**The Arbitration Act 1996: no kind of fault or flaw? - three problems on jurisdiction and the applicable law of the arbitration**

**SESSION 1 – PROPOSED REFORMS TO SECTION 6**

**Section 67 – Challenging the award: substantive jurisdiction**

1. *A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court—*
2. *challenging any award of the arbitral tribunal as to its substantive jurisdiction; or*
3. *for an order declaring an award made by the tribunal on the merits to be of no effect, in whole or in part, because the tribunal did not have substantive jurisdiction.*

*A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).*

1. *The arbitral tribunal may continue the arbitral proceedings and make a further award while an application to the court under this section is pending in relation to an award as to jurisdiction.*
2. *On an application under this section challenging an award of the arbitral tribunal as to its substantive jurisdiction, the court may by order—*
3. *confirm the award,*
4. *vary the award, or*
5. *set aside the award in whole or in part.*
6. *The leave of the court is required for any appeal from a decision of the court under this section.*

**Hilary Heilbron KC**

* Current provision i.e. section 67
* Law Commission proposal
* How s.67 currently interpreted by English courts – *de novo* hearing – *Dallah*
* Effect of proposed change
* Justification for *de novo* hearing
* Disadvantages of change and/or statutory codification
* Other options

**Justice Judith Prakash**

* Introduction: International commercial arbitration in Singapore is governed by the International Arbitration Act 1994 or the IAA.
* The Singapore courts look to the Model Law and connected ancillary material like the preparatory documents for guidance.
* There are three situations in which a court will have decide on a tribunal’s jurisdiction, after the tribunal has rendered its views:
  1. Where a tribunal has rendered its ruling on jurisdiction as a preliminary question;
  2. where a party applies to set aside a final arbitral award on the merits; and
  3. where a party resists the recognition and enforcement of an arbitral award.
* In all three situations, the Singapore court will conduct a *de novo* review of the tribunal’s award or preliminary ruling on jurisdiction.
* Rationale for adopting a *de novo* review
* What a *de novo* review entails:

The court must consider the matter afresh and make an independent determination on the issue of jurisdiction. The court does not give deference to tribunal’s findings.

* Brief remarks on the Australian and Hong Kong positions on standard of review
* The Singapore Courts’ approach when considering a stay application for litigation to be stayed in favour of arbitration where the resisting party contests the arbitrator’s jurisdiction.

**Professor George Bermann**

* Party consent as the cornerstone of arbitration
* Access to courts for independent determination of party consent
* Proper role of courts at the threshold of arbitration
* Distinctions between gateway (jurisdictional) and non-gateway (admissibility) issues
* The *"clear and unmistakable"* delegation concept
* Standard of review of jurisdictional issues in post-award actions

**SESSION 2 – RATIONALISATION OF AVENUES TO CHALLENGE JURISDICTION**

**Relevant Provisions of the Arbitration Act 1996**

**Section 9 – Stay of Legal Proceedings**

*(1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.*

*(2) An application may be made notwithstanding that the matter is to be referred to arbitration only after the exhaustion of other dispute resolution procedures.*

*(3) An application may not be made by a person before taking the appropriate procedural step (if any) to acknowledge the legal proceedings against him or after he has taken any step in those proceedings to answer the substantive claim.*

*(4) On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed.*

*(5) If the court refuses to stay the legal proceedings, any provision that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings.*

**Section 32 – Determination of Preliminary Point of Jurisdiction**

*(1) The court may, on the application of a party to arbitral proceedings (upon notice to the other parties), determine any question as to the substantive jurisdiction of the tribunal. A party may lose the right to object (see section 73).*

*(2) An application under this section shall not be considered unless—*

*(a) it is made with the agreement in writing of all the other parties to the proceedings, or*

*(b) it is made with the permission of the tribunal and the court is satisfied—*

*(i) that the determination of the question is likely to produce substantial savings in costs,*

*(ii) that the application was made without delay, and*

*(iii) that there is good reason why the matter should be decided by the court.*

*(3) An application under this section, unless made with the agreement of all the other parties to the proceedings, shall state the grounds on which it is said that the matter should be decided by the court.*

*(4) Unless otherwise agreed by the parties, the arbitral tribunal may continue the arbitral proceedings and make an award while an application to the court under this section is pending.*

*(5) Unless the court gives leave, no appeal lies from a decision of the court whether the conditions specified in subsection (2) are met.*

*(6) The decision of the court on the question of jurisdiction shall be treated as a judgment of the court for the purposes of an appeal. But no appeal lies without the leave of the court which shall not be given unless the court considers that the question involves a point of law which is one of general importance or is one which for some other special reason should be considered by the Court of Appeal.*

**Section 67 – Challenging the Award: Substantive Jurisdiction**

*(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court—*

*(a) challenging any award of the arbitral tribunal as to its substantive jurisdiction; or*

*(b) for an order declaring an award made by the tribunal on the merits to be of no effect, in whole or in part, because the tribunal did not have substantive jurisdiction.*

*A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).*

*(2) The arbitral tribunal may continue the arbitral proceedings and make a further award while an application to the court under this section is pending in relation to an award as to jurisdiction.*

*(3) On an application under this section challenging an award of the arbitral tribunal as to its substantive jurisdiction, the court may by order—*

*(a) confirm the award,*

*(b) vary the award, or*

*(c) set aside the award in whole or in part.*

*(4) The leave of the court is required for any appeal from a decision of the court under this section.*

**Section 72 - Saving for rights of person who takes no part in proceedings**

*(1) A person alleged to be a party to arbitral proceedings but who takes no part in the proceedings may question—*

*(a) whether there is a valid arbitration agreement,*

*(b) whether the tribunal is properly constituted, or*

*(c) what matters have been submitted to arbitration in accordance with the arbitration agreement,*

*by proceedings in the court for a declaration or injunction or other appropriate relief.*

*(2) He also has the same right as a party to the arbitral proceedings to challenge an award—*

*(a) by an application under section 67 on the ground of lack of substantive jurisdiction in relation to him, or*

*(b) by an application under section 68 on the ground of serious irregularity (within the meaning of that section affecting him;*

*and section 70(2) (duty to exhaust arbitral procedures) does not apply in his case.*

**Sir Richard Aikens**

The issue of the arbitral tribunal’s jurisdiction is central to all commercial arbitrations.

For the first time in English arbitration law, the 1996 Act introduced the doctrine of *“competence- competence”,* permitting the arbitral tribunal to decide, definitively, its own “substantive jurisdiction”, although the decision is open to challenge in court.

There are, in fact, numerous situations under the Act when jurisdictional issues can arise.  The main ones are:  s.9 (stay), s.18 (appointment of arbitrators), s. 31 (challenge before tribunal), s.32 (challenge before the court), s.67 (challenge award on jurisdiction) and s.72 (challenge jurisdiction when not taken part).

The two issues that I consider are:

(1) whether there too many ways in which jurisdiction of the arbitral tribunal can be challenged in court as well as before the tribunal under the Act?

(2) Is too much emphasis given to the court making decisions on jurisdiction rather than the arbitral tribunal?

This leads to the question: does the current statutory framework need simplification or clarification?

**Anne-Veronique Schlaepfer**

1. Relevant provisions

Article 7 PILA:

*If the parties have entered into an arbitration agreement with respect to an arbitrable dispute, any Swiss court before which such dispute is brought shall decline jurisdiction, unless:*

1. *The defendant has proceeded on the merits without reservation;*
2. *The court finds that the arbitration agreement is null and void, inoperative or incapable of being performed; or*
3. *The arbitral tribunal cannot be constituted for reasons that are clearly attributable to the defendant in the arbitration.*

Arbitration proceedings seated in Switzerland are governed by the Chapter 12 of the Private International Law Act (PILA). In particular:

Article 186 PILA:

*The arbitral tribunal shall decide on its own jurisdiction.*

*It shall decide on its own jurisdiction without regard to any action having the same subject matter that is already ending between the same parties before a state court or another arbitral tribunal, unless there are substantial grounds for a stay in proceedings.*

*Any objection to its jurisdiction must be raised prior to any defence on the merits.*

*The arbitral tribunal shall, in general, decide on its jurisdiction by a preliminary decision.*

Article 190 II PILA:

*An arbitral award may be set aside only:*

*(…)*

*b. where the arbitral tribunal wrongly accepted or declined jurisdiction;*

*(…)*

1. The application of the negative effect of competence- competence (distinction between arbitrations seated in Switzerland and abroad)

* The negative effect of competence-competence applies in full when arbitration proceedings are seated in Switzerland.
* Save the exceptions described by Article 7, courts merely decline jurisdiction, the claimant having to bring the dispute before the arbitral tribunal in accordance with the arbitration clause.
* The Arbitral Tribunal decides on its own jurisdiction, and it decides first.

1. The review by the Swiss Federal Tribunal of the arbitral tribunal’s jurisdiction in setting aside proceedings

* A party who disputes the arbitral tribunal’s decision on jurisdiction shall challenge the award (partial or final), in which the tribunal has accepted / denied its jurisdiction.
* The Swiss Federal Tribunal exercises full power of review as regards the law.
* The Swiss Federal Tribunal does not review the facts (save specific, narrow exceptions).

**Professor Pierre Mayer**

Under French law, it belongs to the arbitral tribunal to decide first the issue of its jurisdiction, subject to an appeal before the court of appeal. The only exception to this rule concerns the following situation: the claimant brings its case, on the merits, before a court, not to arbitration, and the respondent challenges the jurisdiction of the court on the ground that there is an arbitration agreement; in that situation, if the arbitration agreement is *manifestly* void or inapplicable, the court will retain its jurisdiction to deal with the merits of the case; if it is not, the court will not decide the validity and applicability of the arbitration agreement, and will decline jurisdiction to deal with the merits

**SESSION 3 – APPLICABLE LAW OF THE ARBITRATION AGREEMENT**

**Relevant Provisions of the Arbitration Act 1996 (“the Act”)**

**Section 4(5)**

*The choice of a law other than the law of England and Wales or Northern Ireland as the applicable law in respect of a matter provided for by a non-mandatory provision of this Part is equivalent to an agreement making provision about that matter.*

*For this purpose an applicable law determined in accordance with the parties’ agreement, or which is objectively determined in the absence of any express or implied choice, shall be treated as chosen by the parties.*

**Mandatory sections of the Arbitration Act (Schedule 1)**

*sections 9 to 11 (stay of legal proceedings); section 12 (power of court to extend agreed time limits); section 13 (application of Limitation Acts); section 24 (power of court to remove arbitrator); section 26(1) (effect of death of arbitrator); section 28 (liability of parties for fees and expenses of arbitrators); section 29 (immunity of arbitrator); section 31 (objection to substantive jurisdiction of tribunal); section 32 (determination of preliminary point of jurisdiction); section 33 (general duty of tribunal); section 37(2) (items to be treated as expenses of arbitrators); section 40 (general duty of parties); section 43 (securing the attendance of witnesses); section 56 (power to withhold award in case of non-payment); section 60 (effectiveness of agreement for payment of costs in any event); section 66 (enforcement of award); sections 67 and 68 (challenging the award: substantive jurisdiction and serious irregularity), and sections 70 and 71 (supplementary provisions; effect of order of court) so far as relating to those sections; section 72 (saving for rights of person who takes no part in proceedings); section 73 (loss of right to object); section 74 (immunity of arbitral institutions, &c.); section 75 (charge to secure payment of solicitors’ costs).*

**Arbitration (Scotland) Act 2010 Section 6**

**Law governing arbitration agreement**

*Where—*

*(a) the parties to an arbitration agreement agree that an arbitration under that agreement is to be seated in Scotland, but*

*(b) the arbitration agreement does not specify the law which is to govern it,*

*then, unless the parties otherwise agree, the arbitration agreement is to be governed by Scots law.*

**Arbitral Rules**

LMAA Terms rule 6

*In the absence of any agreement to the contrary, the parties to all arbitral proceedings to which these Terms apply agree: (a) that the law applicable to their arbitration agreement is English and; (b) that the seat of the arbitration is in England.*

LCIA Rules 2021 Article 16.4

*Subject to Article 16.5 below, the law applicable to the Arbitration Agreement and the arbitration shall be the law applicable at the seat of the arbitration, unless and to the extent that the parties have agreed in writing on the application of other laws or rules of law and such agreement is not prohibited by the law applicable at the arbitral seat.*

**Salim Moollan KC**

1. The problems created by the Supreme Court’s decision in *Enka v Chubb* [2020] UKSC 39 were not an issue spotted by the Law Commission during its pre-consultation phase, and have also gone largely unnoticed by the market. The anecdotal evidence from the Commercial Court is that they are now starting to surface.
2. What are those problems? There are two aspects of the decision which are problematic: (a) the rule that in every London seated arbitration with a choice of foreign substantive law, the arbitration agreement will be governed by that foreign law; and (b) the rule that the effect of section 4(5) is that that choice of foreign law will automatically displace the non-mandatory provisions of the Act where the provision is ‘substantive’ and not ‘procedural’.
3. Taking each of those in turn:
   1. On point (a):
      1. Ouster of English law principles of arbitrability for every London seated arbitration with a choice of foreign law.
      2. Ouster of *Fiona Trust* principles governing interpretation of the arbitration agreement (‘one stop shop’ presumption) for every London seated arbitration with a choice of foreign law.
      3. Practical implications: evidence of foreign law routinely necessary on court applications under section 67 on issues ranging from arbitrability, to scope of the clause to who is bound by it.
   2. On point (b):
      1. Introduction in the arbitration field of the vexed procedure / substance distinction.
      2. Ouster of section 7 (separability).
      3. Quid of sections 48 (remedies) and 49 (interest)? Other sections?
4. Solutions:
   1. Only comprehensive solution: a statutory rule that the law of the seat of the arbitration governs the arbitration agreement, save where the parties have expressly chosen another law in the arbitration agreement itself.
   2. A partial solution would be to revert to the previous interpretation of section 4(5). That will not resolve the issues set out in para. 3(a) above.
   3. An even more partial solution would be to make section 7 mandatory. That will not resolve the issues set out in para. 3(a) and 3(b)(i) and (iii) above.
5. The Law Commission’s response in its Consultation Paper: (a) making section 7 mandatory a possible ‘minor reform’: para. 10.3 to 10.10 of the Consultation Paper; (b) introducing a default statutory rule for the law governing the arbitration agreement a ‘stakeholder suggestion not short-listed for review’, but with no final decision yet taken on the suggestion: para. 11.7 to 11.12 of the Consultation Paper.
6. Reply to the invitation for further substantiation:
   1. The question is not whether Enka “was wrong”, as suggested at para. 11.8 of the Consultation Paper, but what is the correct rule for London as a leading arbitral seat **as a matter of policy**.
   2. This is not to be seen through the narrow prism of conflict of law rules, as suggested at para. 11.12 of the Consultation Paper. As noted by Lord Mustill when the 1996 Act was passed, *“[c]onceptually … the Act marks a radical change of direction. No longer are the internal rules to be derived by analysing the contracts between the parties inter se and between themselves and the arbitrators. The arbitral process is still consensual to the extent that the proceedings would not take place but for the agreement to arbitrate. But by making this agreement the parties contract into a framework, not chosen by themselves but imposed by Parliament, save only to the extent that they avail themselves of the opportunity to depart from the semi-mandatory provisions.”* The question is thus: what makes policy sense for London as a seat, and thus for the framework set by Parliament and in which Parties who choose London as a seat opt into.
   3. Beyond the unanswerable legal issues noted above (which the Consultation Paper does not mention or address), the Consultation Paper itself contains evidence of what the market wishes and of market practice ***i.e.*** a rule that the law of the seat governs the arbitration agreement. See para. 11.9 of the Consultation Paper, which refers to Article 6 of the LMAA Terms 2021 and to Article 16.4 of the LCIA Rules 2021. But those provisions in market driven rules have now effectively been ousted by *Enka* for the reasons noted in para. 11.11 of the Consultation Paper (or have they been? – yet another issue to litigate in the wake of *Enka*?)
   4. Reform is required to restore clarity; to ensure that the rules and principles carefully devised by the legislature and the Courts to make London a safe and efficient seat to arbitrate are not ousted to the benefit of every foreign law chosen to govern the particular contract; and to ensure that London retains its place as a leading, safe and efficient seat in the global market for international arbitration in large commercial cases (which will almost invariably involve choices of foreign law) -- a market in which it is competing with Paris, Geneva and Singapore, amongst others

**Professor Christophe Seraglini**

The reform of the Arbitration Act is aimed at improving English law on arbitration and at consolidating London as one of the main seats of international arbitration.

If it is indeed the objective, then the implementation of the Supreme Court decision of 9 October 2020 in *Enka v Chubb* [2020] UKSC 38, deserves a debate.  The Supreme Court decided *inter alia* that applying English conflict of laws rules, where the Parties to a contract containing an arbitration agreement have made an express choice of law to govern their contract generally, this choice will ordinarily apply also to the arbitration agreement.

One consequence of that decision is that, in every London-seated arbitration with a choice of a foreign law, which is the case in many international cases seated in London, the question of whether or not the arbitration agreement is separable, and what effects will flow from that separable nature (if any), will now turn on the foreign law chosen to govern the main contract. More generally, the solution set out in Enka raises several concerns.

The *Enka* solution contrasts with the French approach to the doctrine of separability whereby the arbitration agreement is in principle governed by substantive rules established by French courts.

The French approach has been criticised in the past, namely by English Courts who distance themselves from “*the concept of arbitral procedures floating in the transnational firmament, unconnected with any municipal system of law”*. But is it really the point of view of French courts and French law? And is the approach adopted in *Enka* the best solution for a country which is both, not convinced by the French approach, and willing to maintain its position as a seat for international arbitration proceedings?

To answer these questions, we will first review the French approach, then the concerns raised by English approach as consolidated in the *Enka* decision and, finally, and finally examine the conclusions we can draw from this comparison and the potential solutions for maintaining London as a leading seat of international arbitration.

**Dr Michele Potestà**

1. The Swiss perspective on the law applicable to the arbitration and separability (in particular: as compared to the English position resulting from *Enka*)
2. The law applicable to the arbitration agreement and the “validation principle” under Art. 178(2) Swiss Private International Law Act (PILA)
   1. The “pro-arbitration” principle
   2. Differences from the English approach
   3. Validation principle: Challenges and future directions
3. Separability under Swiss law (Art. 178(3) PILA)
   1. The relationship between the validation principle and separability
   2. Opting out of separability? How and with what consequences?
      1. *Cf*. Consultation Paper Q28 (Should section 7 of the Arbitration Act 1996 be mandatory, and why)?
      2. The Swiss position

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**Relevant provisions of the Swiss Federal Act on Private International Law (“PILA”)**[[1]](#footnote-1)

*Chapter 12 on “International Arbitration” (Arts 176-194)*

**I. Scope of application. Seat of the arbitral tribunal**

**Art. 176**

(1) The provisions of this Chapter apply to arbitral tribunals that have their seat in Switzerland if, at the time that the arbitration agreement was concluded, at least one of the parties thereto did not have its domicile, its habitual residence or its seat in Switzerland.

(2) The parties may exclude the application of this Chapter by making a declaration to this effect in the arbitration agreement or a subsequent agreement, and instead agree that the provisions of the third part of the CPC apply. The declaration must be in the form specified in Article 178 paragraph 1.

(3) The seat of the arbitral tribunal is determined by the parties, or the arbitration institution designated by them, or, failing both, by the arbitral tribunal itself.

**II. Arbitrability**

**Art. 177**

(1) Any claim involving an economic interest may be submitted to arbitration.

(2) A state, or an enterprise held by or an organisation controlled by a state, that is party to an arbitration agreement, may not invoke its own law in order to contest its capacity to arbitrate or the arbitrability of a dispute covered by the arbitration agreement.

**III. Arbitration agreement and arbitration clause**

**Art. 178**

(1) The arbitration agreement must be made in writing or any other means of communication allowing it to be evidenced by text.

(2) As regards its substance, an arbitration agreement is valid if it conforms either to the law chosen by the parties, to the law governing the subject-matter of the dispute, in particular the law governing the main contract, or to Swiss law.

(3) The validity of an arbitration agreement may not be contested on the grounds that the main contract is invalid or that the arbitration agreement concerns a dispute which has not yet arisen.

(4) The provisions of this Chapter apply by analogy to an arbitration clause in a unilateral transaction or in articles of association.

[…]

**VI. Decision on the merits**

**Applicable law**

**Art. 187**

(1) The arbitral tribunal shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to the rules of law with which the case has the closest connection.

(2) The parties may authorise the arbitral tribunal to decide *ex aequo et bono*.

[…]

1. Federal Act on Private International Law (PILA) of 18 December 1987 (as subsequently amended), unofficial English translation provided on the Swiss Confederation’s website (<https://www.fedlex.admin.ch/eli/cc/1988/1776_1776_1776/en>). [↑](#footnote-ref-1)