditions to enforcement are satisfied and when deciding whether any of the grounds for refusing enforcement are made out. It is, however, important to bear in mind that the manner in which the jurisdiction objection comes before the court may affect the weight given to its decision. So, for example, where the court determines a jurisdictional question on an application under s. 32 of the 1996 Act, the uncertainty over the status of that determination in the law of England and Wales may mean it is of little weight in enforcement proceedings in another jurisdiction.

In other jurisdictions, it may be that the tribunal's decision on its own jurisdiction is of weight under the law of the country of likely enforcement, for instance, where the law of the enforcing state is prepared to give effect to the statutory waiver in s. 73 of the 1996 Act as part of the *lex arbitri*, or where it has developed the analogous principle that a party cannot resist enforcement of an award on grounds that could have been, but were not, relied on to challenge that award under the curial law. In such a case, it may be preferable if the jurisdictional objection is determined, at any rate initially, by the tribunal.

In many jurisdictions, however, at any rate where the jurisdictional objection concerns whether an arbitration agreement was concluded at all, the enforcing court will regard that objection as concerned with whether the enforcing party has satisfied the threshold conditions in article IV of the New York Convention or as raising matters of public policy to be considered under article V(2). If so, it is likely to be irrelevant whether the jurisdictional objection was determined by the tribunal or by a court in England and Wales. The enforcing court will determine the objection for itself.