Who guards the guards?  
Who decides arbitral jurisdiction?

1. In the context of enforcing arbitration agreements, a choice of England as the seat of arbitration carries with it more than just the parties’ agreement to a particular dispute resolution procedure. As Colman J held in A v B:

"... an agreement as to the seat of an arbitration is analogous to an exclusive jurisdiction clause. Any claim for a remedy going to the existence or scope of the arbitrator’s jurisdiction or as to the validity of an existing interim or final award is agreed to be made only in the courts of the place designated as the seat of the arbitration."

2. That proposition was upheld by the English Court of Appeal in C v D. In that case, a party had agreed to arbitrate in London under an insurance policy governed by New York law and was prevented by the English Courts from seeking to vacate a London arbitral award in the New York Courts on a ground which would have been recognised under New York law, but not under English law. Having chosen England as the seat of arbitration and English curial law, any challenge to the award (otherwise than on enforcement of the award under the New York Convention), could only be made to the English Courts on the grounds recognised under the Arbitration Act 1996.

3. That principle has been carried forward in more recent decisions of the English Court. For example, the English Court has restrained a challenge to another English arbitral award in the Indian Courts. In that case, although the English Court recognised that it was open to the party dissatisfied with the award to challenge it on enforcement on the grounds set out in Part V of the New York Convention, controversially, the terms of the injunction required that party to come back to the English Court for permission if he sought to do so.

4. The principle laid down in A v B and C v D applies whether the supervisory jurisdiction of the English Court arises pre-award or post-award. It also applies to foreign seated arbitrations.

5. It is therefore clear (at least to the English Courts) who guards the guards – the English Courts do. But how do the English Courts go about it? There are two aspects: firstly, the protection afforded by the English Courts when there is an attempt to usurp the arbitral process. This aspect is already touched upon above but it is clear that the English Court is willing to go to considerable lengths to

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2 [2008] EWCA Civ 1282.
3 Ie: the Arbitration Act 1996.
4 In that case, under section 69 of the Arbitration Act 1996.
6 The Court of Appeal has granted limited permission to appeal that aspect of the injunction – Shashoua & anor v Sharma [2010] EWCA Civ 15.
7 See, for example, A v B.
8 As in C v D and Shashoua and another v Stancroft Trust Limited.
9 In A v B, for example, the English Court declined jurisdiction and stayed English proceedings where the challenge was made in the English Court to a Swiss seated arbitration/arbistrator. That challenge should have been brought in the seat of the arbitration itself, in that case, Geneva.
maintain the integrity of the arbitral process and, subject, of course, to the restrictions now imposed by the West Tankers decision\(^\text{10}\), to enforce the parties' agreements to arbitrate.

6. The other aspect is how much the English Court is willing to interfere in arbitration itself in exercising its exclusive supervisory jurisdiction over the arbitral process. It is clear from the House of Lords judgment in the West Tankers case\(^\text{11}\) that the approach of the English Courts, is the non-interventionist one envisaged by s.1 of the Arbitration.\(^\text{12}\) As Lord Hoffman said:–

> "But perhaps the most important consideration is the practical reality of arbitration as a method of resolving commercial disputes. People engaged in commerce choose arbitration in order to be outside the procedures of any national court. They frequently prefer the privacy, informality and absence of any prolongation of the dispute by appeal which arbitration offers. Nor is it only a matter of procedure. The choice of arbitration may affect the substantive rights of the parties, giving the arbitrators the right to act as amiables compositeurs, apply broad equitable considerations, even a lex mercatoria which does not wholly reflect any national system of law. The principle of autonomy of the parties should allow them these choices."

7. Lord Mance went on to say:–

> "The purpose of arbitration (enshrined in most modern arbitration legislation) is that disputes should be resolved by a consensual mechanism outside any court structure, subject to no more than limited supervision by the courts of the place of arbitration."

8. The attitude of the English Courts could not therefore be clearer. Arbitrating parties should be allowed to get on with arbitration, choosing the procedures and legal principles most suited to them in the resolution of their disputes, even if the same would not be adopted in the resolution of disputes in the English Courts. But how does this play out in terms of who decides arbitral jurisdiction?

9. It is helpful to remind ourselves of the more recent approach of the English Courts to the question of arbitral jurisdiction generally. The English Courts have made it clear that, when people choose to arbitrate, they expect to have all their disputes relating to that agreement arbitrated together. Accordingly, in determining whether or not an English-seated arbitrator has jurisdiction, we are no longer concerned with semantic differences within the drafting of the arbitration agreements to see

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\(^{10}\) Allianz SpA (formerly Riunione Adriatica di Sicurtà SpA) v West Tankers Inc (C-185/07) (2009) 1 AC 1138 ECJ (Grand Chamber). See also National Navigation Co v Endesa Generacion SA [2009] EWCA Cov 1397 for the difficulties created by the West Tankers decision.


\(^{12}\) See s.1(c) of the Arbitration Act 1996 which provides that "in matters governed by this Part the court should not intervene except as provided by this Part."

\(^{13}\) Lord Hoffman at paragraph 17.

\(^{14}\) Lord Mance at paragraph 29.
which dispute might fall on one side of the arbitration line and what dispute on the other. As Lord Hoffman said in the Fiona Trust case:\(^1^5\):

"In approaching the question of construction, it is therefore necessary to inquire into the purpose of the arbitration clause. As to this, I think there can be no doubt. The parties have entered into a relationship, an agreement or what is alleged to be an agreement or what appears on its face to be an agreement, which may give rise to disputes. They want those disputes decided by a tribunal which they have chosen, commonly on the grounds of such matters as its neutrality, expertise and privacy, the availability of legal services at the seat of the arbitration and the unobtrusive efficiency of its supervisory law. Particularly in the case of international contracts, they want a quick and efficient adjudication and do not want to take the risks of delay and, in too many cases, partiality, in proceedings before a national jurisdiction."\(^1^6\)

10. This has many resonances with what Lord Hoffman also said in the West Tankers case about the consensual nature of arbitration, why people chose to arbitrate and why it should be protected by way of anti-suit injunction.\(^1^7\)

11. Secondly, the English Courts have embraced the separability of the arbitration agreement from the main agreement in which it is found. Compared with other countries, England may have come somewhat late to the party in terms of putting the doctrine of separability on a statutory footing but, having done so, the doctrine has been embraced by the English Courts with vigour.\(^1^8\) Accordingly, it is clear that a dispute may well still be arbitrable even if the main agreement in which the relevant arbitration agreement is found is invalid because of some vitiating factor such as misrepresentation, duress or even fraud. As Lord Hoffman also said in Fiona Trust:--

"The principle of separability enacted in section 7 means that the invalidity or rescission of the main contract does not necessarily entail the invalidity or rescission of the arbitration agreement. The arbitration agreement must be treated as a "distinct agreement" and can be void or voidable only on grounds which relate directly to the arbitration agreement."

12. In other words, only if the relevant vitiating factor impugns the arbitration agreement itself (and not just because the arbitration clause happens to be found in the (invalid) main contract) will the English Court ignore the doctrine of separability and disturb the jurisdiction of the arbitral tribunal to decide the merits of the case. Against this background, the scope for disputes about the jurisdiction of an arbitral tribunal has reduced.

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\(^1^5\) Fiona Trust & Holding Corporation & 20 Ors v Yuri Privalov & 17 Ors sub nom Premium NAFTA Products Ltd (20th Defendant) & Ors V Fili Shipping Co Ltd (14th Claimant) & Ors (2007)[2007] UKHL 40.

\(^1^6\) Lord Hoffman at paragraph 6.

\(^1^7\) See paragraph 6 above.

\(^1^8\) The doctrine did exist under English common law – see Harbour Assurance Co (UK) Ltd V Kansa General International Insurance Co Ltd (1993) 3 All ER 897.
As to those jurisdictional disputes which do remain, the framework for resolving them is to be found in various sections of the Arbitration Act 1996. Firstly, and perhaps most importantly, section 30 of the Act enshrines the doctrine of kompetenz-kompetenz into English statute by providing that:-

"Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to:-

(a) whether there is a valid arbitration agreement;
(b) whether the tribunal is properly constituted; and
(c) what matters have been submitted to jurisdiction in accordance with the arbitration agreement."

Although jurisdictional objections do not prevent parties participating in an arbitration, any such objection must be raised at the outset of the arbitration or as soon as the matter which gives rise to the objection is raised, consistent with the need to avoid delay in arbitration. The arbitral tribunal may then rule on the objection in an award on jurisdiction or deal with it in its award on the merits if, as sometimes happens, it is more convenient to address both together.

Accordingly, unless the parties have expressly stripped the arbitral tribunal of the power to determine its own substantive jurisdiction, it will be the arbitral tribunal which decides that issue in the first instance. There is a procedure under section 32 of the Act for the parties, by agreement, or with the permission of the tribunal and the English Court, to ask the Court to determine the issue of jurisdiction but, having regard to the scheme of the Act – limited judicial intervention - that section is rarely invoked.

If a party disagrees with the arbitral tribunal’s decision on jurisdiction, it can then challenge the award under section 67 of the Act and apply to the English Court for that purpose, although the tribunal can continue with the arbitration proceedings pending such a challenge and make a further award, on the merits for example. Any application under section 67 must again be made promptly to the English Court consistent with the need for certainty in the arbitral process and the need to avoid delay.

So far, this all assumes that the objecting party takes part in the arbitral proceeding but what if he or she simply ignores the arbitration on the basis that there is no arbitration agreement between him or her and the claimant in the arbitration? He or she can, of course, do so, although it may be a risky strategy. In those circumstances, the non-participating person has the same right to challenge any award issued by the tribunal for lack of jurisdiction under section 67 as if he had participated in it.

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19 For example, where an arbitration has been commenced against the wrong party, where an arbitration clause has not been validly incorporated into the parties’ contract, where the arbitration agreement was concluded by an agent who lacked authority, or where the dispute falls outside the scope of the arbitration agreement.

20 Within 28 days of the award or exhaustion f any available arbitral appeal or review - section 70 of the Arbitration Act 1996.
18. In an application under section 67, it is for the Court to determine whether the arbitrator has jurisdiction. The Court does so without any preconception that the arbitrator made the right decision and the arbitrator's decision is provisional. As Colman J said in one case, it "cannot be conclusive between the parties because of the nature of the intrinsic issue, for his jurisdiction can only be founded on the very mutual assent which is in issue".  

19. How the English Courts apply that framework has been shown in a recent case involving the Republic of Serbia. In that case, during the course of an ICC arbitration between ImageSat and the State Union of Serbia and Montenegro, the Union split and the new Republic of Serbia responded to the request for arbitration. The arbitrator decided, as a preliminary issue, that Serbia was the continuation of the State Union rather than its successor and was therefore a proper party to the arbitration agreement. Serbia applied to the English Court under s.67 of the Act on the basis that the arbitral tribunal had no jurisdiction to determine that question. However, the Court held that, by agreeing the ICC terms of reference, the parties had, in fact, agreed to confer jurisdiction on the arbitral tribunal to decide the question of whether Serbia was a continuation state or a successor state.

20. This case shows that a party intending to contest jurisdiction must raise that objection at an early stage, particularly in an ICC arbitration where the terms of reference define the scope of the tribunal’s jurisdiction early in the proceedings. What is perhaps more interesting about the case is that the English Court also held obiter that, even if the ICC terms of reference had not been signed by the parties, it would have been remarkable if the arbitral tribunal could not have decided whether Serbia was a party to the arbitration under s.30 of the Act even though, in a non-arbitration context, the Court itself would probably not have had jurisdiction to decide that question. In reaching this view, the English Court highlighted its respect for the kompetenz of the arbitral tribunal.

21. Although the English Court has got to grips with the jurisdictional framework of the Act, there is one related aspect of the Act which, in my view, requires reconsideration. This is section 9 of the Act and concerns the position when a party brings court proceedings in England in apparent breach of an arbitration agreement.

22. In those circumstances, in accordance with the UK’s international obligations under the New York Convention, the English Court is obliged to stay the relevant proceedings "unless satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed". The circumstances in which an arbitration agreement are likely to be found null and void will be few but

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24 Which applies to both English and non-English seated arbitrations.
25 See, for example, footnote 19 above.
it is the words "unless satisfied" that have caused difficulties for the English Courts in deciding exactly how far they need to go to satisfy themselves as to the nullity of an arbitration agreement.\(^\text{26}\)

23. Having regard to the jurisdictional scheme of the Arbitration Act and the policy of allowing the tribunal to decide its own jurisdiction in the first instance, it is suggested that a less onerous standard is required and that proceedings should be stayed where there is \textit{prima facie} evidence of an arbitration agreement.

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8 February 2010

\(^{26}\) See, for example, Bises Construction Ltd v St David Ltd [1999] ABC.L.R. 02/12