Law Commission
Reforming the law

Review of the Arbitration Act 1996: Final report and Bill

HC 1787

Law Com No 413

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The terms of this report were agreed on 5 July 2023.

The text of this report is available on the Law Commission's website at https://www.lawcom.gov.uk/project/review-of-the-arbitration-act-1996/.

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Abbreviations

Abbreviation	Meaning
ACICA	Australian Centre for International Commercial Arbitration
AMINZ	Arbitrators' and Mediators' Institute of New Zealand
CIArb	Chartered Institute of Arbitrators
CIETAC	China International Economic and Trade Arbitration Commission
CIMAR	Construction Industry Model Arbitration Rules
CP1	Law Commission, *Review of the Arbitration Act 1996: A consultation paper* (2022) CP 257 (our first consultation paper)
CP2	Law Commission, *Review of the Arbitration Act 1996: Second consultation paper* (2023) CP 258 (our second consultation paper)
CPR	Civil Procedure Rules
CQ	Consultation Question (in our consultation papers)
DAC	Departmental Advisory Committee on Arbitration Law (responsible for drafting the Arbitration Act 1996)
DIAC	Dubai International Arbitration Centre
GAFTA	Grain and Feed Trade Association
HKIAC	Hong Kong International Arbitration Centre
IBA	International Bar Association
ICC	International Chamber of Commerce
ICCA	International Council for Commercial Arbitration

ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington, 1965)
IFLA	Institute of Family Law Arbitrators
LCIA	London Court of International Arbitration
LMAA	London Maritime Arbitrators Association
LME	London Metal Exchange
LSAC	Lloyd's Salvage Arbitration Clauses
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)
RICS	Royal Institution of Chartered Surveyors
RSC	Rules of the Supreme Court
SCC	Stockholm Chamber of Commerce
SIAC	Singapore International Arbitration Centre
UKJT	United Kingdom Jurisdiction Taskforce, appointed by Lawtech Delivery Panel (a UK government-backed initiative)
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration 1985, with 2006 Amendments

Review of the Arbitration Act 1996

To the Right Honourable Alex Chalk KC MP, Lord Chancellor and Secretary of State for Justice

Chapter 1: Introduction

ABOUT ARBITRATION

1.1 Arbitration is a form of dispute resolution. If two or more parties have a dispute, which they cannot resolve themselves, instead of going to court, they might appoint a third person as an arbitrator to resolve the dispute for them. They might appoint a panel of arbitrators to act as an arbitral tribunal.

1.2 Arbitration tends to happen only when all parties agree to it. It is possible to agree to arbitration after a dispute has arisen. More usually, when parties enter into a contract, and wish to resolve any disputes by arbitration rather than litigation, that contract will include an arbitration clause. In broad terms, an arbitration clause provides that any dispute arising out of the contract will be settled by arbitration. Although that clause appears in the contract, it is usually viewed as a separable agreement.

1.3 Arbitration happens in a wide range of settings, both domestic and international, from family law and rent reviews, through commodity trades and shipping, to international commercial contracts and investor claims against states.

1.4 Arbitration is a major area of activity in England and Wales. In a 2021 survey, London was ranked as the most preferred seat for international arbitration.[1] In our first consultation paper, we estimated that there are at least 5000 domestic and international arbitrations in England and Wales every year, potentially worth at least £2.5 billion to the economy, although the actual figures may be much higher.[2]

The Arbitration Act 1996

1.5 In England and Wales, arbitration is regulated by the Arbitration Act 1996, which provides a framework for arbitration. For example, it upholds

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1 Queen Mary University London and White & Case LLP, *2021 International Arbitration Survey: Adapting arbitration to a changing world* (2021).

2 CP1 para 1.2. We took the caseload figures provided to us, and divided arbitration between domestic and international, and between those conducted in proceedings where arbitrator fees are capped or uncapped, to estimate likely arbitrator and legal fees.

arbitration agreements, preventing one party from unilaterally ignoring their promise to arbitrate rather than litigate in court. It can help get an arbitration under way, for example if the parties cannot agree on a choice of arbitrator. It can assist during an arbitration, for example by enabling the courts to make supportive orders for the preservation of evidence or assets. And it provides ways in which an arbitral award (that is, the ruling of the arbitrator) can be enforced or challenged.

1.6 The Act has sections which are mandatory and non-mandatory. The mandatory sections apply to all arbitrations. The non-mandatory sections tend to provide a default procedure, but allow the parties to agree a different procedure instead.

1.7 A history of arbitration and its legislation in England and Wales was set out in Chapter 1 of our first consultation paper.[3]

ABOUT THIS PROJECT

Background

1.8 In March 2021, the Ministry of Justice asked the Law Commission to conduct a review of the Arbitration Act 1996. The Law Commission was tasked with determining whether any amendments to the Act were needed to ensure that it remains fit for purpose and continues to promote England and Wales as a leading destination for commercial arbitration. Our terms of reference are attached to this report at Appendix 1. We began our review in January 2022.

Consultations

1.9 In September 2022, we published our first consultation paper. This analysed the current law, reached provisional conclusions, and made provisional proposals for reform on a shortlist of topics. Throughout the paper, we asked questions which sought the views of consultees.

1.10 The first consultation period closed in December 2022. We received responses from around 118 consultees. Those consultees ranged from individual practitioners, through academics and specialist bodies, to major domestic and international firms and institutions, some representing thousands of people. Engagement has been broad, and the responses were often detailed.

1.11 In the first consultation paper, we asked consultees whether any other topic needed to be considered, beyond those we had examined. A significant number indicated that we should consider the question of how to identify which law governs the arbitration agreement.

1.12 After considering those responses, and discussing further with some stakeholders who made representations on this subject, we were

[3] CP1 paras 1.21 to 1.32.

persuaded that this was a topic which required discussion and potentially reform.

1.13 We published a second consultation paper setting out the current law in relation to the governing law of the arbitration agreement and making provisional proposals for reform. Since we were consulting again, we also took the opportunity to revisit what were perhaps the two most controversial topics in our first consultation paper: challenges to awards under section 67 on the basis that the tribunal lacked jurisdiction; and discrimination in arbitral appointments. In March 2023 we published our second consultation paper.

1.14 The second consultation period closed in May 2023. We received responses from around 60 consultees, again from a range of backgrounds and perspectives.

1.15 A list of those who responded to our consultation papers is attached to this report at Appendix 2.

THIS REPORT

1.16 We have considered the responses to both of our consultation papers in detail and have developed our thinking to reflect many of the points raised. Where required, we have undertaken further research and revisited our provisional proposals. This report sets out our final conclusions and recommendations. It also includes a draft Bill which would implement our recommendations. It is for Government to decide whether or not to implement our recommendations, in whole or in part.

1.17 At various points in this report we quote or make references to certain consultation responses. Where we do so, it is because we think the response is usefully representative of other responses too, or because the response raises a point we wish to comment upon. We do not list every reason given by consultees for or against our proposals, but we have considered them all.

1.18 We are extremely grateful to all those who took the time to respond to our consultation papers, or who otherwise met with us or responded to other requests for assistance or information in support of this work.

The structure of this report

1.19 This report comprises 13 chapters and 5 appendices.

(1) This is Chapter 1, where we introduce the project.

(2) In Chapter 2, we discuss confidentiality in the context of arbitration.

(3) In Chapter 3, we discuss arbitrators' duties of independence and disclosure.

(4) In Chapter 4, we discuss discrimination in arbitration proceedings.

(5) In Chapter 5, we discuss the extent of arbitrator immunity.

(6) In Chapter 6, we discuss provision for summary disposal in arbitration proceedings of issues which obviously lack merit.

(7) In Chapter 7, we discuss court powers exercisable in support of arbitral proceedings, under section 44 of the Arbitration Act 1996.

(8) In Chapter 8, we discuss how the Act should respond to the phenomenon of emergency arbitrators.

(9) In Chapter 9, we discuss challenges to arbitral awards under section 67 of the Act on the basis that the tribunal lacked jurisdiction.

(10) In Chapter 10, we discuss whether there should be any reform to section 69, which provides for appeals on a point of law.

(11) In Chapter 11, we discuss our provisional proposals of minor amendments to various provisions of the Act. The matters addressed are: section 7 (separability of arbitration agreement); appeals under section 9 (stay of legal proceedings); section 32 (determination of preliminary point of jurisdiction) and section 45 (determination of preliminary point of law); the compatibility of the Act with modern technology; section 39 (power to make provisional awards); when time runs under section 70 (challenge or appeal: supplementary provisions); and sections 85 to 88 (domestic arbitration agreements).

(12) In Chapter 12, we discuss the law governing the arbitration agreement.

(13) Chapter 13 collects together in one place all of our recommendations.

(14) In Appendix 1, we provide the terms of reference for this project

(15) In Appendix 2, we list all the people we have heard from since the publication of our first consultation paper.

(16) In Appendix 3, we list other suggestions for reform made to us by consultees in response to our consultation papers but which we have not taken forward.

(17) In Appendix 4, we provide a draft Bill, titled the Arbitration Bill, which sets out to amend the Arbitration Act 1996 to give effect to our recommendations.

(18) In Appendix 5, we provide explanatory notes to accompany the draft Bill, which explain the practical effect of each clause in the Bill.

Territorial extent

1.20 As the Law Commission of England and Wales, we can make proposals and recommendations for reform only in England and Wales. This report is therefore restricted to that extent.

1.21 However, the Arbitration Act 1996 extends to England, Wales and Northern Ireland.[4] We hope that the Government will consider implementing our proposed reforms in Northern Ireland too, after appropriate engagement and consultation.

SUMMARY OF RECOMMENDATIONS

1.22 We are mindful of the consensus that the Act works well, and that root and branch reform is not needed or wanted. Accordingly, we have confined our recommendations to a few major initiatives, and a very small number of minor corrections.

1.23 By way of a broad overview, we recommend the following major initiatives: codification of an arbitrator's duty of disclosure; strengthening arbitrator immunity around resignation and applications for removal; introduction of a power of summary disposal; an improved framework for challenges under section 67; a new rule on the governing law of an arbitration agreement; clarification of court powers in support of arbitral proceedings, and in support of emergency arbitrators.

1.24 We also recommend the following minor corrections: making appeals available from an application to stay legal proceedings; simplifying preliminary applications to court on jurisdiction and points of law; clarifying time limits for challenging awards; and repealing unused provisions on domestic arbitration agreements.

PROJECT TEAM

1.25 The following members of the Commercial and Common Law team have contributed to this report: Laura Burgoyne (team manager); Nathan Tamblyn (lawyer); and Richard Hine (research assistant).

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4 Scotland has its own separate arbitration legislation – the Arbitration (Scotland) Act 2010.

Chapter 2: Confidentiality

2.1 The Arbitration Act 1996 does not have any provisions on confidentiality. Nevertheless, a duty of confidentiality can arise in arbitral proceedings in various ways. This duty of confidentiality might attach, for example, to things said in an arbitral hearing, or documents produced to support a claim, or to the contents of the arbitral award. Confidentiality would then restrict who could repeat those things, and to whom, and why.

2.2 In this chapter, we discuss whether the Act should set out a statutory duty of confidentiality. Ultimately, we do not recommend any reform on this point.

OUR POSITION IN THE FIRST CONSULTATION PAPER

General principles

2.3 In Chapter 2 of our first consultation paper, we began by noting the position adopted by the Departmental Advisory Committee on Arbitration Law (DAC), who were responsible for drafting the Arbitration Act 1996. In their report on that legislation, they said that arbitrations seated in England and Wales were governed by general principles of confidentiality and privacy, but that the exceptions were manifestly legion and unsettled. They concluded that attempting a statutory code would create more problems than it would solve, and that any issues which arose could be resolved by the courts on a pragmatic case-by-case basis.[5]

2.4 We explained that the complexity arose in part because confidentiality in arbitration might have a number of bases. First, it could be an express contract term. For example, some arbitral rules (incorporated into the arbitration agreement or otherwise agreed by the parties) have provisions on confidentiality (see below). Second, it could be an implied term of the arbitration agreement.[6] Third, it could arise in equity.[7] Fourth, there is the tort of misuse of private information.[8] Fifth, in arbitral proceedings, the arbitrator might make a ruling, binding on the parties, in respect of confidentiality.

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5 *Report on the Arbitration Bill* (1996) paras 16 to 17.

6 *Halliburton Co v Chubb Bermuda Insurance Ltd* [2020] UKSC 48, [2020] 3 WLR 1474 at [83] by Lord Hodge, and at [173] by Lady Arden. See too: *Ali Shipping Corp v Shipyard Trogir* [1998] 2 All ER 136, 146 by Potter LJ; *Emmott v Michael Wilson & Partners Ltd* [2008] EWCA Civ 184, [2008] 2 All ER (Comm) 193 at [81] by Lawrence Collins LJ.

7 *Halliburton Co v Chubb Bermuda Insurance Ltd* [2020] UKSC 48, [2020] 3 WLR 1474 at [83], [102] by Lord Hodge.

8 *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457.

Exceptions

2.5 Confidentiality cannot be absolute. For example, a person who has behaved unlawfully cannot invoke their desire for confidentiality to deny all inquiry into their wrongdoing.[9]

2.6 As for the limits of confidentiality in arbitration, the leading case is *Emmott v Michael Wilson & Partners Ltd*.[10] Lord Justice Lawrence Collins set out the following list of exceptions to confidentiality:[11]

> The first is where there is consent, express or implied; second, where there is an order, or leave of the court (but that does not mean that the court has a general discretion to lift the obligation of confidentiality); third, where it is reasonably necessary for the protection of the legitimate interests of an arbitrating party; fourth, where the interests of justice require disclosure, and also (perhaps) where the public interest requires disclosure.

2.7 Lord Justice Lawrence Collins expressed caution in formulating this list. He noted that earlier case law had not been the subject of much discussion.[12] He said that the exceptions were still in the process of development,[13] and represented (only) the "principal cases" in which disclosure may be permissible.[14]

2.8 He also acknowledged[15] that his list of exceptions must be read in light of the reservation of Lord Hobhouse in *Associated Electric and Gas Insurance Services*.[16] In that case, Lord Hobhouse said that he doubted the desirability or merit of characterising the duty of confidentiality solely on the basis of it being an implied term, and then formulating exceptions to it. Different types of confidentiality might arise, and different rules might apply when it comes to the arbitral award itself.

2.9 We noted the large variety of ways in which the exceptions to confidentiality might manifest in the particulars of any given case. For example, disclosure may be legitimate to enable an arbitrating party to found a cause of action against a third party, or defend a claim brought by

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9 *Westwood Shipping Lines Inc v Universal Schiffahrtsgesellschaft MBH* [2012] EWHC 3837 (Comm), [2013] 1 Lloyd's Rep 670 at [14] by Flaux J.

10 [2008] EWCA Civ 184, [2008] 2 All ER (Comm) 193. It was endorsed in *Halliburton v Chubb* [2020] UKSC 48, [2020] 3 WLR 1474 at [85].

11 [2008] EWCA Civ 184, [2008] 2 All ER (Comm) 193 at [107].

12 [2008] EWCA Civ 184, [2008] 2 All ER (Comm) 193 at [89].

13 A point echoed by Lord Hodge in *Halliburton v Chubb* [2020] UKSC 48, [2021] AC 1083 at [85].

14 [2008] EWCA Civ 184, [2008] 2 All ER (Comm) 193 at [107].

15 [2008] EWCA Civ 184, [2008] 2 All ER (Comm) 193 at [91] to [93].

16 [2003] UKPC 11, [2003] 1 All ER (Comm) 253 at [20].

a third party.[17] It could be used to question the honesty of witness evidence in one arbitration by comparing it to their evidence in previous arbitral proceedings,[18] or to prove that an issue in current arbitral proceedings was resolved in previous arbitral proceedings and so cannot be relitigated.[19] Further, while arbitration claims in court might be heard in private, the default position is for court judgments to be published, at least where this can be done without disclosing significant confidential information (for example, by redacting or anonymising).[20]

2.10 The DAC gave the following further examples of when disclosure might be appropriate and to whom:[21]

> The award may become public in [domestic] legal proceedings … or abroad under the 1958 New York Convention; the conduct of the arbitration may also become public if subjected to judicial scrutiny within or without England; and most importantly, several non-parties have legitimate interests in being informed as to the content of a pending arbitration, even short of an award: eg parent company, insurer, P & I Club, guarantor, partner, beneficiary, licensor and licensee, debenture-holder, creditors' committee etc, and of course even the arbitral institution itself (such as the ICC Court members approving the draft award) … . Further, any provisions as to privacy and confidentiality would have to deal with the duty of a company to make disclosure of eg arbitration proceedings and actual or potential awards which have an effect on the company's financial position.

Variety of contexts

2.11 We suggested that confidentiality in arbitration was not one-size-fits-all. For example, investor-state arbitrations tend to start from a default position of transparency rather than confidentiality.[22] More transparency might also be appropriate in areas which affect the general public, such

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17 *Hassneh Insurance Co of Israel v Steuart J Mew* [1993] 2 Lloyd's Rep 243; *Ali Shipping Corp v Shipyard Trogir* [1998] 2 All ER 136, 147.

18 *London and Leeds Estates Ltd v Paribas Ltd (No 2)* [1995] 1 EGLR 102 (QBD); *Ali Shipping Corp v Shipyard Trogir* [1998] 2 All ER 136, 148.

19 *Associated Electric and Gas Insurance Services* [2003] UKPC 11, [2003] 1 All ER (Comm) 253 at [20].

20 *Department of Economics, Policy and Development of the City of Moscow v Bankers Trust Co* [2004] EWCA Civ 314, [2005] QB 207 at [39] by Mance LJ; *Manchester City Football Club Ltd v Football Association Premier League Ltd* [2021] EWCA Civ 1110, [2021] 1 WLR 5513.

21 *Report on the Arbitration Bill* (1996) para 16.

22 UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration. If an investor-state arbitration falls within the ICSID Convention, to that extent the Arbitration Act 1996 is excluded: Arbitration (International Investment Disputes) Act 1966, s 3.

as public procurement contracts,[23] or sport;[24] and family law arbitrations concerning children might have more extensive duties of disclosure, for example to report child welfare concerns.[25]

2.12 As for arbitral rules, what was notable was the sheer variety of approaches. Some provide that hearings are private,[26] but others provide for joinder of parties, or consolidation of proceedings, or concurrent hearings.[27] Some provide for confidentiality with a (varying) list of exceptions.[28] Some encourage the tribunal to discuss confidentiality with the parties,[29] and some empower the tribunal to make orders to protect confidentiality.[30] At least one even provides for potential anonymity, so that the parties do not know each other's identities (but the arbitrator will know).[31] Some confirm the confidentiality of awards,[32] others provide that awards might be disseminated (or when appropriately anonymised),[33] or

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23 See the Australian case of *Esso Australia Resources Ltd v Plowman* [1995] HCA 19, (1995) 183 CLR 10 at [39] to [40] by Mason CJ. That was a case about gas sold by private companies to public utilities. See also: S Brekoulakis and M Devaney, "Public-Private Arbitration and the Public Interest under English Law" (2017) 88 *Modern Law Review* 22; C Phiri, "Arbitration of public procurement disputes: what is amiss about it?" [2021] *Public Procurement Law Review* 188.

24 B Hannah, "Ready, set, reform? The future of sports arbitration" (2020) 23 *International Arbitration Law Review* 199. See too: *Manchester City Football Club Ltd v Football Association Premier League Ltd* [2021] EWCA Civ 1110, [2021] 1 WLR 5513.

25 This is explicitly acknowledged in the IFLA Children Scheme Rules 2021.

26 CIArb Arbitration Rules 2015, art 28.3; ICC Arbitration Rules 2021, art 26.3; LCIA Arbitration Rules 2020, art 19.4; RICS Fast Track Arbitration Rules 2015, r 27; DIAC Arbitration Rules 2022, art 26.5.

27 For example: CIArb Arbitration Rules 2015, art 17.5 (joinder); ICC Arbitration Rules 2021, art 7 (joinder), art 10 (consolidation); LCIA Arbitration Rules 2020, art 22.1(x) (joinder), art 22A (consolidation and concurrent hearings); CIMAR 2016, r 3.7 (concurrent hearings), r 3.9 (consolidation); GAFTA Arbitration Rules No 125 (2020), r 7 (concurrent hearings and consolidation); LME Arbitration Regulations, r 11 (concurrent hearings and consolidation); LMAA Terms 2021, r 17(b) (concurrent hearings); IFLA Financial Scheme Rules 2021, art 7.1 (concurrent hearings and consolidation), r 7.5 (joinder); UKJT Digital Dispute Resolution Rules v 1.0 (2021), r 14 (consolidation).

28 LCIA Arbitration Rules 2020, art 30.1; RICS Fast Track Arbitration Rules 2015, r 28; IFLA Financial Scheme Rules 2021, art 16; DIAC Arbitration Rules 2022, art 38.

29 CIArb Arbitration Rules 2015, appendix 2, para 12.

30 ICC Arbitration Rules 2021, art 22.3.

31 UKJT Digital Dispute Resolution Rules v 1.0 (2021), r 13.

32 LCIA Arbitration Rules 2020, art 30.3.

33 CIArb Arbitration Rules 2015, art 34.5; LMAA Terms 2021, para 29; LME Arbitration Regulations, para 12.9; ICC Notes to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration, s IV.C; UKJT Digital Dispute Resolution Rules v 1.0 (2021), r 15.

published.[34] Some prescribe publicity for those parties who fail to abide by an arbitral award.[35]

2.13 Similarly, as for those foreign statutes which address confidentiality,[36] although they have a large measure of overlap, we noted that their respective provisions were not identical, either to each other, or to the principles set out in the case law of England and Wales discussed above. We said that this might indicate a lack of consensus in identifying with precision the limits of confidentiality. It might also reflect the fact that the proper balance between confidentiality and transparency is still a matter of debate.

Consultation question

2.14 Overall, we were not persuaded that confidentiality should be the default position in all types of arbitration. We provisionally concluded that it would not be possible to provide a detailed statutory codification of the law relating to confidentiality in arbitration in a way which would be comprehensive, let alone future-proof. We said that the law of confidentiality is complex, fact-sensitive, and in the context of arbitration, a matter of ongoing debate. In such circumstances, we suggested that there is a significant practical advantage in relying on the courts' ability to develop the law on a case-by-case basis.

2.15 We asked the following consultation question (CP1 CQ1):

> We provisionally conclude that the Arbitration Act 1996 should not include provisions dealing with confidentiality. We think that confidentiality in arbitration is best addressed by the courts. Do you agree?

CONSULTEES' VIEWS

2.16 There were 85 responses to CP1 CQ1: 56 agreed, 23 disagreed, and 6 gave other responses.

2.17 In support of our proposal, some consultees said that the current approach works well, and that a new approach might destabilise it. The current law was said to be flexible and adaptable, whereas a new approach in statute might be overly restrictive. It was noted that the UNCITRAL Model Law says nothing about confidentiality. It was reported that international arbitration is not necessarily confidential under French law, without problem. It was said that confidentiality can safely be left to parties and arbitral rules to specify in terms appropriate to their particular cases or sectors.

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34 LSAC 2020, cl 13.

35 GAFTA Arbitration Rules No 125 (2020), r 24; LME Arbitration Regulations, para 12.14.

36 See: CP1 para 2.25.

2.18 Some consultees pointed to a wide variety of practice across different sectors when it comes to confidentiality in arbitral proceedings. Even within sectors, there can be considerable variety.

2.19 For example, the ICC International Court of Arbitration said:

> Approximately 50% of London-seated ICC arbitrations are subject to a confidentiality agreement of the parties, whether in the contract, Terms of Reference or procedural order of the arbitral tribunal. While this demonstrates the importance of confidentiality provisions, there is no standard confidentiality agreement chosen by parties. Each agreement on confidentiality is agreed by the parties, or ordered by a tribunal, depending on the specifics of the case.

2.20 Some consultees said that transparency should be the default rule for arbitrations, or at least when there are allegations of corruption. Other consultees were in favour of the Act stipulating a general rule that arbitrations are confidential by default, with a non-exhaustive list of exceptions. Principally, they said, this was to provide reassurance, particularly to international arbitration users who value confidentiality.

CONCLUSION

2.21 We understand that confidentiality is important to many users of arbitration. We note that if parties agree that their arbitration is confidential, that already will provide the maximum protection available under the law of England and Wales (without need for statutory intervention). We further note that arbitral rules often provide various bespoke approaches to confidentiality.

2.22 We continue to think that there should not be a default position of confidentiality in all cases of arbitration. We do not think that one size fits all: different default rules can apply in different arbitral contexts. For example, in some types of arbitration, such as investor-state arbitrations, the default already favours transparency. Elsewhere, there is a trend towards transparency, at least in some respects, such as the publication of awards. And there is further debate to be had in other contexts, for example with some public procurement contracts, about the extent to which hearings should be open to public scrutiny. We would be concerned about the longevity of any statutory rule, given this ongoing debate.

2.23 We note that arbitral rules reveal a wide variety of approaches to confidentiality, and that foreign legislation does not speak with one voice. Meanwhile, the law of England and Wales does recognise that confidentiality can attach to arbitral proceedings – but this can arise on a number of legal bases (such as contract, equity, and tort), each of which has its own body of rules. We do not think that a singular statutory rule would sufficiently reflect this variety.

2.24 Also, any rule would necessarily be subject to exceptions. The case law has identified a list of exceptions, but with the following caveats: the list is not exhaustive; the law is still developing; and different approaches might be needed given that confidentiality can arise on a number of different bases. These caveats are not trivial.

2.25 Overall, we do not think that a statutory rule on confidentiality would be sufficiently comprehensive, nuanced or future-proof. We continue to think that the current approach works well, and that the development of the law of confidentiality is better left to the common law – alongside the bespoke practices of arbitral rules. Accordingly, we make no recommendation for reform. We note that the majority of consultees support this conclusion.

Chapter 3: Arbitrator independence and disclosure

3.1 In this chapter, we discuss arbitrator independence, impartiality, and disclosure.

3.2 In broad terms, impartiality is the idea that arbitrators are neutral as between the arbitrating parties, and independence is the idea that arbitrators have no connection to the arbitrating parties or to the dispute. Disclosure is the idea that arbitrators should reveal what connections they do have, if those connections might go to the question of impartiality and independence.

3.3 The Arbitration Act 1996 already contains an express duty of impartiality.[37] The Act also provides that an arbitrator can be removed by the court if there are justifiable doubts as to their impartiality.[38]

3.4 In this chapter, we consider whether arbitrators should also be subject to statutory duties of independence and disclosure.

3.5 Ultimately, we do not recommend that there be any statutory duty of independence. We recommend that there be a statutory duty of disclosure, based on what an arbitrator knows and what they reasonably ought to know.

INDEPENDENCE

Our position in the first consultation paper

3.6 In Chapter 3 of our first consultation paper, we discussed whether the Arbitration Act 1996 should be amended to add an express duty of independence.

3.7 On the one hand, we noted that there is an express duty of independence in the UNCITRAL Model Law,[39] and in some arbitral rules.[40]

3.8 On the other hand, we noted that it was a deliberate decision not to include a duty of independence in the Act. The DAC said that, whether or not the arbitrator is independent, what matters is their impartiality.[41]

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37 Arbitration Act 1996, s 33.

38 Arbitration Act 1996, s 24.

39 UNCITRAL Model Law, art 12(1).

40 For example: ICC Arbitration Rules 2021, art 11; LCIA Arbitration Rules 2020, r 5.3.

41 *Report on the Arbitration Bill* (1996) paras 101 to 102.

Indeed, we noted that some foreign legislation define the duty of independence in terms of its impact on impartiality.[42]

3.9 We said that, if the arbitrator is impartial, and is seen to be impartial, it should not matter whether they have a connection to the parties before them. Of course, some connections are so close that there is at least the risk of unconscious or apparent bias. But other connections might be so trivial or tenuous that no-one could reasonably consider the arbitrator's impartiality to be in question. What matters is not the connection, we said, but its effect on impartiality and apparent bias.

3.10 We said that complete independence may be impossible to achieve, given the limited number of people with expertise in certain sectors, and the inevitable encounters with others as those professionals develop their experience over the years. We noted that some arbitration clauses explicitly require what we might call immersive area expertise. This may be so particularly, for example, in maritime, commodity, insurance or sports arbitration. To the extent that parties are kept informed, this does not appear to cause any problem in practice.

3.11 More generally, we said, arbitrators with desirable experience will inevitably have encountered other professionals and actors in their field. Hermetic separation is not possible. Again, what matters is that arbitrators are open about relevant connections, and that parties are reassured that their tribunal is impartial.

3.12 For these reasons, our provisional conclusion was that there should be no statutory duty of independence.

3.13 We asked the following consultation question (CP1 CQ2):

> Our provisional conclusion is that the Arbitration Act 1996 should not impose a duty of independence on arbitrators. Do you agree?

Consultees' views

3.14 There were 78 responses to CP1 CQ2: 63 agreed, 12 disagreed, and 3 gave other responses.

3.15 Consultees who agreed tended to emphasise the practical difficulty of ensuring no connections between the arbitrator and the parties or their lawyers, and that impartiality was really the key principle.

3.16 For example, Bryan Cave Leighton Paisner LLP said:

> We agree that what matters most is an arbitrator's duty of impartiality and the focus should be on an arbitrator's duty to disclose any circumstances that might reasonably give rise to justifiable doubts as to his/her impartiality.

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[42] CP1 para 3.39.

3.17 Consultees who disagreed tended to suggest that independence was an equally important principle, and that its absence from the Act was out of line with international practice.

Conclusion

3.18 We continue to think that complete independence is not possible. This is so especially where arbitrators are drawn from a small pool with specialist expertise, or where they are expected to have immersive experience in a particular area of activity. Any duty of independence might involve defining a required level of independence, which in turn would be impossible, or it might involve defining independence in terms of impartiality after all, which we note is the approach of some foreign legislation.

3.19 Instead, we think that what matters is that an arbitrator is impartial – and that any connections they might have are disclosed, so that the parties can consider for themselves, and be reassured about, the arbitrator's impartiality. With duties of impartiality and disclosure, we think that there is no need for a further and potentially unworkable duty of independence.

3.20 For these reasons, and in light of the support of the majority of consultees, we make no recommendation for reform here.

DISCLOSURE

Our position in the first consultation paper

3.21 In Chapter 3 of our first consultation paper, we provisionally proposed that arbitrators should be subject to a statutory duty of disclosure. In summary, our reasons were as follows.

3.22 First, even if there is no duty of independence, still arbitrators may need to disclose any connections. This is to demonstrate their impartiality. It also allows the parties to have an informed discussion about the choice of arbitrator.

3.23 Second, we also noted that a duty of disclosure appears in the UNCITRAL Model Law,[43] and in some foreign legislation,[44] as well as in some arbitral rules.[45] Its absence from our legislation is a noticeable omission.

3.24 Third, we said that arbitrators are already under a common law duty of disclosure as a result of the decision of the Supreme Court in *Halliburton*

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43 UNCITRAL Model Law, art 12(1).

44 For example: Arbitration (Scotland) Act 2010, sch 1 r 8; Swedish Arbitration Act 1999, s 9; Private International Law Act 1987 (Switzerland), art 179(6).

45 For example: ICC Arbitration Rules 2021, art 11; LCIA Arbitration Rules 2020, r 5.5; IFLA Financial Scheme Arbitration Rules 2021, art 5.1.

v Chubb[46] (which remedies the omission in the legislation). We proposed to codify that duty. We said that it is a virtue of the Act that it recites, in one place, and easily accessible to users, the governing principles of arbitration, but that the duty of disclosure is currently missing.

3.25 We proposed to codify only a short statement of general principle: that arbitrators have a continuing duty to disclose any circumstances which might reasonably give rise to justifiable doubts as to their impartiality. This is the test which appears in *Halliburton v Chubb*, as we discuss further below.

3.26 We did not propose reform which prescribed precisely what should be disclosed. We thought that that would vary according to the circumstances, and any guidance was better built up through the case law, or addressed through arbitral rules in the specific context of their own sectors.

3.27 We made the following provisional proposal, and asked consultees whether they agreed (CP1 CQ3):

> We provisionally propose that the Arbitration Act 1996 should provide that arbitrators have a continuing duty to disclose any circumstances which might reasonably give rise to justifiable doubts as to their impartiality.

Consultees' views

3.28 There were 83 responses to CP1 CQ3: 65 agreed, 13 disagreed, and 5 gave other responses.

3.29 Consultees who agreed tended to stress the importance of disclosure to the perception of impartiality, and that codification of the case law would provide clarity.

3.30 An additional reason for a duty of disclosure was given by Imran Benson, in the context of insurance arbitrations brought by policy holders, and Claimspace Ltd, in the context of consumer arbitrations. They stressed the importance of disclosure in addressing informational asymmetry.

3.31 For example, an arbitral respondent might be a repeat user of arbitration, and through that might have private knowledge of arbitrators' views on various issues. This might give the arbitral respondent an advantage when selecting an arbitrator. It might thus be important for an arbitral claimant to know how often an arbitrator has been involved with cases involving the arbitral respondent.

3.32 Some consultees who supported our proposal nevertheless suggested that statute should also stipulate the consequences of non-disclosure.

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46 *Halliburton Co v Chubb Bermuda Insurance Ltd* [2020] UKSC 48, [2021] AC 1083.

3.33 For example, Robert Gay said that non-disclosure should lead to removal, rather than being merely a possible ground for removal. He also said that an arbitrator's immunity should extend to non-disclosure unless the arbitrator has acted in bad faith.

3.34 Some consultees objected to our proposal. They said that there was no need for a statutory duty, given the common law duty, and that statutory codification would lose the flexibility offered by the common law.

3.35 The principal objection to our proposal came from a group of specialist organisations or their representatives. They included: the Grain and Feed Trade Association (GAFTA); FOSFA International (the Federation of Oils, Seeds and Fats Associations); the London Maritime Arbitrators Association (LMAA); Edward Album; the Sugar Association of London, and the Refined Sugar Association; the Federation of Commodity Associations;[47] and David Scorey KC, on behalf of ARIAS (UK), the Insurance and Reinsurance Arbitration Society.

3.36 These consultees were united in their objections. They expressed a concern that a statutory duty would be seen as departing from the common law duty in *Halliburton v Chubb*, and so imposing something more onerous.

3.37 By way of detail, they said that, in their sectors, there was a small pool of arbitrators and appointing firms of solicitors. Repeat and overlapping appointments were common, and the practice was accepted without the need for disclosure. In some cases, the very fact that parties have proceeded to arbitration is confidential, which inhibits disclosure. Many appointments, they said, do not lead to arbitral hearings or awards because the parties settle; these repeat appointments (and thus their disclosure) count for little.

Discussion: *Halliburton v Chubb*

3.38 Let us begin by revisiting precisely what was said in *Halliburton v Chubb*.[48] In that case, the complaint was that an arbitrator had failed to disclose his appointments in overlapping arbitrations. The arbitral claimant sought the arbitrator's removal on the grounds that there were justifiable doubts as to his impartiality.

3.39 Here is an example of an overlapping arbitration. An arbitrator is appointed in a first arbitration between parties A and B, and then appointed in a second arbitration between parties B and C, when the issues in dispute are similar. The complaint is that B would be able to lead evidence and arguments in one arbitration, and, discovering how the arbitrator reacts, amend their stance in the other arbitration. The other

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47 The Federation of Commodity Associations additionally represents the Global Pulses Confederation, the Federation of Cocoa Commerce, and the Rubber Trade Association of Europe.

48 *Halliburton Co v Chubb Bermuda Insurance Ltd* [2020] UKSC 48, [2021] AC 1083.

parties might object to B making use of its knowledge of the arbitrator in this way, if they ever discovered the overlap.[49]

3.40 In *Halliburton v Chubb*, the LMAA and GAFTA were given permission to intervene. GAFTA's intervention included submissions by ARIAS (UK). Also given permission to intervene were the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), and the Chartered Institute of Arbitrators (CIArb).

3.41 The submissions by the ICC, LCIA, and CIArb were to the effect that overlapping appointments could give rise to justifiable doubts as to an arbitrator's impartiality, and that the failure to disclose the overlapping appointments could itself also give rise to justifiable doubts.[50]

3.42 The submissions by GAFTA and ARIAS (UK) were to the effect that overlapping appointments were common and required no disclosure.[51] The LMAA similarly said that overlapping appointments were common and did not necessarily require disclosure.[52] Both GAFTA and the LMAA submitted that overlapping appointments did not give rise to any appearance of bias, being a feature of arbitrations in their sectors which parties accept. They said that there was no need to impose upon them a duty of disclosure.[53]

3.43 Thus, the submissions put before the court in *Halliburton v Chubb* by GAFTA, ARIAS (UK), and the LMAA, were largely the same as their objections to our proposal.

3.44 The Supreme Court said that arbitrators are under a duty of disclosure. This duty was said to arise in two ways.

3.45 First, the duty of disclosure was said to arise as part of the duty of impartiality in section 33 of the Arbitration Act 1996.[54] Lord Hodge said that proper disclosure is in itself a badge of impartiality.[55] But as Lady Arden pointed out,[56] section 33 only applies to the tribunal, that is, to

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49 The leveraging of such knowledge might be viewed as a form of procedural unfairness: C Hancock and D Bovensiepen, "The Restrictions on Multiple Arbitral Appointments under English Law" (2020) 7(2) *Bahrain Chamber for Dispute Resolution International Arbitration Review* 333, 335 to 337.

50 [2020] UKSC 48, [2021] AC 1083 at [42].

51 [2020] UKSC 48, [2021] AC 1083 at [43].

52 [2020] UKSC 48, [2021] AC 1083 at [44].

53 [2020] UKSC 48, [2021] AC 1083 at [45].

54 [2020] UKSC 48, [2021] AC 1083 at [78], [81] by Lord Hodge DPC, with whom Lord Reed PSC, Lady Black and Lord Lloyd-Jones JJSC agreed, and at [167] by Lady Arden JSC.

55 [2020] UKSC 48, [2021] AC 1083 at [70].

56 [2020] UKSC 48, [2021] AC 1083 at [168].

appointed arbitrators; it does not create any duty of disclosure prior to appointment.

3.46 Second, a duty of disclosure was said to be an implied term of the arbitrator's contract of appointment.[57] However, the court noted that breach of that term might not give rise to any damages, or at least not in the absence of bad faith (because of arbitrator immunity – discussed further in Chapter 5 below).[58]

3.47 We think that a contractual explanation is of limited reach. It assumes that the contract of appointment is governed by the law of England and Wales. If the contract is governed by foreign law, there might be no term implying a duty of disclosure. Also, an arbitrator's contract of appointment might not be made with all the parties, with the result that the duty of disclosure might not be owed contractually to all the parties. (In *Halliburton v Chubb*, the challenged arbitrator was appointed by the court.)

3.48 Further, we agree that disclosure should be made prior to appointment to the person seeking to make the appointment, because the impartiality of the arbitrator is obviously relevant to the decision whether or not to appoint. After appointment, disclosure should also be made to the parties, who might not have been the person making the appointment.

3.49 However, a contract only arises upon appointment, so it cannot create a duty of disclosure that exists prior to appointment; all it can do is warrant what disclosure actually took place prior to appointment. In contrast, legislation can impose an existing duty of disclosure at the pre-contract stage – as is the case, for example, in the UNCITRAL Model Law,[59] and in Scotland.[60]

3.50 We think that a statutory duty of disclosure is on surer ground than a contractual duty: it is not dependent on the governing law of the appointment contract; it ensures that the duty is owed to all parties. We also think that it is sufficiently important as to merit its separate articulation from the duty of impartiality; and this will also ensure that the duty extends to pre-appointment discussions. These are further reasons in favour of codification.

What does the duty of disclosure entail?

3.51 In *Halliburton v Chubb*, the Supreme Court said that there is a duty to disclose any circumstances which might reasonably give rise to justifiable

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57 [2020] UKSC 48, [2021] AC 1083 at [76] by Lord Hodge DPC, with whom Lord Reed PSC, Lady Black and Lord Lloyd-Jones JJSC agreed, and at [167] by Lady Arden JSC.

58 [2020] UKSC 48, [2021] AC 1083 at [106] by Lord Hodge DPC, with whom Lord Reed PSC, Lady Black and Lord Lloyd-Jones JJSC agreed, and at [169] by Lady Arden JSC.

59 UNICTRAL Model Law, art 12.

60 Arbitration (Scotland) Act 2010, sch 1, r 8.

doubts as to the arbitrator's impartiality.[61] This is the same as the common law test for apparent bias,[62] which asks whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.[63] The duty of disclosure is a continuing one, like the duty of impartiality.[64]

3.52 The Act already uses the language of justifiable doubt in applications to remove an arbitrator.[65] This is why we proposed that the duty of disclosure be expressed in terms of justifiable doubt. We think it better to keep the language of the Act uniform, rather than use paraphrases like apparent bias or the fair-minded observer.

3.53 The Supreme Court said that privacy and confidentiality in arbitral proceedings put a premium on frank disclosure.[66] However, what an arbitrator can disclose is in turn limited by their duties of confidentiality. For example, in some cases the very fact that parties have proceeded to arbitration is itself confidential.[67]

3.54 The factual issue in *Halliburton v Chubb* was overlapping appointments. The Supreme Court said as follows.

(1) Overlapping appointments can give rise to justifiable doubts as to an arbitrator's impartiality,[68] in which case they should be disclosed.

(2) Failure to disclose overlapping appointments can itself give rise to justifiable doubts as to an arbitrator's impartiality.[69]

(3) In some sectors, it is established custom and practice that an arbitrator can (and thus should) reveal the fact of overlapping appointments, and the name of the overlapping party.

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61 [2020] UKSC 48, [2021] AC 1083 at [108], [116], [132], [136], [145] by Lord Hodge DPC, with whom Lord Reed PSC, Lady Black and Lord Lloyd-Jones JJSC agreed.

62 [2020] UKSC 48, [2021] AC 1083 at [55] by Lord Hodge DPC, with whom Lord Reed PSC, Lady Black and Lord Lloyd-Jones JJSC agreed.

63 [2020] UKSC 48, [2021] AC 1083 at [52] by Lord Hodge DPC, with whom Lord Reed PSC, Lady Black and Lord Lloyd-Jones JJSC agreed.

64 [2020] UKSC 48, [2021] AC 1083 at [70], [120] by Lord Hodge DPC, with whom Lord Reed PSC, Lady Black and Lord Lloyd-Jones JJSC agreed.

65 Arbitration Act 1996, s 24(1)(a).

66 [2020] UKSC 48, [2021] AC 1083 at [56] by Lord Hodge DPC, with whom Lord Reed PSC, Lady Black and Lord Lloyd-Jones JJSC agreed.

67 [2020] UKSC 48, [2021] AC 1083 at [92] by Lord Hodge DPC, with whom Lord Reed PSC, Lady Black and Lord Lloyd-Jones JJSC agreed.

68 [2020] UKSC 48, [2021] AC 1083 at [130] to [131] by Lord Hodge DPC, with whom Lord Reed PSC, Lady Black and Lord Lloyd-Jones JJSC agreed, and at [164] by Lady Arden JSC.

69 [2020] UKSC 48, [2021] AC 1083 at [118], [131], [133], [136] by Lord Hodge DPC, with whom Lord Reed PSC, Lady Black and Lord Lloyd-Jones JJSC agreed.

(a) This is the case for insurance arbitrations on the Bermuda Form (the type of arbitration in issue in *Halliburton v Chubb*).[70]

(b) It may be the case for ICC, LCIA, and CIArb arbitrations.[71]

(c) The custom and practice means that the overlapping party's consent to this disclosure can be inferred from its participation in arbitral proceedings.[72]

(d) The parties can override such custom and practice by expressly withholding consent to the disclosure.[73]

(4) If confidentiality precludes an arbitrator from disclosing what they need to disclose, then the arbitrator should decline the overlapping appointment.[74]

(5) In some sectors, it may well be established custom and practice that overlapping appointments occur and do not need to be disclosed.

(a) This may be the case for LMAA and GAFTA arbitrations.[75]

(b) This may also be the case more generally for maritime, sports, and commodity arbitrations.[76]

(c) There may also be a similar practice for reinsurance arbitrations.[77]

Justifiable doubts

3.55 To repeat, the court in *Halliburton v Chubb* said that there is a duty to disclose any circumstances which might reasonably give rise to justifiable doubts as to the arbitrator's impartiality. In this section, we explain why

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70 [2020] UKSC 48, [2021] AC 1083 at [93, [95], [104], [137] by Lord Hodge DPC, with whom Lord Reed PSC, Lady Black and Lord Lloyd-Jones JJSC agreed.

71 [2020] UKSC 48, [2021] AC 1083 at [100], [105], [127] by Lord Hodge DPC, with whom Lord Reed PSC, Lady Black and Lord Lloyd-Jones JJSC agreed.

72 [2020] UKSC 48, [2021] AC 1083 at [88], [89] by Lord Hodge DPC, with whom Lord Reed PSC, Lady Black and Lord Lloyd-Jones JJSC agreed.

73 [2020] UKSC 48, [2021] AC 1083 at [100], [104], [137] by Lord Hodge DPC, with whom Lord Reed PSC, Lady Black and Lord Lloyd-Jones JJSC agreed.

74 [2020] UKSC 48, [2021] AC 1083 at [88] by Lord Hodge DPC, with whom Lord Reed PSC, Lady Black and Lord Lloyd-Jones JJSC agreed.

75 [2020] UKSC 48, [2021] AC 1083 at [91], [137] by Lord Hodge DPC, with whom Lord Reed PSC, Lady Black and Lord Lloyd-Jones JJSC agreed.

76 [2020] UKSC 48, [2021] AC 1083 at [87], [133] to [135] by Lord Hodge DPC, with whom Lord Reed PSC, Lady Black and Lord Lloyd-Jones JJSC agreed.

77 [2020] UKSC 48, [2021] AC 1083 at [91] by Lord Hodge DPC, with whom Lord Reed PSC, Lady Black and Lord Lloyd-Jones JJSC agreed.

the words “reasonably” and “justifiable” both appear together in the formulation of that duty of disclosure.

3.56 The phrase “justifiable doubts” appears in article 12 of the UNCITRAL Model Law. It also appears in section 24 of the Arbitration Act 1996. It seems, unsurprisingly, that the wording in section 24 was inspired by the UNCITRAL Model Law.[78]

3.57 In *Halliburton v Chubb*, in the Court of Appeal, the court said that the phrase

> would or might give rise to justifiable doubts as to his impartiality

was synonymous with

> would or might lead the fair-minded and informed observer, having considered the facts, to conclude that there was a real possibility that the arbitrator was biased.[79]

3.58 For example, thinking the arbitrator is a friend of the opponent is a justifiable doubt as to the arbitrator’s impartiality; thinking the arbitrator had Weetabix for breakfast is not.

3.59 The Court of Appeal’s formulation was approved by the Supreme Court[80] – except for the phrase “would or might”. Any circumstance which “would” give rise to doubt had to be disclosed; but saying any circumstance which “might” give rise to doubt put the bar too low – it was only those circumstances which might *reasonably* give rise to doubt which had to be disclosed.[81]

3.60 Article 12(1) of the UNCITRAL Model Law refers to circumstances “likely” to give rise to justifiable doubt. The Supreme Court in *Halliburton v Chubb* said that this meant “could reasonably” give rise to doubt.[82]

3.61 For example, thinking the arbitrator is a friend of the opponent is a justifiable doubt as to the arbitrator’s impartiality. This thought arises reasonably if the arbitrator regularly dines with the opponent at the same club; it does not arise reasonably simply because the arbitrator has stood behind the opponent in a queue at the coffee shop. The former would need disclosing, not the latter.

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78 DAC, *Report on the Arbitration Bill* (1996), para 101.

79 As reported in [2020] UKSC 48, [2021] AC 1083 at [74].

80 [2020] UKSC 48, [2021] AC 1083 at [107].

81 [2020] UKSC 48, [2021] AC 1083 at [108].

82 [2020] UKSC 48, [2021] AC 1083 at [113].

3.62 The word “reasonably” also indicates that the test for what should be disclosed is objective. The Supreme Court explained as follows:[83]

> the arbitrator's legal obligation of disclosure imposes an objective test. This differs from the rules of many arbitral institutions which look to the perceptions of the parties to the particular arbitration and ask whether they might have justifiable doubts as to the arbitrator's impartiality. The legal obligation can arise when the matters to be disclosed fall short of matters which would cause the informed observer to conclude that there was a real possibility of a lack of impartiality. It is sufficient that the matters are such that they are relevant and material to such an assessment of the arbitrator's impartiality and could reasonably lead to such an adverse conclusion.

3.63 Finally, the Supreme Court emphasised that the test was “might reasonably”, even underlining those words, throughout the judgments.[84]

Recommendation

3.64 We consider it beyond doubt that there is a continuing duty to disclose any circumstances which might reasonably give rise to justifiable doubts as to an arbitrator’s impartiality. This was the test formulated in *Halliburton v Chubb*. This is the test we proposed in our first consultation paper.

3.65 The Supreme Court said that this duty was necessary in the public interest to uphold the integrity of arbitration as a system of dispute resolution.[85] We agree. Disclosure is a demonstration of an arbitrator’s impartiality. It also helps to address the potential unfairness of informational asymmetry.

3.66 We think it appropriate that such an important duty be recognised in the Arbitration Act 1996. This would be in line with international best practice. A concise statutory rule is also more accessible than the current case law. Separating out the duty of disclosure from the duty of impartiality allows the duty of disclosure to apply to pre-appointment discussions. Statutory codification of this duty has the support of most consultees.

3.67 Further, we think its codification in statute is a safer approach than relying on an implied term in the arbitrator’s contract of appointment. This is because not all arbitral parties will necessarily be party to the arbitrator’s contract of appointment, and anyway it would depend on that contract being governed by the law of England and Wales, which need not always be the case.

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83 [2020] UKSC 48, [2021] AC 1083 at [116].

84 [2020] UKSC 48, [2021] AC 1083 at [118], [132], [136], [145], [153].

85 [2020] UKSC 48, [2021] AC 1083 at [103] by Lord Hodge DPC, with whom Lord Reed PSC, Lady Black and Lord Lloyd-Jones JJSC agreed.

3.68 We do not think that codification will lose the flexibility offered by the common law. Our recommendation only pertains to codifying the general principle, which itself is certain. We do not otherwise seek to prescribe what needs to be disclosed. Such details will vary from case to case, and can be developed through case law, or addressed in arbitral rules.

3.69 For example, *Halliburton v Chubb* only dealt with the fact of overlapping appointments, and even then it was noted that there were different expectations in different sectors.

3.70 To repeat, in some sectors, like maritime, sports, commodity, and reinsurance, it might well be established custom and practice that overlapping appointments do not need to be disclosed. In such circumstances, an overlapping appointment would not reasonably give rise to justifiable doubts as to an arbitrator's impartiality.

3.71 However, just because some circumstances need not be disclosed, it does not follow that the duty of disclosure in general can be waived. The duty of impartiality is mandatory; so too, as a matter of public interest, is the related duty of disclosure.

3.72 Failure to make due disclosure can give rise to justifiable doubts as to an arbitrator's impartiality, and so expose them to removal under section 24. Beyond that, we do not think that the consequences of non-disclosure should be specified. We think that being prescriptive would risk closing off developments which might properly be considered in the factual context of different cases. In other words, we do not think that the law has developed to the point where we could recommend with confidence an exhaustive list of the consequences of non-disclosure.

3.73 For example, *Halliburton v Chubb* concerned an application under section 24 to remove the impugned arbitrator. But the Supreme Court also made reference to the fact that, if non-disclosure led to a serious irregularity which caused substantial injustice, an award might be challenged under section 68.[86] Further, if a duty of disclosure is also an implied term of the arbitrator's contract of appointment, as the Supreme Court suggested, breach might lead to other contract law remedies – although we think that this would ordinarily involve section 29 (immunity of arbitrator).

3.74 Accordingly, we make the following recommendation.

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[86] [2020] UKSC 48, [2021] AC 1083 at [51] by Lord Hodge DPC, with whom Lord Reed PSC, Lady Black and Lord Lloyd-Jones JJSC agreed.

Recommendation 1.

3.75 We recommend that the Arbitration Act 1996 should provide that arbitrators have a continuing duty to disclose any circumstances which might reasonably give rise to justifiable doubts as to their impartiality.

3.76 This recommendation is given effect by clause 2 of the draft Bill.

STATE OF KNOWLEDGE

Our position in the first consultation paper

3.77 Should an arbitrator's duty of disclosure be based only upon their actual knowledge, or also upon what they ought to know after making reasonable inquiries? Case law has not yet answered this question.

3.78 In Chapter 3 of our first consultation paper, we considered whether we should answer the question. Our answer might then be added into the Arbitration Act 1996. This could provide clarity.

3.79 On the other hand, *Halliburton v Chubb* deliberately chose not to answer the question. In that case, Lord Hodge said this:[87]

> An arbitrator can disclose only what he or she knows and is, as a generality, not required to search for facts or circumstances to disclose. But I do not rule out the possibility of circumstances occurring in which an arbitrator would be under a duty to make reasonable enquiries in order to comply with the duty of disclosure. … Mr Kimmins QC, on behalf of LCIA … submitted that an arbitrator is under a duty to make reasonable enquiries as to whether there are facts or circumstances which might lead the fair-minded and informed observer to conclude that there was a real possibility of bias. It is not necessary in the context of this appeal to express a concluded view on whether this statement of good practice is also an accurate statement of English law, but I do not rule out that it might be.

3.80 Lady Arden said this:[88]

> As regards the duty to disclose, it is of some interest that section 177(5) of the Companies Act 2006 provides that a director should be treated as being aware of matters "of which he ought reasonably to be aware". While I agree with Lord Hodge DPSC … that this court should leave open the question of what enquiries an arbitrator should make about conflict of interests, the formulation in this subsection seems to me to be unexceptionable in principle, and it may be helpful guidance to arbitrators. I would add that the conclusion that as a matter of the law of

87 [2020] UKSC 48, [2021] AC 1083 at [107].

88 [2020] UKSC 48, [2021] AC 1083 at [162].

> England and Wales an arbitrator is to be treated as aware of a conflict of interest of which he is not actually aware would on the face of it take English and Wales beyond Scots law, which appears to require actual awareness … . That may confirm the wisdom of Parliament when it enacted the 1996 Act in leaving issues such as these to judicial development of the law rather than codifying them in legislation. By leaving them to judicial development, the common law of England and Wales can keep pace with change. It can take account of developing standards and expectations in international commercial arbitration in particular.

3.81 In our first consultation paper, we also noted that a duty to make reasonable inquiries is stipulated by the International Bar Association in its *Guidelines on Conflicts of Interest in International Arbitration*.[89] Some authors have said that it would be consistent with a duty of reasonable care generally expected of professionals.[90] In contrast, in Scotland, the duty of disclosure is based only upon the actual knowledge of the arbitrator.[91]

3.82 Ultimately, we did not make a proposal either way. Rather, we asked the following consultation questions:

> Should the Arbitration Act 1996 specify the state of knowledge required of an arbitrator's duty of disclosure, and why? (CP1 CQ4)
>
> If the Arbitration Act 1996 were to specify the state of knowledge required of an arbitrator's duty of disclosure, should the duty be based upon an arbitrator's actual knowledge, or also upon what they ought to know after making reasonable inquiries, and why? (CP1 CQ5)

Consultees' views

3.83 There were 65 responses to CP1 CQ4, on whether the Act should specify the state of knowledge: 31 were in favour of specifying the state of knowledge, 33 were against, and there was 1 other response

3.84 Those in favour tended to think that specifying the state of knowledge would provide clarity, rather than leaving the question at large. Those against tended to prefer the approach of Lady Arden; specifying the required state of knowledge was something to be left for the courts to develop. Some consultees also said that the matter could be better addressed through arbitral rules tailored to their specific sectors.

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89 International Bar Association, *Guidelines on Conflicts of Interest in International Arbitration* (2014) General Standard 7(d).

90 *Merkin and Flannery on the Arbitration Act 1996* (6th ed 2020) p 287.

91 Arbitration (Scotland) Act 2010, sch 1 r 8; *Davidson: Arbitration* (2nd ed 2012) para 7.31.

3.85 There were 42 responses to CP1 CQ5, on how to formulate any state of knowledge: 26 were broadly in favour of constructive knowledge, 11 were in favour of actual knowledge, and 5 gave other responses.

3.86 Those in favour of actual knowledge said, for example, that it is fair to require someone to disclose only what they actually know. In contrast, the principal reason in favour of constructive knowledge was that this is the standard already expected of other similar professionals like barristers and solicitors. There was a range of suggestions as to how it might be formulated, as follows.

3.87 Following the approach of Lady Arden, Clare Ambrose suggested that an arbitrator's duty of disclosure should be based on what the arbitrator knows or reasonably ought to know. She thought this better than a positive duty to make inquiries.

3.88 Orrick, Herrington & Sutcliffe (UK) LLP suggested that there should be a duty to make reasonable inquiries before appointment; after appointment, the duty might be based on actual knowledge, but with reasonable systems in place to bring relevant matters to light.

3.89 Imran Benson suggested that reasonable inquiries should be restricted to a paid professional, but a volunteer should only be held to actual knowledge (by analogy to professional and non-professional trustees).

3.90 Clifford Chance LLP said that it would be reasonable for a solicitor arbitrator to check for conflicts of interest within their firm, whereas a self-employed arbitrator might be more confident to rely on their actual knowledge.

3.91 The British Insurance Law Association suggested that the test should be the same as that found in section 4(6) of the Insurance Act 2015, so that an arbitrator ought to know what should reasonably have been revealed by a reasonable search of information available to them (whether the search is conducted by making enquiries or by any other means).

3.92 Reed Smith LLP reported that French law imposes on the *parties* a duty of curiosity to discover information which is publicly available.

3.93 The judges of the Business and Property Courts (who are judges of the High Court) said that the court might attach different significance to any breach of the duty of disclosure, depending on whether the failure was to disclose something known rather than something which should have been investigated.

Recommendation

3.94 We doubt that a court, in private proceedings, could be in a better position than we are to decide, as a matter of principle, the state of knowledge against which any arbitrator's duty of disclosure is to be judged. In which case, we see no value in leaving the question unanswered, thereby burdening the court with an inquiry which we have

already made. There are different ways of formulating the test, but ultimately it is a question of policy. We think that the choice is largely binary: to base the duty of disclosure on actual knowledge, or also on what the arbitrator ought reasonably to know.

3.95 We think that the duty of disclosure should be based on what the arbitrator ought reasonably to know. This standard of reasonableness aligns with the usual standard expected of similar professionals. It is a higher standard than actual knowledge; a higher standard is appropriate given the importance of disclosure to maintaining (the appearance of) impartiality in arbitrators.

3.96 On reflection, however, we agree that what an arbitrator ought to know does not necessarily translate in every case into a positive duty to make inquiries; it will depend on the circumstances. For example, sometimes the actual knowledge of an arbitrator might also be all that they ought reasonably to know. Or sometimes they ought to make connections in their knowledge without the need for further inquiries. In contrast, it may be that arbitrators in a firm ought to do a search for conflicts of interest within their firm – an inquiry which might not be necessary for a sole practitioner well aware of who is on their (perhaps shorter) list of clients. Sometimes it might be necessary to make reasonable inquiries after all: for example, if an arbitrator learns that one party is owned by a person with the same name as a friend, they probably ought to check whether it is indeed that friend or simply someone else with the same name.

3.97 Accordingly, we recommend that an arbitrator should be under a continuing duty to disclose what they actually know and what they ought reasonably to know. We do not recommend requiring arbitrators always to make inquiries.

3.98 We think that this strikes the right balance between resolving the matter at the level of principle, while couching it in terms of sufficient generality that there is room for the courts, or arbitral rules, to adopt nuanced requirements in different situations. Put simply, what an arbitrator ought reasonably to know will vary from case to case, and no doubt from sector to sector.

Recommendation 2.

3.99 We recommend that an arbitrator should be under a duty to disclose what they actually know and what they ought reasonably to know.

3.100 This recommendation is also given effect by clause 2 of the draft Bill, which provides as follows.

(1) The Arbitration Act 1996 is amended as follows.

(2) After section 23 insert—

"23A Impartiality: duty of disclosure

(1) An individual who has been approached in connection with their possible appointment as an arbitrator must, as soon as reasonably practical, disclose to the person exercising the power of appointment any relevant circumstances of which the individual is, or becomes, aware.

(2) An arbitrator must, as soon as reasonably practical, disclose to the parties to the arbitral proceedings any relevant circumstances of which the arbitrator is, or becomes, aware.

(3) For the purposes of this section—

(a) "relevant circumstances", in relation to an individual, are circumstances that might reasonably give rise to justifiable doubts as to the individual's impartiality in relation to the proceedings, or potential proceedings, concerned, and

(b) an individual is to be treated as being aware of circumstances of which the individual ought reasonably to be aware."

(3) In Schedule 1 (mandatory provisions), after the entry for section 13, insert—

"section 23A (impartiality: duty of disclosure);".

Chapter 4: Discrimination

4.1 In this chapter, we discuss discrimination in arbitral proceedings.[92] In this context, we do not recommend any reform to the Arbitration Act 1996.

BACKGROUND

Equality Act 2010

4.2 The Equality Act identifies the following protected characteristics: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation.[93]

4.3 Direct discrimination is where a person is treated less favourably because of their protected characteristics – for example, not offering someone a job because they are gay.[94]

4.4 Indirect discrimination is applying a criterion or practice which puts individuals who share a protected characteristic at a disadvantage – for example, only offering jobs to someone over six feet tall, which is likely to exclude most women.[95]

4.5 Indirect discrimination can be justified if shown to be a proportionate means of achieving a legitimate aim.[96] Beyond specific exceptions (see below), direct discrimination cannot be justified, save for age discrimination: an age restriction, for example, can be justified if shown to be a proportionate means of achieving a legitimate aim.[97]

4.6 The Equality Act also contains provisions protecting those who make complaints of discrimination,[98] protecting against harassment related to a protected characteristic,[99] and laying down special duties owed to persons with disabilities – for example, to make reasonable adjustments.[100]

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92 We gratefully acknowledge the assistance of Michael Ford KC who commented on an earlier draft of this chapter. All views and errors are our own.

93 Equality Act 2010, s 4.

94 Equality Act 2010, s 13.

95 Equality Act 2010, s 19.

96 Equality Act 2010, s 19(2)(d).

97 Equality Act 2010, s 13(2).

98 Equality Act 2010, s 27.

99 Equality Act 2010, s 26.

100 Equality Act 2010, s 20.

4.7 The Equality Act prohibits discrimination in various contexts including: the provision of services to the public,[101] employment,[102] discrimination by or against a barrister,[103] membership of a trade organisation,[104] or membership of an association.[105]

4.8 The Equality Act contains detailed exceptions. For example, in the work sphere, it can be justified to require an employee to have a protected characteristic if it is an occupational requirement, the application of which is a proportionate means of achieving a legitimate aim.[106] Also, associations may restrict membership to people who share a protected characteristic.[107] And there are further exceptions for service providers, for example, to allow them to provide separately for different sexes (like single sex changing rooms).[108]

4.9 In this way, the Equality Act applies specific rules in particular areas, rather than applying a blunt prohibition across the board.

4.10 We discuss below what remedies should be available for discrimination in arbitration. By way of comparison, proceedings claiming a contravention of the Equality Act can be brought in the county court, for example in respect of public services or associations,[109] where remedies include those available in tort law (like compensation) or judicial review (like quashing the decision of a public body).[110] Proceedings are brought in the employment tribunals for discrimination occurring in a work context,[111] where remedies include a declaration of the complainant's rights, compensation, and a recommendation.[112]

4.11 The Equality Act also provides that a term of a contract is unenforceable if it is discriminatory;[113] such a term can be removed or modified by a

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101 Equality Act 2010, s 29.

102 Equality Act 2010, s 39.

103 Equality Act 2010, s 47.

104 Equality Act 2010, s 57.

105 Equality Act 2010, s 101.

106 Equality Act 2010, sch 9, para 1.

107 Equality Act 2010, sch 16, para 1.

108 Equality Act 2010, sch 3, pt 7, para 26.

109 Equality Act 2010, s 114.

110 Equality Act 2010, s 119.

111 Equality Act 2010, s 120.

112 Equality Act 2010, s 124.

113 Equality Act 2010, s 142.

county court.[114] It is not permissible to contract out of the Equality Act except where this is done to settle a claim.[115]

Arbitration and discrimination

4.12 In *Hashwani v Jivraj*,[116] the Supreme Court held that discrimination law then in force did not apply to the appointment of arbitrators, because arbitrators are not employees of the arbitral parties, nor in a subordinate position to the arbitral parties. We agree that arbitrators are not employees of, or in a subordinate position to, the arbitral parties.

4.13 Subsequently, Baroness Cox introduced a Private Member's Bill, seeking amendment to the Arbitration Act (among others) to prohibit various forms of sex discrimination.[117] This did not become law.

4.14 In our first consultation paper, we noted statistics which tended to show that women were up to three times less likely to be appointed arbitrators than men.[118]

4.15 We commended initiatives within the arbitration community to increase diversity of arbitral appointments, including the Equal Representation in Arbitration Pledge, and Racial Equality for Arbitration Lawyers.

4.16 Ultimately, the question for us was whether, through reform of the Arbitration Act, provisions prohibiting discrimination should apply to arbitral proceedings.

OUR FIRST CONSULTATION PAPER

Our position

4.17 In *Hashwani v Jivraj*, the discrimination law considered was the Employment Equality (Religion or Belief) Regulations 2003.[119] These prohibited, in the context of employment, discrimination on the grounds of religion or belief, unless being of a particular religion or belief was a genuine occupational requirement applied proportionately.

4.18 The Court of Appeal suggested that possession of a protected characteristic would have to be necessary to the task at hand to qualify

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114 Equality Act 2010, s 143.

115 Equality Act 2010, s 144.

116 [2011] UKSC 40, [2011] 1 WLR 1872.

117 Arbitration and Mediation Services (Equality) Bill. <https://bills.parliament.uk/bills/1793>

118 CP1, para 4.4.

119 These were revoked by the Equality Act 2010, sch 27, pt 2. They have been replaced by similar rules in sch 9 the Equality Act 2010, which apply to protected characteristics in general. By para 1, the latter make it an exception to discrimination in the work sphere if a requirement to have a protected characteristic is an occupational requirement and its application is a proportionate means of achieving a legitimate aim. There is a separate occupational requirement exception to discrimination at work, in para 3, applicable to persons with an ethos based on religion or belief,

as a genuine occupational requirement.[120] In the Supreme Court, Lord Clarke said instead that it need only be legitimate and justified, rather than strictly necessary.[121]

4.19 We asked the following consultation question (CP1 CQ6):

> Do you think that the requirement of a protected characteristic in an arbitrator should be enforceable only if it is necessary (as suggested by the Court of Appeal in *Hashwani v Jivraj*) or if it can be more broadly justified (as suggested in the Supreme Court)?

4.20 We then went on to make the following provisional proposal, and asked if consultees agreed (CP1 CQ7):

> (1) the appointment of an arbitrator should not be susceptible to challenge on the basis of the arbitrator's protected characteristic(s), and
>
> (2) any agreement between the parties in relation to the arbitrator's protected characteristic(s) should be unenforceable
>
> unless in the context of that arbitration, requiring the arbitrator to have that protected characteristic is a proportionate means of achieving a legitimate aim.
>
> "Protected characteristics" would be those identified in section 4 of the Equality Act 2010.

4.21 We suggested that this proposal did not prescribe whom to appoint, nor did it provide an additional basis on which to challenge an arbitrator or an award. Instead, we suggested that it would free parties or institutions to make appointments without being constrained to comply with a discriminatory requirement in an arbitration agreement that the arbitrator have a particular characteristic. We suggested that this proposal would capture terms which were directly discriminatory, but not clauses which were indirectly discriminatory.

4.22 We also discussed the compatibility of our proposal with the New York Convention, as follows.

4.23 The New York Convention enables an award from an arbitration seated in England and Wales to be enforced in another Convention state. One of the grounds for resisting enforcement, under article V.1(d), is that "the composition of the arbitral authority … was not in accordance with the agreement of the parties". Thus, if a discriminatory term was unenforceable, and so an arbitral party was allowed to appoint an arbitrator with characteristics other than those specified in the arbitration

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120 [2010] EWCA Civ 712, [2011] 1 All ER 510 at [29].

121 [2011] UKSC 40, [2011] 1 WLR 1872 at [70].

agreement, the concern is whether that might allow the other party to resist enforcement of the award abroad.

4.24 We suggested that the risk of successful challenge under the New York Convention was probably more theoretical than practical. In summary, we said that the Arbitration Act already has provisions which can lead to a change in the agreed composition of the arbitral tribunal. We also noted that, even under article V of the New York Convention, the court retains a discretion whether to enforce anyway. Still further, the UNCITRAL Model Law suggests that enforcement may still be appropriate where the reason for any discrepancy in the composition of the tribunal is because of the application of the mandatory law of the seat, which would be the case if our proposal became mandatory law under the Arbitration Act.[122]

Consultees' views

4.25 In response to CP1 CQ6, and the question whether any justification of a discriminatory requirement should be more or less generous, a large majority of consultee responses preferred the broader approach of the Supreme Court, rather than the narrower approach of the Court of Appeal.[123] That is, consultees tended to think that a discriminatory requirement need not be strictly necessary, provided that it is legitimate and justified.

4.26 As for our proposal, there were 82 responses to CP1 CQ7: 46 agreed with our proposal, 21 disagreed, and 15 made comments but were non-committal in terms of the proposal. Consultees raised a number of issues, including the following.

4.27 Some consultees said that the problem was not so much discriminatory terms in arbitration agreements, which were rare, but appointments which were discriminatory (even when there were no terms restricting appointments). Some said that discrimination was not limited to the appointment of arbitrators, but could manifest in arbitral proceedings more generally.

4.28 Some consultees doubted that our proposal would be limited to direct discrimination, as we had suggested; some thought it might also capture indirect discrimination. Some thought that any cross-reference to the Equality Act would be complex and discouraging, particularly for international users. Some were unpersuaded by our arguments concerning the New York Convention, and feared that our proposal might expose awards from England and Wales to challenges in foreign enforcing courts.

4.29 Some consultees asked, if a discriminatory term is unenforceable, does that impeach the whole arbitration agreement, or just the discriminatory

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122 CP1, paras 4.24 to 4.35.

123 There were 52 responses to CP1 CQ6; 40 favoured the approach of the Supreme Court; 12 favoured the approach of the Court of Appeal.

terms? Some consultees suggested that it would be unfair to require the parties to arbitrate if they could not have their choice of arbitrator.

4.30 Some consultees said that it should be permitted to require an arbitrator to have a neutral nationality different from the parties, consistent with international practice. Some consultees raised a further concern that our proposal would render awards made by faith-based tribunals unenforceable or would make faith-based tribunals impossible. Some consultees were also concerned about age discrimination. For example, if an arbitrator was required to have a certain number of years' experience, might that requirement be discriminatory, or require justification? Some consultees questioned whether our proposal would have the effect of stifling the positive action taken within the arbitration community to improve diversity.[124]

OUR SECOND CONSULTATION PAPER

Our position

4.31 On reflection, we agreed that it should be permitted to require an arbitrator to have a neutral nationality different from the parties. We thought that a neutral nationality could assist in the appearance of impartiality. We noted that there was precedent for this in the UNCITRAL Model Law,[125] and in the rules of arbitral institutions.[126]

4.32 We made the following proposal, and asked if consultees agreed (CP2 CQ4):

> We provisionally propose that it should be deemed justified to require an arbitrator to have a nationality different from that of the arbitral parties.

4.33 To repeat, some consultees had said, in response to our first consultation paper, that the problem was not so much discriminatory terms in arbitration agreements, which were rare, but appointments which were discriminatory; and discrimination could manifest in arbitral proceedings more generally, beyond the appointment of arbitrators.

4.34 In light of that, in our second consultation paper, we considered whether a more comprehensive approach to discrimination ought to be

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124 Positive action is something which the Equality Act explicitly addresses and allows (within bounds): Equality Act 2010, ss 158 (non-work context), 159 (work context). For those seeking to implement positive action within an arbitration context, analogous examples of permissible positive action can be found in the literature, eg Robinson and others (eds), *Blackstone's Guide to the Equality Act 2010* (4th ed 2021) pp 239 to 243, and in the Explanatory Notes to the Equality Act, para 517: <https//:www.legislation.gov.uk/ukpga/2010/15/notes/contents>

125 UNCITRAL Model Law, art 11.

126 ICC Arbitration Rules 2021, arts 13(5), 13(6); LCIA Arbitration Rules 2020, art 6.1. See too: ICSID Convention, arts 38, 39. CIArb Arbitration Rules 2015, art 6(5), reflects the language of art 11(5) of the UNCITRAL Model Law.

considered. Whereas in our first consultation paper we were concerned with discriminatory terms in arbitration agreements as regards the appointment of arbitrators, in our second consultation paper we also considered discrimination more generally (for example, discrimination by arbitrators in their conduct of arbitral proceedings). We asked consultees the following linked questions:

> Do you think that discrimination should be generally prohibited in the context of arbitration? (CP2 CQ5)
>
> What do you think the remedies should be where discrimination occurs in the context of arbitration? (CP2 CQ6)

Consultees' views

4.35 As for CP2 CQ4, a majority of consultees agreed with our proposal that a neutral nationality be deemed justified.[127] This was principally on the grounds that it was common practice internationally and assisted in the perception of neutrality.

4.36 However, some consultees who agreed with the proposal nevertheless raised concerns. For example, the Law Society of England and Wales said:

> However, the stipulation that an arbitrator should have a different nationality does not guarantee neutrality. For example, the arbitrator may have a different nationality to the parties but could have lived in the country of one of the parties for many years. Further, an arbitrator might adopt a new nationality but remain closely aligned (for example through family connections) with a particular country which may be the residence of one of the parties. On the other hand, an arbitrator's nationality or residence might influence them in a way that is adverse to a party from a particular country, because of geopolitical or other reasons. In today's world, a binary approach to questions of nationality (i.e., an arbitrator is either of the same nationality as the parties or not) might not be entirely appropriate.

4.37 For some consultees, these complexities were a reason to disagree with the proposal. For example, Y K Chan said:

> The issue is how to determine the nationality of an arbitrator, by means of passport, or by race, or by his/her own declaration/disclosure. How do you view the permanent residence (which is not the same of his/her nationality)? It is not uncommon for an arbitrator to have dual or even more nationality and stay in different place from his/her own state/country. Also, if this is to stop bias, bias can be detected regardless of nationality.

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[127] There were 45 responses to CP2 CQ 4: 27 agreed, 10 disagreed, and 8 expressed other views.

4.38 Some consultees objected to the proposal, that a neutral nationality be deemed justified, as a matter of principle. For example, Bryan Cave Leighton Paisner LLP said that, as long as an arbitrator is impartial, their nationality should not matter. The Commercial Bar Association said that nationality could be entirely irrelevant in some areas of arbitral activity (like family arbitration). The Federation of Commodity Associations said that our proposal might be taken wrongly to imply that an arbitrator of the same nationality as one of the parties could not necessarily be viewed as impartial. This could be a problem, it said, in specialist areas of activity with fewer qualified arbitrators available as alternatives. Falcon Chambers warned that a perceived necessity for a neutral nationality in an arbitrator could jeopardise domestic arbitrations.

4.39 Consultees who objected to our proposal did so principally because they thought that it might lead to spurious challenges to an arbitral appointment, or perhaps to an award, on the basis that it was discriminatory, simply because the nationality of the arbitrator was not somehow neutral.

4.40 Some consultees objected to our proposal because they thought that we were mandating that an arbitrator must have a neutral nationality, when the arbitral parties may wish to choose otherwise. That was explicitly not our intention.[128] However, if a proposal can be misread, that is a reason to reflect.

4.41 As for CP2 CQ5, about prohibiting discrimination generally, a majority of consultees disagreed that reform of the Arbitration Act was appropriate.[129] Consultees decried discrimination, and confirmed their commitment to equality and diversity, but said that a general prohibition would open up the possibility of too many "concocted" challenges to awards by losing parties invoking discrimination.

4.42 Some consultees warned of the risk of conflicting legislation if discrimination were also addressed in the Arbitration Act, rather than through the Equality Act. Some said it would be difficult to police any discrimination in the appointment of arbitrators, because that process is private, and often confidential as a matter of legal professional privilege; how would arbitrators who were not appointed know that they were excluded for discriminatory reasons? Some thought that employment tribunals would not be best placed to consider complaints about discrimination in arbitral appointments, and that such satellite litigation would delay arbitral proceedings.

4.43 In response to CP2 CQ6, about remedies for discrimination, most consultees who addressed this question suggested that current remedies

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[128] CP2, para 4.61.

[129] There were 42 responses to CP2 CQ6: 10 were in favour of prohibition, 18 were against, and 14 expressed other views which tended to voice reservations.

were sufficient.[130] This was also given by some consultees as a further reason against any general prohibition of discrimination; a general prohibition would be redundant in light of remedies already available.

4.44 Consultees suggested that the following remedies are currently available. Section 24 of the Arbitration Act 1996 could enable the removal of an arbitrator who has acted in a discriminatory manner, and section 68 could allow an award tainted by such discrimination to be challenged for serious irregularity. Solicitors and barristers, who appear in arbitrations, or advise on arbitral appointments, are also regulated by professional rules which prohibit discrimination.

4.45 Additionally, Allen & Overy LLP, and Clare Ambrose, suggested that arbitral institutions could be covered by the Equality Act, whether in terms of how they treat members, or in the services they provide to the public. And Mark Sanders suggested that section 142 of the Equality Act (which renders discriminatory clauses in a contract unenforceable) could already apply to arbitration agreements without the need to replicate it in the Arbitration Act.

4.46 In contrast, a minority of consultees were in favour of a general prohibition of discrimination, or at least were in favour of legislating the proposal from our first consultation paper (that discriminatory terms be unenforceable). Some also suggested additional remedies, including a duty on arbitral institutions to report their appointment processes, and the banning of arbitrators who act in a discriminatory manner.

DISCUSSION

Current legal mechanisms concerning discrimination in arbitration

4.47 This review has revealed that there are several ways in which the law is already concerned with discrimination in arbitration proceedings, as follows.

4.48 As for discrimination by arbitrators, they are under a duty to act fairly and impartially.[131] In our view, that means acting without discrimination. We do not think that an arbitrator would be acting fairly, for example, if they treated a party less favourably simply because of their race.

4.49 If there are justifiable doubts as to an arbitrator's impartiality, they can be removed.[132] If an arbitrator adopts processes which are unfair, causing substantial injustice, then any resulting award can be challenged for serious irregularity.[133]

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130 There were 25 responses to CP2 CQ 7: 19 said that current remedies were sufficient. Other consultees expressed the same view when answering CP2 CQ6.

131 Arbitration Act 1996, s 33.

132 Arbitration Act 1996, s 24.

133 Arbitration Act 1996, s 68.

4.50 Beyond discrimination by arbitrators, various prohibitions on discrimination imposed by the Equality Act 2010 may apply to arbitral institutions in certain contexts, such as who can become a member, and what facilities are offered to members (like being nominated for arbitral appointments);[134] and what services are offered to the public (like making arbitral appointments).[135]

4.51 To the extent that barristers and solicitors in England and Wales are involved in arbitration, they are prohibited from discriminating, not least by their professional codes of conduct,[136] breach of which can lead to disciplinary consequences. Additionally, the selection of a barrister must not be discriminatory.[137]

4.52 The International Bar Association (IBA) reports that codes of conduct for legal professionals explicitly address discrimination in around 18% of nations (treating nations as single jurisdictions).[138] The IBA itself advocates a rule of non-discrimination for lawyers.[139] Arbitral institutions too could be encouraged to prohibit discrimination explicitly in their codes of conduct, to the extent that they do not already do so.

4.53 The Equality Act provides that a term of a contract is unenforceable in so far as it promotes treatment that is prohibited by the Act,[140] or seeks to derogate from the Act.[141] While this is significant, it does not address every situation in which discrimination might arise. For example, because arbitrators are not employees of the parties, their appointment by private parties is not an activity where the Act prohibits discrimination. Nevertheless, examples of contract terms which might fall foul of the Act could include: a clause requiring an association to select for appointment an arbitrator member on criteria prohibited by the Equality Act; or an arbitration clause purporting to preclude a claim for discrimination from being brought before the employment tribunal.[142]

4.54 Those are the ways in which discrimination in arbitration is addressed. Perhaps the only significant gap is discrimination by the parties in whom they appoint. However, we have reluctantly come to the conclusion that it would cause more problems than it solves were we to recommend

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134 Equality Act 2010, ss 57, 101.

135 Equality Act 2010, s 29.

136 SRA [Solicitors Regulation Authority] Code of Conduct for Solicitors, para 1.1; BSB [Bar Standards Board] Handbook, core duty 8.

137 Equality Act 2010, s 47(6).

138 IBA, *A Global Directory of Anti-Discrimination Rules Within the Legal Profession: Main Findings* (2022) p 8.

139 IBA, *International Principles on Conduct for the Legal Profession* (2018) p 16.

140 Equality Act 2010, s 142. This applies to contracts written under the law of England and Wales (or of Scotland).

141 Equality Act 2010, s 144.

142 *Clyde & Co LLP v Bates van Winkelhoff* [2011] EWHC 668 (QB), [2011] IRLR 467.

legislating so as to prohibit discrimination by the parties in the appointment of arbitrators, for the following reasons.

Our conclusion on the need for reform

4.55 The proposal in our first consultation paper was to prohibit terms in an arbitration agreement which required a discriminatory appointment. Consultees tended to say that such terms were a rarity, and that prohibiting them would not make significant difference to the diversity of arbitral appointments. We accept these points.

4.56 At any rate, consultees also pointed to an international practice which permits an arbitrator to be required to have a neutral nationality. In our second consultation paper, we accepted that such a practice is defensible, so we proposed an exception to any prohibition of discrimination to allow for that practice. But such an exception itself gave rise to further objections. Consultees said that it risks giving the impression that an arbitrator without a neutral nationality might not be considered perfectly impartial, raising the spectre of applications to challenge that arbitrator's appointment for bias. This risk might even become unmanageable in those areas of arbitral activity where the pool of arbitrators with sufficient expert knowledge is too small to guarantee a neutral nationality in every case.

4.57 Further, if an exception is made for a neutral nationality, this might spawn satellite arguments about what truly falls within the exception: that is, whether nationality should be judged by passport or residence or other affiliation. It also raises the question why only the practice of neutral nationality should attract an exception, and not other recognised practices, like arbitration before a faith-based tribunal.

4.58 In this way, our original proposal, deliberately narrow, nevertheless prompted objections that it needed an exception; and when we proposed that exception, it prompted further but different objections. This reveals the challenges of legislating in this area, and no doubt partly explains the complexity of the Equality Act – which in turn suggests a danger of creating in the Arbitration Act an additional regime of discrimination law which might conflict with the Equality Act.

4.59 There are yet further difficulties with a prohibition of discrimination by the parties in the appointment of an arbitrator. Let us say that one party refuses to countenance the appointment of an arbitrator who is not a man. That is discriminatory, but what are the consequences? The arbitrator could decline the appointment, but this response is already available. A woman arbitrator is unlikely to be in a position to sue successfully, because she is unlikely to know of the arbitration, let alone the discrimination, and anyway she is unlikely to be able to prove that but for the discrimination she out of all possible alternative candidates had a probable prospect of appointment.

4.60 Could the other arbitral party complain about the discriminatory appointment? The male arbitrator appointed might be conspicuously impartial and competent to decide the dispute, in which case he could not be removed for bias, and it seems wrong to set aside an arbitral award which is otherwise sound. Again, we do not want to give disingenuous parties the opportunity cynically to leverage a law prohibiting discrimination to avoid their arbitral obligations.

4.61 To elaborate, the risk of disingenuity is that one arbitral party might challenge an appointment, or challenge an award, on the basis that the appointment was discriminatory, but only so as to delay the arbitration, or avoid an adverse award – an award which is otherwise sound because delivered by an impartial arbitrator after a fair procedure. That arbitral party is invoking discrimination, not out of genuine concern to improve the diversity of arbitral appointments, but to hamper the arbitration itself. The use of "guerrilla tactics" which seek to derail an arbitration are not uncommon.

4.62 To return to our example, even if the male arbitrator were removed, who would be appointed in his place? It cannot be that a woman would be automatically appointed instead; a non-discriminatory appointment might still result in another man being appointed. If an appointment discriminated on the basis of a protected characteristic (like male *sex*), then it only repeats the discrimination to make an alternative appointment on the basis of that protected characteristic (like female *sex*). Of course, better that there is a fair and non-discriminatory process, even if that results in the appointment of another man. But it weakens the impact of any reform if the end result does not improve diversity of arbitral appointments.

4.63 What is more, to the extent that any replacement appointment results in a composition of the tribunal which is different from that originally agreed by the parties, this might render awards from England and Wales more susceptible to challenge before foreign enforcing courts under the New York Convention. In our first consultation paper, we addressed this issue, and presented arguments as to why the risk may be more apparent than real (as summarised above). Some consultees were not persuaded. We accept that our arguments are not conclusive, and that a risk remains.

4.64 It does no good to introduce a well-meaning law to improve arbitration, by prohibiting discrimination in the appointment of arbitrators by private parties, which has the effect of worsening arbitration, by encouraging satellite litigation or challenges to awards. It diminishes the moral force of anti-discrimination campaigning if discrimination can be used as a cover for disingenuous complaint by arbitral parties seeking to avoid arbitration or an adverse award. This is all the worse if the end result still cannot guarantee more diverse appointments.

4.65 Many of these difficulties do not arise when discrimination occurs in a context other than arbitration. For example, let us say that an employer

discriminates against an applicant on the grounds of sex by not offering them employment. The applicant knows of their rejected application. They know of the discrimination (otherwise they could not bring a claim). The loss is identifiable – the applicant has been denied a salary. The applicant can sue the employer. But in arbitration, the position is more complex. The overlooked arbitrators might not know of the arbitration, or the appointment of another arbitrator on a discriminatory basis, or that they themselves might have been in the running for appointment. And there are yet other interested persons who might raise a complaint, including other arbitral parties, and perhaps even an arbitral institution. The remedies too go beyond compensating the victim for lost earnings: an arbitrator might be removed and replaced; and an award might be challenged. The context of arbitration is multi-faceted.

4.66 We commend the initiatives of the arbitration community to increase diversity in arbitral appointments. We record above the ways in which the law already is concerned with discrimination in arbitration, and encourage the arbitration community to take note. Reluctantly, we do not recommend any further legislation within the Arbitration Act to prohibit discrimination, in particular in the appointment of arbitrators by private parties, because we think that this will not improve diversity of arbitral appointments, but could well lead to unwarranted satellite litigation and challenges to awards.

Chapter 5: Arbitrator immunity

5.1 Section 29 of the Arbitration Act 1996 provides that an arbitrator is not liable for anything done or omitted in the discharge or purported discharge of their functions as arbitrator, unless the act or omission is shown to have been in bad faith.

5.2 Nevertheless, an arbitrator can still incur liability for resignation. And a line of case law suggests that arbitrators can be liable for the costs of (even unsuccessful) applications for their removal.

5.3 In this chapter, we recommend that the law should be reformed so that arbitrators incur no liability for resignation unless the resignation is proved to be unreasonable.

5.4 We also recommend that arbitrators should incur no liability, including costs liability, in respect of an application for their removal, unless the arbitrator has acted in bad faith.

ABOUT ARBITRATOR IMMUNITY

5.5 Ordinarily, if a person has contracted to perform a task, that person can incur liability for breaching the contract, for example, by not performing that task at all, or not performing all of it, or performing it with less than reasonable care.

5.6 Arbitrator immunity reflects the idea that an arbitrator should nevertheless not incur liability if their performance as an arbitrator is alleged to be below standard.

5.7 We think that arbitrator immunity is important for two reasons. First, it supports an arbitrator to make robust and impartial decisions without fear that a party will express their disappointment by suing the arbitrator. Second, it supports the finality of the dispute resolution process by preventing a party who is disappointed with losing the arbitration from bringing further proceedings against the arbitrator.

5.8 Similarly, the DAC said that arbitrators should have immunity for the same reason as judges: to enable them properly to perform an impartial decision-making function, and to ensure finality of the dispute resolution process.[143]

5.9 Thus, section 29(1) of the Arbitration Act 1996 provides:

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143 *Report on the Arbitration Bill* (1996) para 132.

> An arbitrator is not liable for anything done or omitted in the discharge or purported discharge of his functions as arbitrator unless the act or omission is shown to have been in bad faith.

5.10 There are still ways of dealing with a recalcitrant arbitrator. For example, the parties can revoke the arbitrator's authority,[144] or apply to court to remove the arbitrator.[145] In both cases, the arbitrator may lose their entitlement to fees and expenses.[146]

5.11 Provisions conferring immunity on arbitrators can be found in some foreign legislation,[147] and in arbitral rules.[148] However, other foreign laws appear to retain contractual liability for arbitrators.[149] There is no international consensus on arbitrator immunity.

5.12 In England and Wales, despite section 29, immunity can be lost in two overlapping ways. First, if an arbitrator resigns, they risk incurring liability (see below). Second, if an arbitrator does not resign, a party might apply to court for the arbitrator's removal. A line of case law suggests that an arbitrator can incur liability for the costs of that application.[150]

5.13 We discuss resignation and removal in turn below.

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144 Arbitration Act 1996, s 23.

145 Arbitration Act 1996, s 24.

146 The International Bar Association had previously said, in the Introductory Note to its *Rules of Ethics for International Arbitrators* (1987), that removal from office, and loss of remuneration, was the normal sanction for the recalcitrant arbitrator, except in cases of wilful or reckless disregard of their legal obligations.

147 For example, International Arbitration Act 1994 (Singapore), s 25, and Arbitration Act 2001 (Singapore), s 20 (not liable for negligence or mistake); Arbitration Ordinance (Cap 609) (Hong Kong), s 104 (liable only if dishonest); Arbitration Act 1996 (New Zealand), s 13 (not liable for negligence); International Arbitration Act 1974 (Cth) (Australia), s 28, and eg Commercial Arbitration Act 2010 (NSW) (Australia), s 39 (not liable if good faith); Arbitration Act 2010 (Ireland), s 22 (full immunity); Arbitration (Scotland) Act 2010, sch 1, r 73 (immunity unless bad faith or resigns).

148 For example: AMINZ Arbitration Rules 2022, r 17.1 (full immunity to extent permitted by law); ACICA Rules 2021, r 40 (not liable unless bad faith); DIAC Arbitration Rules 2022, art 41 (full immunity); HKIAC Administered Arbitration Rules 2018, art 46 (immunity unless dishonest); SCC Arbitration Rules 2017, art 52 (immunity unless wilful misconduct or gross negligence); ICC Arbitration Rules 2021, art 41 (full immunity to extent permitted by law); ICSID Convention, art 21 (full immunity); UNCITRAL Arbitration Rules 2021, art 16, and CIArb Arbitration Rules 2015, art 16 (immunity except for intentional wrongdoing); LCIA Arbitration Rules 2020, art 31.1 (immunity unless conscious or deliberate wrongdoing).

149 For example: Austrian Code of Civil Procedure, art 594(4); Argentine National Code of Civil and Commercial Procedure, art. 745. For an overview, see: *Redfern & Hunter: Law and Practice of International Commercial Arbitration* (6th ed 2015) paras 5-50 to 5-61; S Franck, "The Liability of International Arbitrators: A Comparative Analysis and Proposal for Qualified Immunity" (2000) 20 *New York Law School Journal of International and Comparative Law* 1.

150 *Wicketts v Brine Builders* (8 June 2001) (HHJ Seymour) (unreported) (TCC); *Cofely Ltd v Bingham* [2016] EWHC 540 (Comm); *C Ltd v D* [2020] EWHC 1283 (Comm), [2020] Costs LR 955; *Halliburton Co v Chubb Bermuda Insurance Ltd* [2020] UKSC 48, [2021] AC 1083 at [111] by Lord Hodge.

RESIGNATION

Current law

5.14 The immunity in section 29 explicitly does not extend to any liability incurred by reason of an arbitrator's resignation.[151] Instead, an arbitrator who resigns can apply to court, for the court to grant them relief from any liability, and to make an order in respect of their fees and expenses.[152] The court may do so if satisfied that the resignation was reasonable.[153]

5.15 When is it reasonable to resign? The DAC suggested that it may be reasonable to resign if the parties seek to adopt a procedure which the arbitrator considers conflicts with the arbitrator's overriding duty to adopt a fair and suitable procedure to avoid unnecessary delay and expense. Another example given by the DAC was where the arbitration is taking far longer than could have been expected, so as to impose an unfair burden on the arbitrator.[154]

5.16 Some authors have suggested that good reasons for resignation might include illness, bereavement, or public commitments.[155] Yet further reasons might include a subsequent and unforeseeable discovery, for example of a connection between the arbitrator and a witness, with an attendant risk of apparent bias.

5.17 There is no case law on when a resignation is positively reasonable. Some authors have questioned whether the absence of case law reveals that arbitrators are not brave enough to risk an adverse costs order by applying for immunity following resignation.[156]

5.18 However, it has also been suggested by the court that it is unreasonable to resign just because one party wishes it, has sought to impugn the arbitrator's impartiality, and has expressed a lack of confidence in the arbitrator.[157] In such a scenario, therefore, it may be appropriate for the arbitrator to stand firm.

5.19 Thus, an arbitrator who agrees in their appointment to see the dispute all the way through to a final award, but who resigns early, might thereby incur liability for breach of contract.[158] They could find themselves liable to

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151 Arbitration Act 1996, s 29(3).

152 Arbitration Act 1996, s 25(3).

153 Arbitration Act 1996, s 25(4).

154 *Report on the Arbitration Bill* (1996) para 115.

155 C Ambrose, K Maxwell and M Collett, *London Maritime Arbitration* (4th ed 2017) para 11.62.

156 *Merkin and Flannery on the Arbitration Act 1996* (6th ed 2020) p 309.

157 *Halliburton Co v Chubb Bermuda Insurance Ltd* [2017] EWHC 137 (Comm), [2017] 1 WLR 2280 at [63]. A similar point was made in the Supreme Court: [2020] UKSC 48, [2021] AC 1083 at [68] by Lord Hodge.

158 DAC, *Report on the Arbitration Bill* (1996) para 111; *Merkin and Flannery on the Arbitration Act 1996* (6th ed, 2020) p 317; *Russell on Arbitration* (24th ed, 2015) para 4-162.

the arbitral parties for losses such as the extra legal fees incurred as a result of appointing a replacement arbitrator who might also need to revisit any earlier arbitral processes.

Our position in the first consultation paper

5.20 In Chapter 5 of our first consultation paper, we discussed whether an arbitrator should ever incur liability for resignation.

5.21 On the one hand, we said that incurring liability for resignation may deter appropriate resignation. The arbitrator can apply to court for immunity, but that incurs cost, and the London courts might not be accessible to non-lawyer or international arbitrators.

5.22 On the other hand, we said that inappropriate resignations should be discouraged because of the delay and cost they can cause to the arbitral parties.

5.23 We said that one solution might be to alter the balance by requiring an arbitral party to prove that a resignation was unreasonable, rather than requiring the arbitrator to prove it was reasonable. Alternatively, the only sure way of encouraging appropriate resignations might be to remove all liability for resignation. That way, at least, the arbitrator would have no fear of litigation hanging over them.

5.24 We thought that the arguments were finely balanced, and we did not make proposals either way. Instead, we asked consultees the following consultation questions:

> Should arbitrators incur liability for resignation at all, and why? (CP1 CQ8)
>
> Should arbitrators incur liability for resignation only if the resignation is proved to be unreasonable? (CP1 CQ9)

Consultees' views

5.25 There were 64 responses to CP1 CQ8, about whether arbitrators should incur liability at all: 45 were in favour of some form of liability, 15 were against, and 4 gave other responses.

5.26 The main reason given in favour of liability was that an arbitrator promises to perform a professional service, in particular to resolve a dispute by issuing an arbitral award. In this case, early resignation is presumptively a breach of contract, which can cause delay and wasted costs for the arbitral parties. Such wasted costs might be a particular burden, for example, where the arbitral party is a consumer.

5.27 For example, the Commercial Bar Association said:

> As a matter of principle it seems to us appropriate that where an arbitrator has acted both in breach of contract and unreasonably in

resigning then he or she should remain liable for the normal legal consequences that flow. It seems likely in practice that any liability arising would be limited to wasted costs. We do not discount that those costs might be substantial; but in principle it is not objectionable that the parties be permitted to recover those costs from the arbitrator where they arise from his or her unreasonable resignation in breach of contract.

5.28 There were 44 responses to CP1 CQ9, about incurring liability only for unreasonable resignation: 35 were in favour of liability if the resignation is proved to be unreasonable, 1 was against such a limitation, and 8 gave other responses. Additionally, some of the responses to CP1 CQ8 also addressed this issue: 22 were in favour of liability based upon unreasonableness, whereas 14 were in favour of a different standard for liability, for example bad faith.

5.29 Some consultees suggested that we draw up an indicative list of when resignation might be reasonable. Suggestions of when resignation might be reasonable included bereavement, illness, or a need to avoid subsequent sanctions (for example, arising out of the war in Ukraine). Some consultees suggested that liability might instead be incurred if the resignation was not merely unreasonable, but rather manifestly or grossly unreasonable, or capricious or perverse, or in bad faith. After all, bad faith is the limit of immunity in section 29. In contrast, Allen & Overy LLP said that a test of bad faith was too high, being “almost insurmountable”.

Recommendation

5.30 We think that there is a balance to be struck. On the one hand, an arbitrator should be able to resign when it is appropriate to do so, without fear of incurring liability. On the other hand, arbitral parties should not have to bear the wasted costs caused by improper resignations.

5.31 This is not quite the same as immunity under section 29. The latter immunity applies to anything done in discharge of the functions of an arbitrator. Here we are concerned with an arbitrator ceasing their functions.

5.32 We think that it strikes the right balance to have liability for resignations, but only if the resignation is unreasonable, and with the burden of showing unreasonableness on a complainant. This has the support of the majority of consultees.

5.33 We do not propose a list of when resignation might be unreasonable. We think that this will vary according to the circumstances, and is a matter best left open, to be decided (if necessary) by the courts, case by case.

5.34 Accordingly, we make the following recommendation.

Recommendation 3.

5.35 We recommend that an arbitrator should incur no liability for resignation unless the resignation is shown to be unreasonable.

5.36 This recommendation is given effect by clause 4 of the draft Bill, which provides as follows:

(1) The Arbitration Act 1996 is amended as follows.

(2) In section 25 (resignation of arbitrator) –

(a) in subsection (1), omit paragraph (b) (together with the "and" before it);

(b) for subsections (3) and (4) substitute –

"(3) Where an arbitrator resigns, a relevant person may (upon notice to the other relevant persons) apply to the court to make such order as it thinks fit with respect to the arbitrator's entitlement (if any) to fees or expenses or the repayment of any fees or expenses already paid.

(4) For the purposes of subsection (3), each of the parties and the arbitrator is a "relevant person".";

(c) in the heading, at the end insert ": entitlement to fees or expenses".

(3) In section 29 (immunity of arbitrator) –

(a) omit subsection (3);

(b) at the end insert –

"(3A) An arbitrator's resignation does not give rise to any liability for the arbitrator unless it is shown that the resignation was, in all the circumstances, unreasonable.

(3B) But subsection (3A) is subject to –

(a) an agreement reached between the parties and the arbitrator as mentioned in section 25(1)(a);

(b) an order made under section 25(3)."

(4) In Schedule 2 (modifications in relation to judge-arbitrators), in paragraph 10(2), for "25(3)(b)" substitute "25(3)".

REMOVAL: LIABILITY FOR COSTS

Current law

5.37 Arbitral parties can revoke the authority of an arbitrator.[159] If one party refuses to revoke an arbitrator's authority, the other party can apply to court under section 24 for the court to remove an arbitrator, for example on the ground that there are justifiable doubts as to the arbitrator's impartiality. The arbitrator is joined as a party to that application.[160] A line of cases suggests that the arbitrator might incur personal liability for the costs of that application.[161]

Our position in the first consultation paper

5.38 In Chapter 5 of our first consultation paper, we thought that this line of cases might be wrong as a matter of statutory construction, for the following reasons.

5.39 The Arbitration Act 1996 says nothing about an arbitrator losing immunity or incurring liability following revocation of their authority by the parties,[162] or following their removal by the court. Instead, following an arbitrator's removal, the Act only refers to an arbitrator's (entitlement to or repayment of) fees.[163]

5.40 This is in contrast to the position with resignation, where liability is expressly addressed, as we have seen. Thus, as a matter of statutory construction, we thought it doubtful that the removal of an arbitrator should result in loss of immunity.

5.41 This appears to be supported by the DAC. They said that the parties should not be able to undermine the immunity granted to arbitrators simply by revoking their authority, and the parties should not achieve the same thing by applying to the court for the arbitrator's removal.[164]

5.42 Further, section 29 provides that immunity extends to "anything done or omitted in the discharge or purported discharge of their functions as arbitrator." This wording is very broad. We thought that, when a party applies to court to remove an arbitrator, they are complaining about the arbitrator continuing to be an arbitrator discharging their functions. We

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159 Arbitration Act 1996, s 23.

160 CPR r 62.6.

161 *Wicketts v Brine Builders* (8 June 2001) (HHJ Seymour) (unreported) (TCC); *Cofely Ltd v Bingham* [2016] EWHC 540 (Comm); *C Ltd v D* [2020] EWHC 1283 (Comm), [2020] Costs LR 955; *Halliburton Co v Chubb Bermuda Insurance Ltd* [2020] UKSC 48, [2021] AC 1083 at [111] by Lord Hodge.

162 Arbitration Act 1996, s 23.

163 Arbitration Act 1996, s 24(4).

164 The DAC originally thought this state of affairs unsatisfactory: *Report on the Arbitration Bill* (1996) paras 361 to 362; but they were ultimately persuaded it was correct: *Supplementary Report on the Arbitration Act 1996* (1997) para 24.

thought that such a complaint falls within the immunity granted by section 29.

5.43 We had also heard from some stakeholders that there was no insurance available to cover the potential liability of costs in the application under section 24.

5.44 Finally, this line of cases so far has been concerned with applications under section 24 to remove an arbitrator. Nevertheless, we were concerned that it might apply by analogy to any application to court triggered by something done by the arbitrator. For example, an arbitrator might thereby be exposed to costs liability for an application under section 68 which complains about the arbitrator's conduct of the arbitral procedure.

5.45 For these reasons, we provisionally concluded that this line of cases is contrary to the wording and intention of the statute. It risks encouraging collateral challenges by parties disappointed with an arbitrator's ruling. It risks undermining the neutrality of an arbitrator who is cowed into complying with a party's demands for fear that a contrary stance might lead to court and personal liability for costs.

5.46 We suggested that this line of cases is also contradicted by the requirement for arbitrators to stand firm against party calls for their resignation. Under the current law, the interaction between arbitrator resignation and applications to court to remove an arbitrator puts the arbitrator in a difficult position. If a party demands an arbitrator's resignation, the arbitrator risks incurring liability (for the resignation), or standing firm and incurring liability (for the costs of the application to court to remove them).

5.47 Accordingly, we made the following provisional proposal, and asked consultees whether they agreed (CP1 CQ10):

> We provisionally propose that arbitrator immunity should extend to the costs of court proceedings arising out of the arbitration, such as applications to remove an arbitrator.

Consultees' views

5.48 There were 72 responses to CP1 CQ10: 46 agreed with extending immunity, and 26 gave responses which indicated keeping some form of liability.

5.49 Some consultees said that the potential liability could undermine the role of an arbitrator.

5.50 For example, the Royal Institution of Chartered Surveyors said:

> RICS submits that the Law Commission's proposed extension to immunity will prevent spurious and unnecessary applications to remove arbitrators. The risk of party manipulation of the arbitral process should

be legislated against to avoid undermining arbitration as an effective ADR option. RICS therefore agrees with the Law Commission recommendation to support arbitrator impartiality in providing protection for arbitrators, so they do not succumb to party demands and the potential threat of personal liability. RICS is aware of the damage done to the credibility and attractiveness of other seats of arbitration where penal arrangements against arbitrators are imposed or available.

5.51 Bryan Cave Leighton Paisner LLP, who agreed with our proposal, said:

> Our view in this regard is, in part, informed by a case in which an arbitrator in an English-seated case was named as a defendant in French litigation primarily brought against the International Chamber of Commerce. The arbitrator resigned from the tribunal in question in order to avoid the costs risk in the misconceived litigation.

5.52 Some consultees said that the potential exposure to costs liability was not insurable, but others contested this.

Further views and discussion

5.53 Some consultees said that an arbitrator should potentially incur liability for costs in the application for their removal if the arbitrator actively participates in that application (for example, by resisting their removal).

5.54 We reply that the arbitrator is currently required to be joined as a party to the application, and to that extent is formally a participant.

5.55 The Commercial Bar Association suggested simply removing the requirement to join the arbitrator as a party to any application for their removal under section 24.

5.56 This suggestion might have been a tidy solution – but section 24(5) provides that an arbitrator is entitled to appear and be heard by the court. This is presumably necessary because, under section 24(4), the court can make an order as to an arbitrator's entitlement to, or need to repay, fees and expenses. There might also be circumstances when it is appropriate for the arbitrator to address the court, for example to explain why they chose not to resign.

5.57 Some consultees were concerned that, if an arbitral party made a successful application under section 24, but the arbitrator was immune from costs liability, then the arbitral party would have to bear the costs of that application, which would be unfair. Other consultees replied that the costs might instead be borne by the other arbitral party who refused to revoke the authority of the arbitrator, thereby necessitating an application under section 24.

5.58 We agree that there may be circumstances where it is appropriate for the resisting arbitral party to pay the costs necessitated by a successful application under section 24.

5.59 Clare Ambrose thought our proposal – that immunity should extend to the costs of court proceedings arising out of the arbitration – was too broad. For example, she said, an arbitrator suing for their fees should not be immune from court costs.

5.60 On reflection, we agree. The line of cases which we criticise above is concerned with applications under section 24. Therefore, we think it appropriate to limit our recommendations to the context of section 24. For example, we agree that it may be appropriate for an arbitrator to bear the costs of suing for their fees.

5.61 Some consultees suggested that an arbitrator should incur liability where they have acted in bad faith, which is the limit of immunity under section 29, or alternatively where they have acted unreasonably, by analogy to the limit of immunity recommended in respect of resignation.

5.62 On reflection, we agree that immunity provisions in the Act should align wherever possible. We think that the better analogy is with immunity under section 29, with its exception for bad faith. Section 29 is concerned with immunity where the arbitrator continues to act. Resignation is of course concerned with an arbitrator ceasing to act. An application under section 24 presupposes that the arbitrator has not resigned but is willing to continue to act.

Recommendation

5.63 A party is entitled to apply to court to remove an arbitrator. But this imperils the ability of an arbitrator to make robust and impartial decisions, for fear that a party will express their disappointment by making an application for the arbitrator's removal, if that application risks incurring personal liability for the arbitrator. We think that the case law supportive of personal liability is thus undesirable in principle. We also think that it is contrary to the wording or intention of the Act.

5.64 We think it appropriate to reassert arbitrator immunity, and this is supported by the majority of consultees. As noted above, we think any immunity here should be aligned with the limits of general immunity in section 29, such that an arbitrator should incur liability after all, for example if in bad faith they contest the application for their removal. Accordingly, we make the following recommendation.

Recommendation 4.

5.65 We recommend that an arbitrator should not incur costs liability in respect of an application for their removal under section 24 of the Arbitration Act 1996 unless the arbitrator has acted in bad faith.

5.66 This recommendation is given effect by clause 3 of the draft Bill, which provides as follows:

(1) The Arbitration Act 1996 is amended as follows.

(2) In section 24 (power of court to remove arbitrator), after subsection (5) insert –

> "(5A) The court may not order the arbitrator to pay costs in proceedings under this section unless any act or omission of the arbitrator in connection with the proceedings is shown to have been in bad faith."

(3) In section 29(1) (general immunity of arbitrator), at the end insert "(and see section 24(5A) (immunity in respect of costs of proceedings for removal)".

Chapter 6: Summary disposal

6.1 In court proceedings, the court may decide a claim or issue without a trial. This is called summary judgment. The court may give summary judgment on an issue when it considers that a party has no real prospect of succeeding on that issue, and there is no other compelling reason why the issue should be disposed of at a trial. This saves time and costs. Such summary disposal avoids invoking every procedural step otherwise available in a dispute process, when a full procedure simply would not improve a party's weak prospects of success on an issue.

6.2 The Arbitration Act 1996 does not contain explicit provisions allowing for summary disposal in the context of arbitration. In this chapter, we discuss whether it should do so.

6.3 In broad terms, we recommend that the Arbitration Act 1996 should contain an express power for arbitrators to make an award on an issue on a summary basis if a party has no real prospect of succeeding on that issue.

EXPRESS POWER OF SUMMARY DISPOSAL

Our position in the first consultation paper

6.4 The Arbitration Act 1996 does not expressly provide for summary disposal.

6.5 Nevertheless, in Chapter 6 of our first consultation paper, we said that arbitrators probably have an implicit power to use summary disposal. After all, arbitrators are under a duty to adopt procedures which avoid unnecessary delay and expense.[165] And it is for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter.[166]

6.6 However, arbitrators are also under a duty to give each party a reasonable opportunity to put their case.[167] If arbitrators fail to do so, their award can be challenged before the courts in England and Wales.[168] Recognition and enforcement of the award can also be refused by foreign courts.[169] We had heard from stakeholders that this can lead to "due process paranoia", discouraging arbitrators from using summary disposal.

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165 Arbitration Act 1996, s 33(1)(b).

166 Arbitration Act 1996, s 34(1).

167 Arbitration Act 1996, s 33(1)(a).

168 Arbitration Act 1996, s 68(2)(a).

169 New York Convention, art V.1(b).

6.7 We noted that summary disposal is not a feature of the UNCITRAL Model Law. However, early determination and similar summary processes are available under some arbitral rules,[170] and summary judgment has long been a successful feature of court litigation.[171]

6.8 Further, there is some support in the case law for the notion that a summary procedure can be compatible with an arbitrator's duty of fairness.[172] It also finds support with authors.[173] And the use of summary judgment in court proceedings can certainly be fair.[174]

6.9 We suggested that a reasonable opportunity to put one's case should not entitle an arbitral party with a fatally weak case to draw out the procedure excessively, thereby generating wasted costs, and delaying the inevitable resolution of the dispute. We thought that, if the Act expressly provided for summary disposal, this might reassure arbitrators, and enforcing foreign courts, as to the propriety of its use. An express provision could also provide a framework to ensure that the process for summary disposal was fair.

6.10 We provisionally concluded in favour of an express provision. We thought that this should be non-mandatory – that is, subject to the contrary agreement of the parties –so as to preserve party autonomy. Similarly, we thought that summary disposal should be available only on the application of a party, rather than on the initiative of the arbitrator.

6.11 We made the following proposal, and asked consultees whether they agreed (CP1 CQ11):

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170 AMINZ Arbitration Rules 2022 r 6.11(d) (which uses the language "summarily dismiss"); SIAC Rules 2016 r 29 ("early dismissal"); HKIAC Administered Arbitration Rules 2018 art 43 ("early determination"); LCIA Arbitration Rules 2020 art 22.1(viii) ("early determination"); SCC Arbitration Rules 2017 art 39 ("summary procedure"); ICSID Arbitration Rules 2022 r 41 (objection for manifest lack of legal merit); ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration (2021) para 110 ("expeditious determination").

171 CPR rr 3.3 and 3.4 (striking out), and Pt 24 (summary judgment).

172 *Travis Coal Restructured Holdings LLC v Essar Global Fund Ltd* [2014] EWHC 2510 (Comm), [2014] 2 Lloyd's Rep 494 at [44], [50] by Blair J. See too the discussion of (supportive) foreign case law in K Dharamananda, D Ryan, "Summary Disposal in Arbitration: Still Fair or Agreed to be Fair" (2018) 35(1) *Journal of International Arbitration* 31, 41 to 46.

173 *Merkin and Flannery on the Arbitration Act 1996* (6th ed 2020) p 372; *Russell on Arbitration* (24th ed 2015) para 5-107; *Redfern & Hunter: Law and Practice of International Commercial Arbitration* (6th ed 2015) para 6-040; B T Howes, A Stowell, W Choi, "The Impact of Summary Disposition on International Arbitration: A Quantitative Analysis of ICSID's Rule 41(5) on Its Tenth Anniversary" (2019) 13 *Dispute Resolution International* 7; A Raviv, "No more excuses, toward a workable system of dispositive motions in international arbitration" (2012) 28(3) *Arbitration International* 487; P Chong, B Primrose, "Summary judgment in international arbitrations seated in England" (2017) 33(1) *Arbitration International* 63.

174 Striking out unsustainable causes of action does not infringe the right to a fair trial under art 6 of the ECHR: *Z v United Kingdom* (2002) 34 EHRR 3 at [97].

We provisionally propose that the Arbitration Act 1996 should provide that, subject to the agreement of the parties, an arbitral tribunal may, on the application of a party, adopt a summary procedure to decide a claim or an issue.

Consultees' views

6.12 There were 85 responses to CP1 CQ11: 63 agreed with the proposal, 11 disagreed, and 11 gave other responses, some of which were in favour of summary disposal but on terms other than those we proposed.

6.13 For example, Shearman & Sterling LLP said:

> Clear and express summary disposal provisions have the potential to save substantial time and costs, particularly where one party raises unmeritorious claims or defences as a 'guerrilla tactic' to delay or burden the proceedings.

6.14 Pinsent Masons LLP said:

> It is a common refrain that arbitration proceedings are often conducted at significant time and cost. The proper use of summary procedure in arbitration proceedings would increase efficiency by dealing with unmeritorious matters via truncated procedure, therefore reducing time and cost. Our views are shared by practitioners and clients; as the Commission notes, the 2019 Pinsent Masons & Queen Mary University [of London] survey on the efficiency of international arbitration in the construction sector found that 44% of respondents identified summary disposal as having the greatest potential to increase the efficiency of arbitration.

6.15 Some consultees suggested that a summary disposal provision should be mandatory; others said that it should be opt-out (as proposed). Some consultees said that summary disposal should be available on the tribunal's own initiative; others appreciated the proposed requirement that summary disposal be available only upon the application of a party. Some consultees suggested that it be called early determination instead. Some consultees said that there was no need for an express provision, that it might generate wasteful applications, or that it was better addressed through arbitral rules.

6.16 Some consultees questioned whether summary disposal might make an award more difficult to enforce abroad. On this point, other consultees said that, if an arbitral claimant was worried about enforcing a summary award, then they should simply not apply for summary disposal.

6.17 Our original proposal referred to a summary procedure deciding "a claim or an issue". Some consultees suggested: it should also refer to a defence; it should be available where a matter is manifestly outside the jurisdiction of the tribunal; it should apply to any issue of fact or law.

Discussion and recommendation

6.18 We continue to think that summary disposal has the potential to resolve some disputes more efficiently. We think that, if the Act expressly provides for summary disposal, this might reassure arbitrators, and enforcing foreign courts, as to the propriety of its use, while providing a framework to ensure that the process for summary disposal is fair.

6.19 We continue to think that a power of summary disposal should be subject to the contrary agreement of the parties, and should be available only on the application of a party. We note that most consultees agree with our approach.

6.20 We agree that summary disposal should be available for any issue which lacks merit, whether the issue arises in a claim or defence, and whatever the issue raised, including jurisdictional objections.

6.21 We think it worth emphasising that, just because an arbitral party has applied for summary disposal, it does not mean that the arbitrator must accede to that request. Summary disposal should be used for the fair and efficient resolution of disputes. Summary disposal should not become an additional interim procedural step invoked disingenuously, for example, by one party in order to delay the other party's progression to trial.

6.22 An arbitrator who receives a request for summary disposal may consider that the more appropriate procedure is to continue to a full hearing as normal. In similar vein, some arbitral rules have fast-track procedures, for example for claims of smaller value or lesser complexity.[175] It may be more appropriate in any given case, rather than having summary disposal in a full procedure, for a dispute to proceed fully in a fast-track procedure.

6.23 With those observations, we make the following recommendation.

Recommendation 5.

6.24 We recommend that the Arbitration Act 1996 should provide that, subject to the agreement of the parties, an arbitral tribunal may, on the application of a party, issue an award on a summary basis.

6.25 This recommendation is given effect by clause 7 of the draft Bill.

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[175] AMINZ Arbitration Rules 2022 r 11; HKIAC Administered Arbitration Rules 2018 art 42; ICC Arbitration Rules 2021 art 30; CIETAC Arbitration Rules 2015 ch IV; CIMAR 2016 rr 7 to 8; ICE Arbitration Procedure 2012 rr 14 to 15; GAFTA Expedited Arbitration Procedure Rules No 126 (2022); LMAA Small Claims Procedure 2021, and Interim Claims Procedure 2021; ICSID Arbitration Rules 2022 ch XII; SIAC Rules 2016 r 5; LSAC 2020, cl 15; UNCITRAL Arbitration Rules 2021, appendix.

PROCEDURE

Our position in the first consultation paper

6.26 In Chapter 6 of our first consultation paper, we thought that best practice would require the arbitral tribunal to consult with the parties, not merely on whether to entertain an application for summary disposal, but also on the form of any procedure for determining that application. This would go towards ensuring that the parties felt that they had been given a reasonable opportunity to put their case.

6.27 We provisionally concluded against proposing any prescriptive detail on the procedure to adopt, because an appropriate procedure would vary from case to case.

6.28 We made the following proposal, and asked consultees whether they agreed (CP1 CQ12):

> We provisionally propose that the summary procedure to be adopted should be a matter for the arbitral tribunal, in the circumstances of the case, in consultation with the parties.

Consultees' views and recommendation

6.29 There were 67 responses to CP1 CQ12: 63 agreed with our proposal, none disagreed, and 4 gave other responses.

6.30 We note that it is usually the preserve of the tribunal to decide what to procedure to adopt in any arbitration, unless the parties agree otherwise.[176]

6.31 We also note that it can be good practice generally for a tribunal to consult with the parties on *any* procedure it adopts.[177] Some arbitral rules require the tribunal to consult the parties on procedure,[178] but not all.[179] It is notable that some arbitral rules explicitly refer to consulting the parties *in the context of summary disposal* – even though the rules already require the tribunal to consult the parties on procedure generally.[180] We too think that it is advisable, in the particular context of summary disposal, that the tribunal consults with the parties, to ensure that the parties feel that they have had a reasonable opportunity to put their case.

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176 Arbitration Act 1996, s 34(1).

177 For example, see: CIArb, *Guideline 6: Managing Arbitrations and Procedural Orders* (2016), art 1.2.

178 SIAC Arbitration Rules 2016, art 19.1; ICC Arbitration Rules 2021, para 93; LCIA Arbitration Rules 2020, art 14.5.

179 UNCITRAL Arbitration Rules 2021, art 17; HKIAC Administered Arbitration Rules 2018, art 13.1; SCC Arbitration Rules 2023, art 23.

180 LCIA Arbitration Rules 2020, art 22.1; ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration (2021) para 112.

6.32 The University of Aberdeen School of Law, and Greenberg Traurig LLP, both of whom agreed with our provisional proposal, suggested that an applicant for summary disposal ought to suggest a procedure. We think that this would be good practice in many cases; while it will be for the tribunal to decide the procedure, after consulting all parties, an applicant can suggest a procedure as a starting point for debate.

6.33 Thus, we make the following recommendation.

Recommendation 6.

6.34 We recommend that the procedure adopted to determine any application for summary disposal should be a matter for the tribunal, having consulted with the parties.

6.35 This recommendation is also given effect by clause 7 of the draft Bill.

THRESHOLD FOR SUCCESS

Our position in the first consultation paper

6.36 In Chapter 6 of our first consultation paper, we suggested that legislation should stipulate the threshold for summary disposal explicitly. That way all arbitrations seated in England and Wales would apply the same test. It would help ensure certainty and consistency and, in the selection of a suitable threshold, fairness.

6.37 What should that threshold be? We identified two candidates. One test is "manifestly without merit". This is found in several arbitral rules.[181] An alternative test can be found in domestic court proceedings. It applies when there is "no real prospect of success" along with "no other compelling reason" for the issue to proceed to trial.[182]

6.38 We preferred "no real prospect of success" because it had an understood meaning explained in case law. It requires a respondent to show that they have a realistic, as opposed to a fanciful, prospect of success, with an argument that carries some degree of conviction.[183] We thought that this threshold was fair: if a position were merely fanciful, it would not merit the time and expense of full investigation.

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[181] For example: LCIA Arbitration Rules 2020 art 22.1(viii); ICSID Arbitration Rules 2022 r 41; SIAC Rules 2016 r 29; HKIAC Administered Arbitration Rules 2018 art 43; AMINZ Arbitration Rules 2022 r 6.11(d).

[182] CPR r 24.2.

[183] *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch), [2009] All ER (D) 13 (Mar) at [15] by Lewison J, approved by the Court of Appeal in *AC Ward & Sons Ltd v Catlin (Five) Ltd* [2009] EWCA Civ 1098; [2010] Lloyd's Rep. I.R. 301 at [24] by Etherton LJ. See generally the commentary on CPR r 24.2 in *The White Book*.

6.39 We made the following proposals, and asked consultees whether they agreed:

> We provisionally propose that the Arbitration Act 1996 should stipulate the threshold for success in any summary procedure. (CP1 CQ13)
>
> We provisionally propose that a claim or defence or issue may be decided following a summary procedure where it has no real prospect of success, and when there is no other compelling reason for it to continue to a full hearing. (CP1 CQ14)

Consultees' views

6.40 There were 66 responses to CP1 CQ13, on whether the Act should stipulate a threshold: 55 agreed, 9 disagreed, and 2 gave other responses.

6.41 There were 74 responses to CP1 CQ14, on what the threshold should be: 47 agreed with our proposal that the threshold be "no real prospect of success", 8 disagreed, 12 preferred manifestly without merit, and 7 gave other responses.

6.42 Some consultees who disagreed or gave other responses said that "no other compelling reason" was not a relevant test for arbitration. It might be relevant in court proceedings, they said, where matters of public interest might be discussed in open court, but it was not relevant to private dispute resolution.

6.43 Some consultees preferred the test "manifestly without merit" because it had international recognition, and it distanced arbitration from the case law of the Civil Procedure Rules. Some said it was a less complex standard; others said it was a higher threshold than "no real prospect of success"; still others said that "manifestly without merit" was problematic precisely because it was novel, vague, and lacking in clarificatory case law.

6.44 The ICC International Court of Arbitration said:

> [Our guidance] does not stipulate a threshold per se but refers to "claims or defences [..] manifestly devoid of merit or which fall manifestly outside the arbitral tribunal's jurisdiction". This is the test which is being adopted in a number of decisions by tribunals. However, there are also some arbitrations in which arbitrators prefer to adopt the test or standard of the relevant applicable law.

Discussion and recommendation

6.45 We continue to think that the Act should stipulate the threshold for summary disposal explicitly. That way all arbitrations seated in England and Wales would apply the same test. This would ensure certainty and consistency and, in the selection of a suitable threshold, fairness. Most consultees agreed that the Act should stipulate a threshold.

6.46 Fairness is achieved by the combination of adopting a suitable procedure to determine any application for summary disposal, and by setting a suitable threshold for any summary disposal. A respondent to an application for summary disposal might have an abbreviated opportunity for argument, but they are not arguing their case as if the application were a truncated trial; rather, they are arguing that their case has enough merit to proceed to a fuller consideration. The threshold for summary disposal (rather than proceeding to full trial) should be set at a level which acknowledges the early stage of proceedings and the potentially abbreviated nature of the evidence and arguments.

6.47 As for the difference between "manifestly without merit" and "no real prospect of success", in our view, either threshold might be adopted. And parties can still agree alternatives, for example by adopting arbitral rules. But we are here concerned with a default position. In which case, we think it defensible that the Act, which would be applied by domestic courts, adopts a threshold carefully developed in domestic law. Thus we prefer the threshold "no real prospect of success". This also has the support of the majority of consultees.

6.48 We accept that "no other compelling reason" is not a relevant test for arbitration. In court litigation, other compelling reasons for a trial tend to involve reaching a decision publicly because third parties might be affected by the outcome,[184] or because the dispute concerns the interpretation of a standard clause in a contract in widespread use.[185] In contrast, in arbitration, even if there is a full hearing, it tends not to be publicised, and is anyway not binding on third parties.

6.49 Also, in court proceedings, a summary judgment application is available as of right. "Other compelling reason" gives the court the opportunity to return the dispute to the full trial procedure. In arbitration, we are not suggesting that a summary disposal application is available as of right. The tribunal will have a discretion whether to entertain the application. If it does entertain the application, it can only issue an award on an issue which has no real prospect of success. But the tribunal does not need an "other compelling reason" to return the dispute to the full procedure, because their discretion whether to entertain the application at all can take account of the existence of such a reason.

6.50 Accordingly, we make the following recommendation.

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184 *Iliffe v Feltham Construction Ltd* [2015] EWCA Civ 715, [2015] BLR 544

185 *AC Ward & Sons Ltd v Catlin (Five) Ltd* [2009] EWCA Civ 1098. More generally, see the commentary at para 24.2.4 in *The White Book*.

Recommendation 7.

6.51 We recommend that an arbitral tribunal may make an award on a summary basis in respect of an issue only if the tribunal considers that a party has no real prospect of succeeding on that issue.

6.52 This recommendation is also given effect by clause 7 of the draft Bill, which provides as follows.

> After section 39 of the Arbitration Act 1996 insert –
>
> "39A Power to make award on summary basis
>
> (1) Unless the parties otherwise agree, the arbitral tribunal may, on an application made by a party to the proceedings (upon notice to the other parties), make an award on a summary basis in relation to a claim, or a particular issue arising in a claim, if the tribunal considers that –
>
> (a) a party has no real prospect of succeeding on the claim or issue, or
>
> (b) a party has no real prospect of succeeding in the defence of the claim or in relation to the issue.
>
> (2) For the purposes of subsection (1), an arbitral tribunal makes an award "on a summary basis" in relation to a claim or issue if the tribunal has exercised its power under section 34(1) (to decide all procedural and evidential matters) with a view to expediting the proceedings on the claim or issue.
>
> (3) Before exercising its power under section 34(1) as mentioned in subsection (2), an arbitral tribunal must afford the parties a reasonable opportunity to make representations to the tribunal."

Chapter 7: Section 44 (court powers in support of arbitral proceedings)

7.1 Section 44 of the Arbitration Act 1996 sets out the powers that a court can exercise in support of arbitral proceedings, such as powers to make orders for the preservation of evidence, sale of goods and appointment of a receiver.

7.2 Orders under section 44 can be made against the arbitral parties. Currently, there is uncertainty as to whether court orders under section 44 can be made against third parties (that is, those not party to the main proceedings). If they can be made against third parties, it appears that third parties have a curtailed right of appeal.

7.3 In this chapter, we recommend that section 44 be amended to confirm that orders thereunder are available against third parties, who should also have the usual full rights of appeal.

7.4 We also consider section 44(2)(a), which concerns the taking of the evidence of witnesses. We discuss whether the focus of this section should be clarified. Ultimately, we do not recommend any reform.

7.5 Further, we discuss whether section 44(5) is redundant, and a hindrance to acknowledging the practice of emergency arbitrators, and so should be repealed. Ultimately, we do not recommend its repeal.

ORDERS AGAINST THIRD PARTIES

Current law

7.6 Section 44 of the Arbitration Act 1996 provides that the court has the power to make orders in support of arbitral proceedings. The matters which the court can make orders about are listed in sections 44(2)(a) to (e). They are: taking of witness evidence, preservation of evidence, orders relating to relevant property, sale of goods, interim injunctions, and the appointment of a receiver. A party applying to the court for an order under section 44 must satisfy the further requirements of section 44(3) to (5) (discussed further below).

7.7 Orders under section 44 can be made against arbitral parties. But can they also be made against third parties? There is uncertainty about this in the case law.

7.8 An initial line of cases, which “inclined to the view” that an order under section 44 might be made against a third party, coalesced into a decision

that it could.[186] Later case law then held that an order under section 44 could not be made against third parties, on a linguistic analysis of section 44.[187] This linguistic analysis found favour with some authors.[188] Others said that a purposive interpretation, informed by historical context, pointed to the opposite conclusion.[189] Recently, the Court of Appeal, employing a different linguistic analysis, said that an order under section 44 can be made against third parties, at least sometimes.[190]

Our position in the first consultation paper

7.9 In Chapter 7 of our first consultation paper, while acknowledging the uncertainties in the case law, we suggested that the better view is that orders under section 44 are available against third parties, and that this flows from the current wording of section 44. We thought that section 44 works as follows.

7.10 Section 44(1) provides:

> Unless otherwise agreed by the parties, the court has for the purposes of and in relation to arbitral proceedings the same power of making orders about the matters listed below as it has for the purposes of and in relation to legal proceedings.

7.11 "Legal proceedings" are defined in section 82(1) to mean civil proceedings in England and Wales in the High Court or county court (or in Northern Ireland, in the High Court or a county court).

7.12 In other words, whatever orders the court can make in the context of civil proceedings in England and Wales, it can also make for arbitral proceedings, for those matters listed in section 44(2).

7.13 The effect of section 2(1) is that the powers conferred on the court by section 44 apply in respect of arbitral proceedings which are seated in England and Wales (or Northern Ireland). Section 2(3) provides that the powers also apply in respect of foreign-seated arbitral proceedings, unless, in the opinion of the court, the fact that the arbitral proceedings are foreign-seated makes an order under section 44 "inappropriate".

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186 *Public Joint Stock Co Bank v Maksimov* [2013] EWHC 3203 (Comm), [2013] All ER (D) 140 (Aug) at [76] to [81] by Blair J.

187 *Cruz City 1 Mauritius Holdings v Unitech Ltd (No 3)* [2014] EWHC 3704 (Comm), [2015] 1 All ER (Comm) 305; *DTEK Trading SA v Morozov* [2017] EWHC 94 (Comm), [2017] 1 Lloyd's Rep 126.

188 *Russell on Arbitration* (24th ed 2015) para 7-196.

189 G Burn, K Cheung, "Section 44 of the English Arbitration Act 1996 and third parties to arbitration" (2021) 37 *Arbitration International* 287; *Merkin and Flannery on the Arbitration Act 1996* (6th ed 2020) pp 457 to 462.

190 *A v C* [2020] EWCA Civ 409, [2020] 1 WLR 3504. This case was concerned with s 44(2)(a). The court declined to say whether the same approach applied under other subsections.

7.14 In short, for the matters listed in section 44(2), whatever a court can do in domestic legal proceedings, it can do for domestic arbitral proceedings, and for foreign arbitral proceedings unless inappropriate.

7.15 In domestic legal proceedings, the court can make orders on a very wide range of issues. In support of arbitral proceedings, the court can only make orders about those matters listed in section 44(2): taking of witness evidence, preservation of evidence, orders relating to relevant property, sale of goods, interim injunctions, and the appointment of a receiver.

7.16 In effect, what section 44 does is this: whatever the law is in domestic legal proceedings in respect of the matters listed in section 44(2), that too is the law in arbitral proceedings. Section 44 does not create a bespoke regime for arbitral proceedings. Rather, it imports the regime from domestic legal proceedings.

7.17 In domestic legal proceedings, the law relating to the listed matters is complicated. It spans multiple parts of the Civil Procedure Rules.[191] Those rules have amassed a large body of case law.[192] But section 44 itself is not complicated. It simply imports complicated law.

7.18 In respect of orders against third parties, we said as follows. As regards the matters listed in section 44(2), orders in respect of them, in domestic legal proceedings, can be made against third parties, but the requirements will vary according to the body of case law around each matter. In our view, because section 44 imports that law, then so too orders can be made against third parties in arbitral proceedings, as long as the varying requirements for each matter are met.

7.19 We said that section 44 does not create a one-size-fits-all regime. Instead, on our analysis, whether an order can be made against a third party will vary according to the matter and its own body of imported rules.

7.20 Nevertheless, in light of the uncertainty in the case law, we asked consultees whether it might be preferable that section 44 be amended to state explicitly that orders can be made against third parties (CP1 CQ 16):

> Do you think that section 44 of the Arbitration Act 1996 should be amended to confirm that its orders can be made against third parties, and why?

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[191] CPR Pt 34 (for taking of witness evidence); CPR Pt 25 (for orders preserving evidence, or relating to property, for sale of goods, and interim injunctions); CPR Pt 69 (for appointing a receiver).

[192] See, for example, the commentary in *The White Book*.

Consultees' views

7.21 There were 66 responses to CP1 CQ16: 51 were in favour of amendment, 12 were against, and 3 gave other responses.

7.22 Consultees who were in favour of amendment tended to say that amendment would bring clarity.

7.23 For example, the judges of the Business & Property Courts said:

> [W]e agree that it would be desirable to amend the Act to make clear that the court has power to make orders under s.44 against third parties, in order to remove the uncertainty arising from *Cruz City1 Mauritius Holdings v Unitech (No 3)* [2014] EWHC 3704 (Comm) and *DTEK Trading SA v Morozov* [2017] EWHC 94 (Comm) (Consultation Question 16). It would remain for the court to decide which, if any, types of remedy are appropriate in any given case.

7.24 Against our proposal, some consultees said that third parties should never be involved in arbitral proceedings. Some consultees said that there was no need for any legislative amendment because section 44 already works as we suggested.

Recommendation

7.25 We think it would bring clarity to amend the Act to confirm that orders under section 44 can be made against third parties. We note that the majority of consultees agree.

7.26 Accordingly, we make the following recommendation.

Recommendation 8.

7.27 We recommend that section 44 of the Arbitration Act 1996 be amended to confirm that court orders thereunder can be made against third parties.

7.28 This recommendation is given effect by clause 9 of the draft Bill.

RIGHTS OF APPEAL

Our position in the first consultation paper

7.29 Section 44(7) limits the right of appeal against decisions under section 44. It requires the permission of the court appealed from. In contrast to the usual position in court proceedings,[193] it does not also allow permission to be sought instead from the court appealed to.

[193] CPR r 52.3(3).

7.30 In Chapter 7 of our first consultation paper, we said that such a restricted right of appeal might be appropriate where it is the arbitral parties who are seeking to appeal. This would return matters more quickly away from the courts and back to arbitration. All the more so when, under section 44(6), there is the possibility of allowing the arbitral tribunal to review any interim order made by the court.

7.31 However, where an order is made against a third party, we said that it might be unfair to cut down their usual rights of appeal. After all, they never agreed to arbitration, and will not appear before the arbitral tribunal to re-argue the order. Yet a reduced right of appeal would seem to be the consequence of section 44(7), which case law has labelled "an anomaly".[194]

7.32 Accordingly, we proposed that section 44(7) should be amended to make explicit that its limitation does not apply to third parties.

7.33 We made the following proposal, and asked if consultees agreed (CP1 CQ17):

> We provisionally propose that the requirement for the court's consent to an appeal of a decision made under section 44 of the Arbitration Act 1996 should apply only to parties and proposed parties to the arbitration, and not to third parties, who should have the usual rights of appeal.

Consultees' views

7.34 There were 62 responses to CP1 CQ17: 57 agreed with our proposal, and 5 disagreed.

7.35 For example, Shearman & Sterling LLP said:

> Third parties have not agreed to the arbitration and, therefore, should retain ordinary rights of appeal should their interests and rights be curtailed via an order under section 44.

7.36 Some consultees who agreed, and some who disagreed, said that some parties might seem to be third parties, but are in fact connected parties. For example, they said, section 82(2) provides that a party to an arbitration agreement includes any person claiming under or through a party to the agreement. Also, they said, a third party can be treated as a party to the arbitration agreement under section 8 of the Contracts (Rights of Third Parties) Act 1999.

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194 *A v C* [2020] EWCA Civ 409, [2020] 1 WLR 3504 at [41] by Flaux LJ.

Recommendation

7.37 We think that, if section 82(2) defines someone as a party to the arbitration agreement, then that person would not be a third party for the other purposes of the Act.

7.38 As for the Contracts (Rights of Third Parties) Act 1999, its application is routinely excluded in commercial contracts, but we accept that it could apply. Nevertheless, we think that our proposal could be read to refer to "genuine" third parties, and not to connected parties, if the court thought that restriction appropriate.

7.39 Otherwise, we continue to think that third parties, who did not agree to arbitration, and will not appear before the tribunal to re-argue any court order, should have the usual full rights of appeal. This has the support of the majority of consultees. Thus, we make the following recommendation.

Recommendation 9.

7.40 We recommend that the requirement for the court's consent to an appeal of a decision made under section 44 of the Arbitration Act 1996 should not apply to third parties, who should have the usual rights of appeal.

7.41 This recommendation is also given effect by clause 9 of the draft Bill, which provides as follows.

(1) Section 44 of the Arbitration Act 1996 (court powers exercisable in support of arbitral proceedings) is amended as follows.

(2) In subsection (1), after "making orders" insert "(whether in relation to a party or any other person)".

(3) For subsection (7) substitute –

"(6A) Subject to subsection (7), an appeal lies from a decision of the court under this section.

(7) The leave of the court is required for any such appeal by a party or proposed party to the arbitral proceedings."

THE FOCUS OF SECTION 44(2)(A)

Our position in the first consultation paper

7.42 In broad terms, a witness can be summoned to court to give oral testimony. A witness can also be required to give oral testimony before an examiner; the record of that testimony is called a deposition, and can stand as evidence in court.

7.43 When the Arbitration Act 1996 was enacted, domestic court proceedings were governed by the Rules of the Supreme Court. At the time, these had one set of rules for summonsing witnesses,[195] and a separate set of rules for deposition evidence.[196]

7.44 In the Act, section 43 concerns securing the attendance of witnesses, and section 44(2)(a) concerns the taking of the evidence of witnesses. In Chapter 7 of our first consultation paper, we thought that these two sections were intended to map onto the distinction between witness summonses and depositions.

7.45 And yet, we thought that the language of section 44(2)(a) was wide enough to encompass both securing the attendance of witnesses and taking of witness evidence. Potentially, we said, this could make section 43 redundant. Accordingly, we provisionally proposed that section 44(2)(a) be amended to limit it explicitly to deposition evidence.

7.46 We made the following proposal, and asked whether consultees agreed (CP1 CQ15):

> We provisionally propose that section 44(2)(a) of the Arbitration Act 1996 should be amended to confirm that it relates to the taking of the evidence of witnesses by deposition only.

Consultees' views

7.47 There were 57 responses to CP1 CQ15: 42 agreed with our proposal, 9 disagreed, and 6 gave other responses.

7.48 Consultees who agreed tended to share the reasons in our first consultation paper, in particular that a distinction (rather than overlap) must have been intended between the two sections.

7.49 Against our proposal, some consultees said that these sections work well enough as they are, without the need for reform. The Centre of Construction Law & Dispute Resolution at King's College London, for example, said that an overlap between the sections was not necessarily objectionable. The University of Aberdeen School of Law, for example, noted that section 43 is mandatory, whereas section 42 is opt-out, which tells against the redundancy of section 43. Some consultees said that our proposed limitation could be too narrow. For example, Timothy Young KC said that there could be debate about what constitutes a deposition; the Commercial Bar Association said that our proposal might preclude evidence beyond depositions, like an affidavit of assets; and Pinsent

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195 RSC O 38 (then called writs of subpoena).

196 RSC O 39. They are now both in CPR Pt 34, but witness summonses are in rr 34.1 to 34.7, and deposition evidence is in r 34.8 onwards. *The White Book* commentary describes them as "two separate and distinct topics": para 34.0.1.

Masons LLP said that it might preclude oral evidence given contemporaneously but remotely.[197]

Conclusions

7.50 Our original proposal seemed to us a neat way to fix what appeared to be a drafting error. However, we are persuaded by those consultees who objected to our proposal that our desire for neatness might have negative consequences, such as precluding other types of evidence, like an affidavit of assets or contemporaneous but remote oral evidence. Even if the drafting of section 44(2)(a) might seem imperfect, nevertheless it does not appear to be causing any problems in practice, in which case amendment is not warranted, especially if amendment brings the risk of negative consequences. Therefore, we do not make any recommendation to reform section 44(2)(a).

SECTION 44(5)

Our position in the first consultation paper

7.51 Access to court for an order under section 44 is mediated through sections 44(3) to (5). Section 44 provides as follows.

> (1) ...
>
> (2) …
>
> (3) If the case is one of urgency, the court may, on the application of a party or proposed party to the arbitral proceedings, make such orders as it thinks necessary for the purpose of preserving evidence or assets.
>
> (4) If the case is not one of urgency, the court shall act only on the application of a party to the arbitral proceedings (upon notice to the other parties and to the tribunal) made with the permission of the tribunal or the agreement in writing of the other parties.
>
> (5) In any case the court shall act only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively.

7.52 In Chapter 7 of our first consultation paper, we noted that, historically, arbitration legislation in England and Wales empowered the court to grant interim orders simply without prejudice to the power of the tribunal to do likewise.[198]

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[197] Such a power was assumed in *A v C* [2020] EWHC 258 (Comm), [2020] Bus LR 426 at [40] to [41] by Foxton J; by the appeal, the parties had resolved this point: [2020] EWCA Civ 409, [2020] 1 WLR 3504 at [48], [78].

[198] Arbitration Act 1934, s 8(1); Arbitration Act 1950, s 12(6).

7.53 However, the DAC said that it was a valid criticism "that the Courts intervene more than they should in the arbitral process, thereby tending to frustrate the choice the parties have made to use arbitration rather than litigation".[199] Instead, said the DAC, the courts should "only intervene in order to support rather than displace the arbitral process".[200]

7.54 The DAC said that section 44(5) was "part of the redefinition of the relationship between arbitration and the Court",[201] and was intended "to prevent any suggestion that the Court might be used to interfere with or usurp the arbitral process".[202] To this extent, at the very least, we thought that section 44(5) might be said to have important symbolic value.

7.55 In contrast, we noted how, in Hong Kong, court powers are exercisable irrespective of whether similar powers might be exercised by the arbitral tribunal. The Hong Kong court may decline to grant an interim measure simply where it considers it "more appropriate" for the interim measure to be dealt with by the arbitral tribunal.[203]

7.56 In Scotland, there is no requirement that the tribunal is unable to act before the court's powers are exercisable. Rather, where the arbitration has begun, the court's powers are exercisable either if the tribunal consents, or if the application is urgent.[204]

7.57 Similarly, there is no equivalent of section 44(5) in the UNCITRAL Model Law.

7.58 We identified two potential issues with section 44(5). First, there was a perception, following the case of *Gerald Metals SA v Timis*,[205] that section 44(5) precluded an arbitral party applying to court under section 44 where emergency arbitrator provisions were available. Second, we questioned whether section 44(5) was redundant, in light of the requirements already set out in sections 44(3) and (4). We take each of those points in turn.

Emergency arbitrators and *Gerald Metals*

7.59 Some arbitral rules provide for the appointment of an emergency arbitrator.[206] We discuss emergency arbitrators in Chapter 8 below. Does

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199 *Report on the Arbitration Bill* (1996) para 21.

200 *Report on the Arbitration Bill* (1996) para 22.

201 *Report on the Arbitration Bill* (1996) para 214.

202 *Report on the Arbitration Bill* (1996) para 215.

203 Arbitration Ordinance (Cap 609), s 45.

204 Arbitration (Scotland) Act 2010, sch 1, r 46.

205 [2016] EWHC 2327 (Ch), [2016] All ER (D) 31 (Oct).

206 For example: CIArb Arbitration Rules 2015, app 1; ICC Arbitration Rules 2021, app V; LCIA Arbitration Rules 2020, art 9B; SCC Arbitration Rules 2017, app II; CIETAC Arbitration Rules 2015, app III; HKIAC Administered Arbitration Rules 2018, sch 4; AMINZ Arbitration Rules 2022, r 12; ACICA Arbitration Rules 2021, sch 1; SIAC Arbitration Rules 2016, sch 1. We discuss emergency arbitrators in more detail in the next chapter.

the existence of emergency arbitrator provisions mean that a "person vested by the parties with power" can act effectively after all, under section 44(5), so as to preclude an application to court? We had heard from stakeholders that this is the perceived consequence of the decision in *Gerald Metals SA v Timis*.[207]

7.60 In that case, the claimant applied for two things. First, for a freezing order against Mr Timis, a defendant in court proceedings. Second, for a freezing order under section 44 against the Timis Trust, a defendant in arbitral proceedings, to prevent the trust from disposing of assets.

7.61 The freezing order against Mr Timis was rejected because, said the judge, the claimant had failed to show a good arguable case against him.

7.62 As for the freezing order against the Timis Trust, the claimant had already applied to the arbitral institution for the appointment of an emergency arbitrator, similarly seeking an order to prevent the trust from disposing of assets. In response to that application, the trust had given undertakings. The arbitral institution decided, in light of those undertakings, that there was no further urgency, and the matter could await the formation of the arbitral tribunal. No emergency arbitrator was appointed.[208]

7.63 The judge refused the freezing order against the trust. We agree with this decision. Section 44 is about the court providing support to an arbitral regime when necessary because the arbitral regime is unable to act effectively; it is not a process for overriding a decision of an arbitral institution which can act, but has chosen not to.[209]

7.64 The judge also said that he saw no real risk of unjustifiable disposal of assets by the trust. That depended on the contention that Mr Timis controlled the trust, and the judge had held that there was no good arguable case against Mr Timis.[210]

7.65 What the judge said about section 44 was perfectly orthodox. The judge said that it was common ground between the parties that the test of urgency under section 44(3) was to be assessed by reference to whether the arbitral tribunal had the power and the practical ability to grant effective relief within the relevant timescale.[211] That would include a consideration of what could be achieved under an expedited appointment process, and emergency arbitrator provisions. The judge accepted that

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207 [2016] EWHC 2327 (Ch), [2016] All ER (D) 31 (Oct). See too: *Merkin and Flannery on the Arbitration Act 1996* (6th ed 2020) pp 470 to 471.

208 [2016] EWHC 2327 (Ch), [2016] All ER (D) 31 (Oct) at [13].

209 See too *Barnwell Enterprises Ltd v ECP Africa FII Investments LLC* [2013] EWHC 2517 (Comm), [2014] 1 Lloyd's Rep 171 at [38] to [39] by Hamblen J.

210 [2016] EWHC 2327 (Ch), [2016] All ER (D) 31 (Oct) at [14] to [15].

211 [2016] EWHC 2327 (Ch), [2016] All ER (D) 31 (Oct) at [3].

even those might be ineffective. He gave the example of an application which needs to be made without notice.[212]

7.66 The judge did not say that the availability of emergency arbitrator provisions precluded an application under section 44. His reasoning simply echoed section 44(5), that the court shall act only if the tribunal cannot act effectively or at all. We might add, other examples of when that might be the case, beyond applications without notice, could include where emergency arbitrator appointments are still too slow,[213] or when it is necessary to bind third parties.[214]

7.67 With that analysis, we said that *Gerald Metals* had been misunderstood. The misperception seems to have arisen simply because, in *Gerald Metals*, emergency arbitrator provisions were available, and the section 44 application was unsuccessful. However, we thought that there was no necessary causal connection between those two facts. Rather, the section 44 application was unsuccessful simply on the merits, not as a matter of principle.

7.68 Instead, we thought that, on the language of section 44, an arbitral party can apply to court even if emergency arbitrator provisions have been agreed, as long as the usual requirements of sections 44(3) to (5) are fulfilled. The availability of emergency arbitrator provisions does not automatically and necessarily preclude an application to court under section 44. We thought that *Gerald Metals* did not say otherwise. And we thought it appropriate that an arbitral party could apply to court under section 44, because there would be times when even an emergency arbitrator would not be able to do justice to the party's needs, as *Gerald Metals* acknowledged.

7.69 Nevertheless, to counter the misperception of *Gerald Metals*, we questioned whether reform of section 44(5) might be warranted.

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212 [2016] EWHC 2327 (Ch), [2016] All ER (D) 31 (Oct) at [6].

213 Emergency arbitrator appointments, and decisions thereafter, are still measured in days, when the court can often act in hours: CIArb Arbitration Rules 2015, app 1, art 2(2) (appointment: two business days), art 6.1 (decision: 15 days); ICC Arbitration Rules 2021, app V, art 2(1) (appointment: two days), art 6(4) (decision: 15 days); LCIA Arbitration Rules 2020, art 9.6 (appointment: three days), art 9.8 (decision: 14 days); CIETAC Arbitration Rules 2015, app III, art 2.1 (appointment: one day), art 6.2 (decision: 15 days); HKIAC Administered Arbitration Rules 2018, sch 4, art 4 (appointment: 24 hours), art 12 (decision: 14 days); AMINZ Arbitration Rules 2022, r 12.8 (appointment: 48 hours), r S1.4 (decision: 14 days); ACICA Rules 2021, sch 1, r 2.1 (appointment: one day), r 3.1 (decision: five days); SCC Arbitration Rules 2017, app II, art 4 (appointment: 24 hours), art 8 (decision: five days); SIAC Arbitration Rules 2016, sch 1, r 3 (appointment: one day), r 14 (decision: 14 days).

214 See too the similar comments of the DAC, *Report on the Arbitration Bill* (1996) paras 214 to 216, and *Gee on Commercial Injunctions* (7th ed 2020) para 6-046.

Is section 44(5) redundant?

7.70 We also thought that there were arguments to the effect that section 44(5) was redundant, as follows.

7.71 Under section 44(4), non-urgent applications require the permission of the arbitral tribunal, or the agreement of the parties. We thought that the court could not be accused of trespassing into the domain of the arbitral tribunal if the tribunal gives permission, or if the parties, whose agreement defines the jurisdiction of the tribunal, agree instead to revert to the court for these interim measures.

7.72 Section 44(3) requires an application to be urgent, and necessary, and even then it only relates to the preservation of evidence or assets. To that extent, the court would only be preserving the current state of affairs, rather than doing anything active which might usurp the decision-making role of the arbitral tribunal. And we thought that the court could not be accused of interfering if its intervention was "necessary". Examples of necessary intervention might again include where the application is more urgent than the timescale of (emergency) arbitrator provisions, or where the order needs to bind third parties.

7.73 Given these restrictions in sections 44(3) and (4), we questioned whether section 44(5) adds anything of practical rather than symbolic value.

7.74 Further, we did not wish to prolong the misperception caused by *Gerald Metals* in favour of a section which might anyway be redundant.

7.75 We asked the following consultation question (CP1 CQ20):

> Do you think that section 44(5) of the Arbitration Act 1996 should be repealed, and why?

Consultees' views

7.76 There were 59 responses to CP1 CQ20: 23 were in favour of repeal, 30 were against, and 6 gave other responses.

7.77 For example, the judges of the Business & Property Courts said:

> We would not favour the repeal of s.44(5) (Consultation Question 20). We believe it exerts a salutary influence, and its removal would be seen as an unwelcome move towards greater court intervention in London-seated arbitrations.

7.78 The London Maritime Arbitrators Association said:

> We are not persuaded that section 44(5) is redundant. We think it is more than merely symbolic. In our view, it performs the function of setting out unequivocally the overriding position as to the relationship between the court and a tribunal. This is not sufficiently clear from sections 44(3) and (4).

7.79 Some consultees said that the best approach would be a minor amendment: to address the misperception of *Gerald Metals*; or to confirm that an application can be made under section 44 even if the parties have agreed a scheme of emergency arbitration.

7.80 For example, Louise Lanzkron and Nick Peacock said:

> [*Gerald Metals*] has led to some users of arbitration considering whether to disapply emergency arbitration provisions in case they should be seen by the court to preclude it from granting interim relief.

7.81 Bryan Cave Leighton Paisner LLP said:

> whilst the Gerald Metals problem may be based on a misconception, we agree that there is a widespread perception that section 44(5) largely precludes recourse to the court when the parties have agreed emergency arbitrator provisions.

7.82 Other consultees resisted any amendment. For example, John Tackaberry KC said:

> I do not think that some possible mis-understanding by some of one application in Gerald Metals should drive the amendment of the Act.

Discussion

7.83 We accept the majority view of consultees on this point. We acknowledge that, whether or not section 44(5) adds significantly to the practical requirements of sections 44(3) to (4), it has value as a statement of principle that court intervention in arbitral proceedings should be less rather than more.

7.84 We think that the current wording of section 44 already allows an arbitral party to apply to court, even if emergency arbitrator provisions have been agreed, as long as the requirements of section 44 are fulfilled in the usual way. *Gerald Metals* does not say otherwise. It may be that *Gerald Metals* has been misperceived, but this is not a sufficient basis to amend the Act when the words of the Act already achieve the purpose of any amendment.

7.85 Thus, we do not recommend that section 44(5) be repealed or amended specifically to address *Gerald Metals*.

Chapter 8: Emergency arbitrators

8.1 Some institutional arbitral rules provide for the appointment of an emergency arbitrator.[215] The scenario is as follows. The parties have agreed to arbitration. The arbitral tribunal is not yet fully constituted. Nevertheless, there is a matter which cannot wait – for example, the preservation of evidence. A party can apply to the arbitral institution for it to appoint an emergency arbitrator. The emergency arbitrator is appointed on an interim basis, holding the fort until the main arbitral tribunal is fully constituted and can take over. The main tribunal can usually then review any decisions taken by the emergency arbitrator.

8.2 The Arbitration Act 1996 has no provisions addressing emergency arbitrators. This is because the introduction of emergency arbitrators as a practice post-dates the Act.

8.3 In this chapter, we discuss whether the Act should provide for a scheme of emergency arbitrators to be administered by the court, and whether the Act should apply to emergency arbitrators as it applies to (normal) arbitrators. Ultimately, we do not recommend any reform on these points.

8.4 However, we do recommend the introduction of provisions which empower the court to enforce a peremptory order issued by an emergency arbitrator; and for an emergency arbitrator to have the same power as a normal arbitrator to give arbitral parties permission to apply to court for an order under section 44.

A SCHEME FOR EMERGENCY ARBITRATORS?

8.5 Should the Act provide for a scheme of emergency arbitrators to be administered by the court? In Chapter 7 of our first consultation paper, we provisionally concluded against this.

8.6 We noted that no such scheme appears in the UNCITRAL Model Law. Rather, emergency arbitrator schemes appear in the rules of arbitral institutions. Typically, the institutions maintain a list of emergency arbitrators. They manage the screening process to ensure that the emergency arbitrator has no conflict of interests. They manage the payment of fees and the transmission of documents. We thought that this is a level of direct management in the arbitral process not suited to the courts.

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[215] For example: CIArb Arbitration Rules 2015, app 1; ICC Arbitration Rules 2021, app V; LCIA Arbitration Rules 2020, art 9B; SCC Arbitration Rules 2017, app II; CIETAC Arbitration Rules 2015, app III; HKIAC Administered Arbitration Rules 2018, sch 4; AMINZ Arbitration Rules 2022, r 12; ACICA Arbitration Rules 2021, sch 1; SIAC Arbitration Rules 2016, sch 1.

8.7 We said that an emergency arbitrator should be appointed only where the parties have agreed a private scheme which administers for its availability – there should be no scheme of emergency arbitrators to be administered by the court. We noted that similar requirements, that parties must have agreed a private scheme for emergency arbitration, could be found in foreign legislation.[216]

8.8 We asked the following consultation question (CP1 CQ19):

> We provisionally conclude that the Arbitration Act 1996 should not include provisions for the court to administer a scheme of emergency arbitrators. Do you agree?

8.9 There were 55 responses to CP1 CQ19: 54 agreed, and 1 disagreed.

8.10 For example, James Clanchy said:

> Institutions can have them and they [can be] useful in arbitrations seated elsewhere. The English courts should focus on their own powers to assist and accelerate arbitrations.

8.11 Pinsent Masons LLP said:

> the arbitral institutions already provide well-developed rules for emergency arbitrators and are – in our view – better placed to administer them. There is a significant amount of administration involved in responding to a request for an emergency arbitrator, including identifying and liaising with emergency arbitrator candidates, dealing with challenges to emergency arbitrator appointments, transmitting documents, and processing fee payments. This level of direct management is not compatible with court procedure, nor arguably would it be a reasonable use of the court's limited time and resources.

8.12 The consultee who disagreed said that emergency arbitrator provisions could be useful in ad hoc arbitrations too (that is, those not administered by an institution). We think that it is open to the parties in ad hoc arbitrations to agree rules for the appointment of emergency arbitrators; we merely think that it would be inapt for the court to administer a default scheme.

8.13 For these reasons, we make no recommendation for reform here.

SHOULD THE ACT APPLY GENERALLY TO EMERGENCY ARBITRATORS?

8.14 We also concluded, in Chapter 7 of our first consultation paper, that the Act should not be read as if references to an arbitrator or tribunal included

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[216] International Arbitration Act 1994 (Singapore), s 2(1); Arbitration Act 1996 (New Zealand), s 2(1); Arbitration Ordinance (Cap 609) (Hong Kong), s 22A.

an emergency arbitrator. We thought that much of the Act is not suited to such a reading.

8.15 For example, section 16 of the Arbitration Act 1996 sets out a default procedure for the appointment of the arbitral tribunal by the arbitral parties. However, this is not suited to the appointment of emergency arbitrators: the timescale in section 16 is too long; and appointment depends on the cooperation of all parties.

8.16 If the tribunal cannot be appointed under section 16, then a party can apply to the court under section 18, for the court to exercise its powers in respect of tribunal appointments. We thought that this too ought not to apply to emergency arbitrators. Under section 44, the court can make interim orders in support of arbitral proceedings. We thought that it risked creating complexity, to blur the court's urgent granting of interim measures under section 44, with a court being required urgently to appoint an emergency arbitrator to grant interim measures. All the more so in light of our conclusion above that the court should itself not be administering a scheme of emergency arbitrators.

8.17 We asked the following consultation question (CP1 CQ18):

> We provisionally conclude that the provisions of the Arbitration Act 1996 should not apply generally to emergency arbitrators. Do you agree?

8.18 There were 61 responses to CP1 CQ18: 41 agreed, 17 disagreed, and 3 gave other responses.

8.19 Those who agreed with us tended to share our reasons, that the Act was not suited to being read such that arbitrator is deemed to include emergency arbitrator for every section.

8.20 Some consultees said that at least some sections of the Act should apply equally to emergency arbitrators, such as section 33 (the general duty of fairness and impartiality).

8.21 Beyond section 33, which other sections should apply to emergency arbitrators? There was a variety of suggestions,[217] which suggests to us that the extent to which the Act might regulate emergency arbitrators even selectively is not free from controversy.

8.22 Some consultees, including the Arbitration Committee of the City of London Law Society, and the Commercial Bar Association, said that,

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[217] For the record, these were the sections which consultees variously suggested might apply to emergency arbitrators: sections 1 (general principles), 13 (limitation), 29 (immunity of arbitrator), 33 (general duties of tribunal), 34 (procedure and evidence), 38 (tribunal's general powers), 39 (provisional awards), 41 (tribunal powers in case of party default), 42 (court enforcement of tribunal peremptory orders), 44 (court powers in support of arbitral proceedings), 46 (law applicable to substantive dispute), 48 (remedies), 49 (interest), 59 (costs), 67 to 69 (challenging or appealing an award), 74 (immunity of arbitral institution), 101 to 103 (enforcement of foreign awards).

since emergency arbitrators are appointed under the rules of arbitral institutions – and not under any scheme administered by the court – those arbitral rules can make provision to regulate emergency arbitrators. And, said Pinsent Masons LLP, any emergency arbitrator will be superseded by the main arbitral tribunal, which *is* subject to the full scope of the Act, and which will review the orders of the emergency arbitrator.

8.23 We are persuaded that, if emergency arbitrators are appointed under arbitral rules, those arbitral rules are the better place to regulate emergency arbitrators. It is sufficient that orders made by emergency arbitrators are temporary and reversible by the full tribunal which is regulated by the Act.

8.24 We think that the Act can support emergency arbitrators in a focussed way, discussed below. But on this more general question, we make no recommendation that the Act should apply, in whole or selectively, to emergency arbitrators.

ENFORCING THE ORDERS OF EMERGENCY ARBITRATORS

Our position in the first consultation paper

8.25 What should happen if an interim order made by an emergency arbitrator is ignored by an arbitral party? This situation is not addressed by the Act,[218] and in Chapter 7 of our first consultation paper we said that amendment might be needed.

8.26 One option we considered was to provide emergency arbitrators with the same scheme that is currently available under the Act for normal arbitrators.[219] Thus, where a party fails to comply with any order or directions of the emergency arbitrator, without showing sufficient cause, then the emergency arbitrator would be able to make a peremptory order to the same effect. If the peremptory order were ignored, then an application might be made to court for the court to order compliance with the peremptory order.

8.27 Another option was to allow the work to be done by section 44. After all, emergency arbitrators are appointed on an interim basis to grant interim measures, and interim measures can be ordered by the court under section 44.

8.28 Thus, if an interim order from the court were needed urgently, and it was necessary for the preservation of evidence or assets, then an applicant can already apply to the court under section 44(3). If the matter were not urgent, then the applicant would proceed under section 44(4), which

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218 A party is probably obliged to comply with the order of an emergency arbitrator pursuant to that party's duty, under s 40(1), to do all things necessary for the proper and expeditious conduct of the arbitral proceedings. But while the consequences of non-compliance with an order of the full tribunal are made explicit in s 41, the Act does not provide similar consequences for non-compliance with an order by an emergency arbitrator.

219 Arbitration Act 1996, ss 41 and 42.

requires the permission of the tribunal or the agreement of the other parties.

8.29 An application to court might be urgent and necessary precisely because an emergency arbitrator order has been ignored by the other party, and a court order is now vital to ensure compliance. In cases which are less urgent, an emergency arbitrator might well be inclined to give permission for an application under section 44(4) where their own order has been ignored.

8.30 Currently, however, section 44(4) requires "the permission of the tribunal". We thought that an amendment would be necessary to allow for permission to be given also by an emergency arbitrator.

8.31 We thought that the merits of these two options were finely balanced. The first option tends to maintain the primacy of the arbitral regime for governing the arbitral proceedings. The second option is perhaps the more streamlined way of dealing with interim measures. We preferred the simplicity of the second option, but we asked consultees for their views.

8.32 We asked the following consultation question (CP1 CQ21):

> Which of the following ways of accommodating the orders of any emergency arbitrator do you prefer, and why?
>
> (1) A provision which empowers an emergency arbitrator, whose order has been ignored, to issue a peremptory order, which, if still ignored, might result in the court ordering compliance.
>
> (2) An amendment which allows an emergency arbitrator to give permission for an application under section 44(4) of the Arbitration Act 1996.
>
> If you prefer a different option, please let us know.

Consultees' views

8.33 There were 54 responses to CP1 CQ21: 26 preferred option (1), 22 preferred option (2), and 6 gave other responses.

8.34 Consultees who favoured option (1) tended to say that it would maintain the primacy of the arbitral regime, and extend a scheme which parties were already accustomed to with the full tribunal. Some consultees said, in favour of option (1), that an emergency arbitrator might be able to make a wider range of orders than the court can under section 44(2).

8.35 Consultees who favoured option (1), and consultees who favoured option (2), both said that their preferred option produced less delay and waste.

8.36 The Commercial Bar Association objected to any reform. They said that, if the matter is urgent, an arbitral party can already make an application under section 44(3). If the matter is not urgent, it can await the

constitution of the main tribunal, who can make orders and peremptory orders, or give permission under section 44(4).

8.37 The Centre of Construction Law & Dispute Resolution at King's College London, and Allen & Overy LLP, suggested that we might have both options.

8.38 One consultee, Stuart Dutson, said that the problem with enforcing an order by an emergency arbitrator is that they are not otherwise subject to the full rigour of the Act (for example, in terms of compliance with the duty of impartiality).

Recommendation

8.39 Most consultees favoured reform one way or the other, so as to provide support for emergency arbitrators. We think that it would support arbitration, if the orders of emergency arbitrators can be enforced by the court in the same way as orders of normal arbitrators. On reflection, we are persuaded that both of our proposed options might be made available. After all, normal arbitrators have both pathways open to them. And this would give almost all consultees their preferred choice of pathway. We do not see any disadvantages in this approach.

8.40 As for the point that an emergency arbitrator is not subject to the duties of the Act, we think this concern is well voiced, but can be accommodated by the court in the exercise of its discretion whether to enforce an emergency arbitrator order.

8.41 Accordingly, we make the following recommendation.

Recommendation 10.

8.42 We recommend that the Arbitration Act 1996 be amended as follows:

(1) to empower an emergency arbitrator, whose order has been ignored, to issue a peremptory order, which, if still ignored, might result in the court ordering compliance;

(2) to allow an emergency arbitrator to give permission for an application under section 44(4).

8.43 This recommendation is given effect by clause 8 of the draft Bill, which provides as follows.

(1) The Arbitration Act 1996 is amended as follows.

(2) After section 41 insert—

"41A Emergency arbitrators

(1) This section applies where—

(a) the parties have agreed to the application of rules that provide for the appointment of an individual as an emergency arbitrator, and

(b) an emergency arbitrator has been appointed pursuant to those rules.

(2) Unless otherwise agreed by the parties, if without showing sufficient cause a party fails to comply with any order or directions of the emergency arbitrator, the emergency arbitrator may make a peremptory order to the same effect, prescribing such time for compliance with it as the emergency arbitrator considers appropriate."

(3) In section 42 (enforcement of peremptory orders of tribunal)—

(a) in subsection (1), at the end insert "or (as the case may be) the emergency arbitrator";

(b) in subsection (2)(a) and (b), after "the tribunal" insert "or the emergency arbitrator";

(c) in subsection (3), for "tribunal's order" substitute "peremptory order";

(d) in subsection (4), for "tribunal's order" substitute "peremptory order";

(e) in the heading, at the end insert "or emergency arbitrator".

(4) In section 44 (court powers exercisable in support of arbitral proceedings)—

(a) for subsection (4) substitute—

(4) If the case is not one of urgency the court may act only on the application of a party to the arbitral proceedings made with—

(a) the permission of the tribunal or (as the case may be) the emergency arbitrator, or

(b) the agreement in writing of the other parties.

(4A) An application under subsection (4) may only be made upon notice to the other parties and to the tribunal or the emergency arbitrator.";

(b) in subsection (5), after "tribunal" insert "or the emergency arbitrator";

(c) in subsection (6), after “tribunal” insert “, the emergency arbitrator”.

(5) In section 82(1) (minor definitions)—

(a) after the definition of “dispute” insert—

““emergency arbitrator” means an individual appointed as mentioned in section 41A(1);”;

(b) in the definition of “peremptory order” after “section 41(5)” insert “or 41A(2),”.

(6) In section 83 (index of defined expressions), after the entry for “dispute” insert—

“emergency arbitrator	section 82(1) (and see section 41A(1))”.

Chapter 9: Section 67 (challenging the award: substantive jurisdiction)

9.1 Section 67 of the Arbitration Act 1996 provides that a party can apply to the court to challenge an award of an arbitral tribunal on the basis that the tribunal lacked substantive jurisdiction.

9.2 In this chapter, we consider the following issues.

9.3 First, we consider whether a challenge under section 67 should take the form of a rehearing or a review. In broad terms, we recommend legislating to provide the power to make rules of court to limit what evidence and grounds of objection can be put before the court when the challenging party has already made a similar challenge before the tribunal.

9.4 Second, we discuss whether a similar change should be made to section 103 for consistency. Section 103 provides, among other things, that the enforcement of a foreign arbitral award can be resisted on the basis that the tribunal lacked jurisdiction. We conclude that no change is needed to section 103.

9.5 Third, we address the relationship between section 67 and section 32. Section 32 provides that a party to arbitral proceedings can apply to the court, as a preliminary point, for the court to determine the jurisdiction of the tribunal. We recommend amending the Act to confirm that section 32 is only available where the tribunal has not already ruled on its jurisdiction.

9.6 Fourth, we consider whether the remedies available under section 67 need supplementing for consistency with sections 68 and 69. The latter provide that a party can, respectively, challenge an arbitral award for serious irregularity, or appeal it on a point of law. We recommend that the following remedies be added to section 67: declaring the award to be of no effect; remitting the award to the tribunal for reconsideration.

9.7 Fifth, we discuss whether an arbitral tribunal can make an award on costs incurred in arbitral proceedings even where the tribunal or the court rules that the tribunal has no jurisdiction. We recommend amending the Act to confirm that this is indeed possible.

SECTION 67: REVIEW OR REHEARING

Current law

9.8 The substantive jurisdiction of an arbitral tribunal refers to the following:[220] whether there is a valid arbitration agreement; whether the arbitral tribunal is properly constituted; and what matters have been submitted to arbitration in accordance with the arbitration agreement.[221]

9.9 If a party to arbitral proceedings disputes the jurisdiction of the tribunal, they can ask the court to determine the matter, under section 32 of the Arbitration Act 1996. But this requires the agreement of the other parties, or the permission of the tribunal. Alternatively, a person may seek a declaration or injunction from the court under section 72(1), but only if they take no part in the arbitral proceedings.

9.10 A party can also object to the tribunal that it lacks jurisdiction. Unless otherwise agreed by the parties, the tribunal has competence to rule on its own jurisdiction, under section 30. This is usually called competence to rule on its own competence, which is abbreviated to competence-competence.

9.11 In response to an objection, a tribunal can rule in an award dealing solely with jurisdiction, or it can deal with jurisdiction as part of an award which also deals with the merits of the dispute.[222] Either way, the ruling of the tribunal can be challenged.[223] In particular, it can be challenged before the court under section 67.

9.12 In *Dallah*,[224] the Supreme Court said that any challenge before the court under section 67 is potentially by way of a full rehearing.[225] This is so, even if there was a full hearing on the matter before the tribunal. Any ruling by the tribunal does not bind the court. Indeed, any ruling by the tribunal was said to be of no legal or evidential value.[226]

9.13 Where a party takes part in arbitral proceedings, and objects that the tribunal lacks substantive jurisdiction, they must make that objection promptly. Otherwise, under section 73(1), they lose the right to object.[227]

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220 Arbitration Act 1996, s 82(1).

221 Arbitration Act 1996, ss 30(1)(a) to (c).

222 Arbitration Act 1996, s 31(4).

223 Arbitration Act 1996, s 30(2).

224 *Dallah Real Estate & Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2010] UKSC 46, [2011] 1 AC 763.

225 [2010] UKSC 46, [2011] 1 AC 763 at [26] (Lord Mance), [96] (Lord Collins), [159] to [160] (Lord Saville).

226 [2010] UKSC 46, [2011] 1 AC 763 at [30] (Lord Mance).

227 Section 73(1) provides that, if a party takes part in arbitral proceedings without making an objection promptly, then they cannot raise that objection later, before the tribunal or the court,

This is unless they show that they did not know, and could not with reasonable diligence have discovered, the grounds for the objection.

First consultation paper: our position

9.14 In chapter 8 of our first consultation paper, we were concerned with the situation where an objecting party had participated in the arbitral proceedings, and there had been a full hearing before the tribunal. We proposed that any subsequent challenge before the court under section 67 should be by way of an appeal, not a full rehearing.

9.15 We made this proposal for two reasons.

9.16 First, a full rehearing has the potential to cause delay and increase costs through repetition.

9.17 Second, a full rehearing raises a basic question of fairness. It allows a party to raise a jurisdiction challenge before the tribunal, and obtain an award, which, if adverse, will usually set out the deficiencies in the evidence and argument. In light of that award, the losing party can seek to obtain new evidence, and develop their arguments, for another hearing before the court. At its most extreme, the hearing before the arbitral tribunal becomes a dress rehearsal; the arbitral award (by effect, not design) becomes a form of "coaching" for the losing party.

9.18 To be clear, we were concerned with the situation where an objecting party had participated in the arbitral proceedings. Where they had not participated in the arbitral proceedings, then any challenge before court would be their first challenge. There would then be no concern about repetition or second bites of the cherry. We did not (and do not) propose any limitation in that situation.

9.19 We made the following provisional proposal, and asked consultees whether they agreed (CP1 CQ22):

> Where a party has participated in arbitral proceedings, and has objected to the jurisdiction of the arbitral tribunal, and the tribunal has ruled on its jurisdiction in an award, then any subsequent challenge under section 67 of the Arbitration Act 1996 should be by way of an appeal and not a rehearing.

First consultation paper: consultees' views

9.20 There were 81 responses to CP1 CQ 22: 55 agreed with our proposal, 24 disagreed, and 2 expressed other views.

9.21 Consultees who agreed with our proposal tended to agree also with our reasons, that the current approach can be wasteful and unfair.

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unless at the time they did not know or could not have discovered the objection. This applies to four types of objection, including the objection that the tribunal lacks substantive jurisdiction.

9.22 Some consultees said that our approach was inconsistent with the principle of competence-competence, on the basis that the principle allowed a tribunal to rule on its jurisdiction, before any court might rule, but without giving the tribunal's ruling any weight before the court. In contrast, other consultees said that our approach gave substance to the principle, by according some deference to the ruling of the tribunal.

9.23 Some consultees criticised our proposal for using the language of "appeal". After all, they said, in court proceedings, an appeal can proceed either by way of a review, or by way of a rehearing. In other words, our proposal, which sought to distinguish between a review and a rehearing, used language which blurred the distinction.

9.24 Those who disagreed with our proposal also made the following points. If a challenge under section 67 is less than a full rehearing, they said, it might fail to establish an issue estoppel when the award is enforced abroad. They said that our proposal was out of step with the approach of foreign jurisdictions. They said that the court can already control what evidence is put before it, using its existing case management powers, so as to achieve an efficient and fair process. They said that our proposal could create inconsistency with section 103.

9.25 One response, co-ordinated by some members of Brick Court Chambers,[228] suggested that reform should address, not section 67, but other sections of the Act which are also concerned with questions of the tribunal's jurisdiction. They suggested repealing sections 32,[229] and 72(1),[230] and amending section 9.[231] They suggested that an applicant under section 9(1) should only need to show a good arguable case that an arbitration agreement existed, while a respondent under section 9(4) should need to show that the arbitration agreement was akin to being manifestly void.

9.26 The response of the judges of the Business and Property Courts in London included the following points. They said that it would be unfair to preclude a full rehearing if the applicant had not in fact consented to the tribunal's jurisdiction. A party should not be put to the choice of either participating in the arbitration to argue the merits or to challenging jurisdiction in full before the court – a party should be allowed to deploy its full range of arguments and defences. The court's case management

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228 Those who subscribed to this response are listed in Appendix 2.

229 Section 32 allows an arbitral party to apply to court to determine a preliminary question as to the jurisdiction of the tribunal – if the application is made with the agreement of the other parties or the permission of the tribunal.

230 Section 72(1) provides that a person alleged to be a party to arbitral proceedings, but who takes no part in those proceedings, can apply to the court, questioning the jurisdiction of the tribunal, and seeking a declaration or an injunction.

231 Section 9(1) provides, in broad terms, that a party to an arbitration agreement can apply to court to stay legal proceedings which should instead be arbitrated. By section 9(4), the court will grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed.

powers are sufficient to tackle any party seeking to take unfair advantage of a second run at the evidence. Limiting any challenge to a review might preclude an issue estoppel from arising, thus enabling a party to renew its challenge before any foreign enforcing court.

Second consultation paper: our position

9.27 In chapter 3 of our second consultation paper, we accepted the criticism about our choice of language. On reflection, we thought it better to focus not on the label of appeal or review or rehearing, but instead to identify practical constraints to a challenge under section 67.

9.28 We made the following revised proposal, and asked consultees whether they agreed (CP2 CQ2):

> Where an objection has been made to the tribunal that it lacks jurisdiction, and the tribunal has ruled on its jurisdiction, then in any subsequent challenge under section 67 by a party who has participated in the arbitral proceedings:
>
> (1) the court will not entertain any new grounds of objection, or any new evidence, unless even with reasonable diligence the grounds could not have been advanced or the evidence submitted before the tribunal;
>
> (2) evidence will not be reheard, save exceptionally in the interests of justice;
>
> (3) the court will allow the challenge where the decision of the tribunal on its jurisdiction was wrong.

9.29 We proposed this because, in light of the support of the majority of consultees in response to our first consultation paper, we continued to think that a full rehearing could be wasteful and unfair.

9.30 We explained how, in our view, our revised proposal was not inconsistent with the principle of competence-competence, but rather gave the principle some substance. Our proposal recognised, not simply that a tribunal might rule on its jurisdiction, and before a court does, but that there are reasons for allowing it to do so, which entail a measure of deference to that ruling, as follows.

(1) As a matter of pragmatism, by allowing a tribunal to rule on its jurisdiction, without first having to wait for the court to rule, arbitral proceedings can get underway, so that the resolution of the dispute is put in train.

(2) As a matter of principle, the tribunal's ruling is made after a fair process by impartial arbitrators often chosen by the parties for their expertise.

9.31 We argued that *Dallah*, and its support for a full rehearing, was not as categorical as had been suggested. By way of summary, our analysis of *Dallah* was as follows. Although the court said that an application under section 67 involved a full rehearing, the case was concerned with section 103 where a party had not participated in arbitral proceedings (whereas we are here concerned with section 67 where a party has participated). The court said that section 103 need not always involve a full rehearing, for example where jurisdiction had already been challenged before the courts at the seat of the arbitration. It said that a tribunal could be the final arbiter of its own jurisdiction in some cases, for example where the parties had agreed to this. It said that a tribunal's own view of its jurisdiction has no legal or evidential value, but that the award could be read if useful, a juxtaposition which we said risked being contradictory and unprincipled.

9.32 As for the court's case management powers, we acknowledged that the Commercial Court Guide seeks to discourage speculative applications under section 67. But otherwise, we said that, in our view, the court's case management powers were generic, and did not provide any guidance specific to the problem we were discussing.

9.33 We also explained how there are policy tensions between, on the one hand, any final decision revealing that the tribunal should not have been acting in the first place, and on the other hand, any final decision confirming that the parties should have been restricted to the arbitral proceedings all along. The correct position is only known in hindsight; in the meantime, the Act seeks to balance the competing assertions of the claimant and respondent. We were not persuaded to overhaul the scheme adopted in the Act by repealing sections 32 and 72(1) or amending section 9.[232]

9.34 Finally, we suggested that any change here be effected through rules of court, rather than through legislation. We proposed legislation to confer power to make rules of court to that end; we asked consultees whether they agreed with this approach (CP2 CQ3).

9.35 We made this proposal because we thought that the language of the Act did not need amendment; it was already compatible with our approach, even if *Dallah* went down a different interpretative route.

9.36 Also, we said that the proposed restrictions are largely procedural and a natural fit for the sort of prescriptions contained within court rules. Their implementation through court rules was, in our view, a compromise as a "softer" type of reform, which might allow these proposals to be piloted and amended (whether tightened or relaxed) should that prove necessary.

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[232] CP2 paras 3.66 to 3.85.

Second consultation paper: consultees' views

9.37 There were 44 responses to CP2 CQ2: 31 agreed with our proposal, 9 disagreed, and 4 gave other responses.

9.38 Those who agreed with our proposal still thought it more apt to achieve an efficient resolution fairly. For example, Clifford Chance LLP said:

> The Law Commission's proposal does not derogate from the Court having the last word on jurisdiction. It simply makes any challenge more efficient. The challenging party will not be prevented from setting out its arguments in support of its challenge in full for the court to decide, based on the existing evidential record, with protection afforded to the challenging party of admitting new evidence when justified in the interests of justice.

9.39 Peter Ashford said:

> A complete rehearing is expensive, time consuming and contrary to the aim of arbitration as set out in s1(a) of the Act. The aim is a 'fair' resolution – not perfection – and without unnecessary delay or expense. That should include not only the arbitration itself but also any allied court process.

9.40 Similarly, Bryan Cave Leighton Paisner LLP said that the proposal struck the right balance between competence-competence and the court's powers to step in where a tribunal has got it wrong. And the Royal Institution of Chartered Surveyors said that it would deter spurious challenges to jurisdiction while allowing an effective review when required by the interests of justice.

9.41 Some consultees, such as the British Insurance Law Association, thought our proposal to be a reasonable third way between competing views. Indeed, it might still be a reasonable compromise approach even when the underlying analysis remains contentious. For example, Toby Landau KC said:

> I believe this is an excellent compromise. I do not entirely agree with the analysis in the Second Consultation Paper of the Supreme Court's judgment in Dallah v Govt of Pakistan (in which I was counsel for Pakistan), or indeed the DAC's approach to Kompetenz-Kompetenz. But I do think that the three propositions usefully accommodate the various concerns that have been expressed in relation to s.67 in the years since 1996.

9.42 Some consultees, like the Commercial Bar Association, and Allen & Overy LLP, who disagreed with the proposal in our first consultation paper, were prepared to accept at least some of the limbs in the formulation of our revised proposal.

9.43 Three Crowns LLP noted that, even in those jurisdictions where national courts adopt a full rehearing, that process is often far more circumscribed in terms of length and scope than currently occurs in our courts.

9.44 Among those consultees who disagreed with our proposal, the principal objection was that, if an arbitral tribunal has no jurisdiction, then its ruling should have no weight at all, and there should be no deference. Some consultees also disagreed with the strength of our analysis of *Dallah*, saying, in summary, that *Dallah* left no doubt that an application under section 67 involved a full rehearing, and that it had been applied repeatedly by other courts to that effect.

9.45 Some consultees, such as the London Court of International Arbitration, maintained that the court's existing case management powers were sufficient, or more flexible. Some members of Brick Court Chambers additionally repeated its suggestion to repeal sections 32 and 72(1), and amend section 9.

9.46 The response of the judges from the Business and Property Courts in London included the following points. They said that *Dallah* left no doubt that section 67 was a full rehearing. They said that it might be appropriate to limit new evidence or oral evidence, but that it might be necessary to allow such evidence in some cases, for example where there were no transcripts of the evidence before the tribunal, or the tribunal had excluded evidence which a party wished to adduce. New grounds of objection were already precluded by sections 31 and 73 of the Act, and so further reform here was not needed. They continued to express concern that anything other than a full rehearing might preclude an issue estoppel from arising.

9.47 As for CP2 CQ3, proposing the use of rules of court, there were 35 responses: 24 agreed with our proposal, 7 thought that any change should be effected through legislation, and 4 made other comments.

9.48 Those who preferred legislation tended to say that containing the rules within the Act made the position clearer and more accessible to users, particularly international users.

9.49 Consultees both for and against our proposal said that any "trialling" of new rules should give sufficient time for those rules to bed down; predictability should not be undermined by the rules being changed too readily.

9.50 Some consultees said that a statutory power to make rules of court was needed. Some said that it was not needed, and that providing a power in this instance risked calling into question the ability to make rules of court in other instances.

Discussion: review not rehearing

9.51 There have been strong views expressed on both sides of the debate. Some consultees reported that there were opposing views within their own organisations. Nevertheless, there has been consistent support in favour of reform, by a two-thirds majority responding to our first consultation paper, and a three-quarters majority responding to our second consultation paper.

9.52 To repeat, the principal objection to our proposal is that, if an arbitral tribunal has no jurisdiction, then its ruling should have no weight at all, and there should be no deference.

9.53 However, this assumes that the tribunal has no jurisdiction. If instead the tribunal does have jurisdiction, then the objection falls away – the tribunal's ruling was proper.

9.54 It is also an objection which only avails an arbitral respondent; an arbitral claimant can hardly complain that the tribunal should have rejected their claim. Indeed, as we discussed in our second consultation paper, it might be questioned whether an arbitral claimant should ever be able to appeal a decision by a tribunal to reject jurisdiction.[233]

9.55 In our view, it is defensible to strike a balance. And yet a procedure based on the presumption that the tribunal has no jurisdiction tilts the scales entirely in favour of one side. It is also a presumption which is unmerited statistically: most challenges under section 67 are not successful.[234] Instead, our proposal seeks to restore the balance: a challenge before the court is allowed; but there are limits to the arguments and evidence which can be presented.

9.56 We have suggested reasons of principle why the arguments and evidence might be restricted, as follows. We think that this gives some substance to the concept of competence-competence, a concept which is internationally recognised, although admittedly its precise boundaries are contested. We think that if a tribunal is empowered to rule on its jurisdiction, and rule first before a court does, that ruling should have some weight. We also think that some practical respect to the tribunal's ruling flows from its due process: it is the ruling of an impartial tribunal, appointed by the parties,[235] after a fair procedure – the whole of which is regulated by statute (that is, by the Arbitration Act itself).

9.57 If these reasons of principle do not convince everyone, our proposal can also be seen as a pragmatic compromise. We think it no weaker for that. We have explained how the Act reflects pragmatic solutions to the policy

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233 CP2 paras 3.96 to 3.99.

234 *Commercial Court Report 2021-2022* (2023) para 3.1.4.

235 If instead a party played no part in the appointment or arbitral proceedings, they would instead be invoking s 72(1).

tensions created by divergent demands, something which can also be found, not just in our legislation, but also in the UNCITRAL Model Law.[236]

9.58 As for the suggestion that the court's existing case management powers are sufficient, the difficulty, as we see it, is that there is no guidance on when those powers will be exercised, or how, in the specific context we are here discussing. Our proposal answers that with a set of rules.

9.59 The first rule provides that the court will not entertain any new grounds of objection, or any new evidence, unless it was not possible with reasonable diligence to put them before the tribunal. The prohibition of new grounds of objection aligns with section 73(1). The prohibition of new evidence is analogous and finds precedent in similar contexts in the case law.[237]

9.60 Incidentally, we think that section 73(1) is sound: an objecting party should be required to make all its objections up front, rather than tease them out over a period of time, with attendant delay and increased cost. No consultee has suggested otherwise.

9.61 We do not think it redundant to recommend rules of court, in the specific context of section 67, which align with and reinforce the general requirements of section 73(1).

9.62 The second rule provides that evidence will not be reheard, save exceptionally in the interests of justice. Some consultees said that the word "exceptionally" should be removed; another said that it accurately reflected how exceptional it would be to rehear evidence.

9.63 On reflection, we would not wish to create the potential for pedantic arguments as to whether the interests of justice in any particular case, so as to engage the proviso, were sufficiently exceptional compared to the interests of justice in general. Ultimately, it would be for the drafters of any rules of court to choose the exact words. But in case it is of assistance, we record the debate here, and our conclusion that the plain words "save in the interests of justice" seem suitable. We also think that this could cover situations such as where there is no record of the evidence heard before the tribunal, or possibly where the tribunal refused to admit evidence which one party wished to advance (depending on why its admittance was refused).

9.64 The third rule of our revised proposal provided that the court will allow the challenge where the decision of the tribunal on its jurisdiction was wrong. Our reasons for proposing this third rule were as follows.

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[236] See CP2 paras 3.69 to 3.71.

[237] For example – limiting new evidence on appeal in court proceedings: *Ladd v Marshall* [1954] 1 WLR 1489 (CA); limiting new evidence in challenges under s 68: *DDT Trucks of North America Ltd v DDT Holdings Ltd* [2007] EWHC 1542 (Comm), [2007] 2 Lloyd's Rep 213.

9.65 In our view, consideration of the award is a sensible starting place. After all, there is only a challenge under section 67 because the party challenging the award is saying that the tribunal's decision is wrong. Even an arbitral respondent who contends that the tribunal has no jurisdiction will not challenge an arbitral award which agrees with them and rejects jurisdiction. We think that the court *should* consider the tribunal's award – whereas the current position is that the court *may* consider the award, but without there being any principled guidance on when that might occur.

9.66 Some consultees said that this third rule does not necessarily entail any deference to the decision of the tribunal. We wish to say two things in response.

9.67 First, the extent of any review can be flexible. We think the point is well captured in this quotation from Lord Justice May in *Dupont* about appeals in court proceedings:[238]

> subject to exceptions, every appeal is limited to a review of the decision of the lower court… The review will engage the merits of the appeal. It will accord appropriate respect to the decision of the lower court. Appropriate respect will be tempered by the nature of the lower court and its decision making process. There will also be a spectrum of appropriate respect depending on the nature of the decision of the lower court which is challenged. At one end of the spectrum will be decisions of primary fact reached after an evaluation of oral evidence where credibility is in issue and purely discretionary decisions. Further along the spectrum will be multi-factorial decisions often dependent on inferences and an analysis of documentary material.

9.68 In similar vein, in their response to us, the judiciary said that a court "may gain some assistance from the tribunal's analysis of the jurisdiction issue, particularly if the arbitrators were experienced and well-regarded".

9.69 Second, perhaps the resistance to our proposal in some quarters is attributable to the word "deference". That can mean submission to the acknowledged superior judgment of another. We do not suggest that the court must adopt that attitude towards arbitral tribunals. But deference can also mean respectful acknowledgment, or practical respect or regard.[239] This we think is appropriate – that it is proper to give practical respect to a ruling which is empowered by section 30 of the Act, and which is given after a fair process by an impartial tribunal chosen by the parties.

9.70 However, we have chosen not to include the third rule in our recommendations (below). We continue to think that a court should give practical regard to the award of the tribunal. And the challenge to the

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238 *EI Du Pont De Nemours & Co v ST Dupont* [2003] EWCA Civ 1368, [2006] 1 WLR 2793 at [94].

239 All these meanings are taken from the *Oxford English Dictionary*.

award is necessarily premised on the assertion that the award is wrong. In light of this and the other rules of our proposal, we think it is almost inconceivable that a court would not read the tribunal's award and take from it the assistance that it warrants. There is no need for our recommendation to state the obvious – and we do not thereby want to create the risk that the third rule is read as imposing some further unspecified limit on when the court can depart from the decision of the tribunal.

9.71 There are two final matters to discuss: whether a rehearing is necessary to set up an issue estoppel; whether other sections of the Act should be reformed instead of section 67. We take each in turn.

Issue estoppel

9.72 Here we discuss whether our approach would preclude an issue estoppel from arising. The concern is this: without a full rehearing by the court, no issue estoppel would arise from any court decision; in turn, this means that enforcement abroad of any award from England and Wales could be challenged afresh in the foreign courts. We are not persuaded that the question of issue estoppel is problematic, for the following reasons.

9.73 First, a party may be able to challenge, before a foreign court, the enforcement of an award from England and Wales, without needing to challenge the award first before the courts of England and Wales. Thus, a party seeking to resist enforcement abroad might anyway avoid an issue estoppel arising from a decision of a court here.[240]

9.74 In *Dallah*, the Supreme Court said that a party who objected to the jurisdiction of the tribunal did not have to challenge any award before the courts of the seat; it could simply resist enforcement before the courts where enforcement was sought.[241]

9.75 Second, it is notable that the decision of our courts in *Dallah*, on a full rehearing, that the challenger was not party to the arbitration agreement, did not create an issue estoppel as far as the French courts were concerned, which subsequently reached the opposite conclusion.

9.76 Third, we do not wish to second guess the approach of foreign courts. But if the situation were reversed, and a party sought to resist enforcement here of a foreign award subjected to our proposed level of review, we think that our courts would be content to find an issue estoppel. This gives us cause to think that foreign courts could similarly find an issue estoppel. Our reasons are as follows.

9.77 If a foreign court, reviewing an award seated there, had said that no new objections or evidence could be presented which should have been put

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240 The desirability of this is contested: see *Merkin and Flannery on the Arbitration Act 1996* (6th ed 2020) § 103.4.

241 [2010] UKSC 46, [2011] 1 AC 763 at [23], [28] (Lord Mance), and at [98], [103] (Lord Collins).

before the tribunal, our courts would surely be obliged to accept that. After all, it aligns with what is required by the law of England and Wales, as set out in section 73(1).

9.78 If the foreign court held that the interests of justice did not require evidence to be reheard, that too seems unobjectionable. That decision – that justice did not require evidence to be reheard – is surely a decision capable of creating an estoppel on that particular issue.

9.79 If the foreign court began its review by considering the tribunal's award, asking whether the award was wrong, it is difficult to see what could be criticised in that approach. Even *Dallah* accepted that a court here *could* consider the reasoning in the tribunal's award.[242] It should not undermine the finality of a court decision that it began by reading the tribunal's award.

Reform to other sections

9.80 To repeat, the suggestion from some members of Brick Court Chambers was to repeal sections 32 and 72(1), and amend section 9, such that an applicant under section 9(1) should only need to show a good arguable case that an arbitration agreement existed, while a respondent under section 9(4) should need to show that the arbitration agreement was akin to being manifestly void.

9.81 In our second consultation paper, we set out the current law in detail and explained how the current scheme of the Act sought to balance the competing demands of the arbitral claimant, who insists on going to arbitration, and the arbitral respondent, who insists that there should be no arbitration.[243] We remain unpersuaded to upset that balance. In summary, our reasons remain as follows.

9.82 Section 32 has the potential to provide a quick route to a court decision on the jurisdiction of the tribunal. It requires either the agreement of the parties or the permission of the tribunal, and thus we are not persuaded that it can be characterised as a hindrance to arbitration. In our first consultation paper, we asked whether section 32 might be simplified (rather than repealed), and a majority of consultees agreed.[244] We are not persuaded to recommend its repeal instead.

9.83 Section 72(1) allows a party, against whom arbitration is sought, to bring an application to court to stop those arbitral proceedings. Without that possibility, either the party must abstain from the arbitral proceedings and challenge any eventual award, or they must participate in the arbitral proceedings. The former – abstaining from arbitral proceedings – was something we considered in our first consultation paper in the context of

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242 [2010] UKSC 46, [2011] 1 AC 763 at [31] (Lord Mance), and at [160] (Lord Saville).

243 CP2 paras 3.66 to 3.85.

244 See ch 11 below.

section 67.[245] Consultees thought this undesirable and unrealistic, and we are persuaded that parties who might have substantive defences to a claim should not have to forego arguing them for the sake of one argument on jurisdiction. As to the latter – participating in arbitral proceedings – both the DAC,[246] and *Dallah*,[247] have said that no party should be obliged to participate in arbitral proceedings. If a party need not participate in arbitral proceedings, but need not await an award before challenging their legitimacy, then section 72(1) is the natural consequence. We are not persuaded to recommend its repeal.

9.84 As for section 9, currently, the court can decide whether there is an arbitration agreement under section 9(1), or whether it is void under section 9(4), on the balance of probabilities,[248] either on the papers, or by directing a trial of the issue. However, under its inherent jurisdiction, the court can also stay court proceedings in favour of arbitral proceedings – and this it tends to do when there is a significant factual inquiry.[249] Reform to section 9 would thus impact on the court's powers under its inherent jurisdiction.

9.85 Section 9 only comes into play when an arbitral respondent has commenced court proceedings in England and Wales. And it will only be available – questions of arbitration aside – where the courts in England and Wales have jurisdiction. This is not trivial. It is not merely a bluff to forestall dispute resolution (through arbitration). On the contrary, it is a commitment to dispute resolution (through the court). Of course, a party who has agreed to arbitrate should be held to that agreement. But we are not persuaded that section 9 is obviously too permissive. And it does not enable a party to avoid the dispute.

9.86 Overall, it seems to us that the approach suggested by some members of Brick Court Chambers is effectively to require all parties to arbitrate, and then after the award to challenge the legitimacy of the arbitral proceedings. The current structure of the Act is tilted towards requiring all parties to arbitrate, but there is some concession to allowing parties to challenge the legitimacy of the arbitral proceedings up front. The current approach is defensible, and we are not persuaded that a major new approach is needed.

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245 See CP1 para 8.44.

246 DAC, *Report on the Arbitration Bill* (1996) para 295.

247 [2010] UKSC 46, [2011] 1 AC 763 at [23] (Lord Mance).

248 We noted in CP2 that there was some leeway for the case law to move towards a standard of good arguable case instead: see paras 3.74 to 3.79 of CP2.

249 The current law is set out in detail in CP2 paras 3.74 to 3.79.

Discussion: using rules of court

9.87 We continue to think that it is fitting for our proposals to be effected through rules of court rather than through legislative change. This was also supported by the majority of consultees.

9.88 We do not think that this approach would make the Arbitration Act 1996 less accessible to users; any party making an arbitration application to court must already consult and comply with rules of court.

9.89 To repeat, some consultees said that a statutory power to make rules of court was needed. Some said that it was not needed, and that providing a power in this instance risked calling into question the ability to make rules of court in other instances. Our analysis on this point is as follows.

9.90 The Civil Procedure Rules are made by the Civil Procedure Rule Committee by way of statutory instrument under the authority of the Civil Procedure Act 1997.

9.91 The courts, exercising their inherent jurisdiction, can develop common law rules of procedure. However, these rules cannot derogate from the Civil Procedure Rules. Common law rules of procedure can fill any gaps, but the Civil Procedure Rules can then "vary" any common law rules.[250] All this follows from the constitutional supremacy of statute over common law.

9.92 The Civil Procedure Rules cannot overrule substantive common law, and they cannot overrule substantive statute law.[251] And the Commercial Court Guide is just that, a guide, for example on how the Commercial Court interprets and applies the Civil Procedure Rules.[252] The Commercial Court Guide does not have the same status as the Civil Procedure Rules.

9.93 It is then necessary to decide whether the decision in *Dallah* establishes common law rules of procedure for a challenge under section 67, or alternatively, interprets the substantive rights of a party under section 67. The former can be varied by the Civil Procedure Rules, but probably not the latter.

9.94 In light of that, it seems to us that the safest way to proceed is for any alteration to the Civil Procedure Rules which departs from *Dallah* to be authorised expressly by statute, instead of relying on the more limited

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250 *Bovale v Communities & Local Government Secretary* [2009] EWCA Civ 171, [2009] 1 WLR 2274 at [41] to [42] (Waller and Dyson LJJ); *Zuckerman on Civil Procedure: Principles of Practice* (4th ed, 2021), para 2.45.

251 For example, see: *General Mediterranean Holdings SA v Patel* [2000] 1 WLR 272.

252 *Bovale v Communities & Local Government Secretary* [2009] EWCA Civ 171, [2009] 1 WLR 2274 at [35] to [36] (Waller and Dyson LJJ); *Lomax v Lomax* [2019] EWCA Civ 1467, [2019] 1 WLR 6527 at [28] (Moylan LJ).

authority of the Civil Procedure Act 1997. This approach, of another statute giving explicit authority to make rules of court, is not unusual.[253]

Recommendations

9.95 For the reasons given above, we make the following recommendations.

Recommendation 11.

9.96 We recommend that legislation confer the power to make rules of court to implement the following.

9.97 Where an objection has been made to the tribunal that it lacks jurisdiction, and the tribunal has ruled on its jurisdiction, then in any subsequent challenge under section 67 by a party who has taken part in the arbitral proceedings:

(1) the court will not entertain any new grounds of objection, or any new evidence, unless even with reasonable diligence it could not have been put before the tribunal;

(2) evidence will not be reheard, save in the interests of justice.

9.98 This recommendation is given effect by clause 11 of the draft Bill, which provides as follows.

(1) In section 67 of the Arbitration Act 1996 (challenging the award: substantive jurisdiction) after subsection (3) insert—

"(3A) Rules of court about the procedure to be followed on an application under this section may, in particular, include provision within subsection (3B) in relation to a case where the application—

(a) relates to an objection as to the arbitral tribunal's substantive jurisdiction on which the tribunal has already ruled, and

(b) is made by a party that took part in the arbitral proceedings.

(3B) Provision is within this subsection if it provides that—

(a) a ground for the objection that was not raised before the arbitral tribunal must not be raised before the court unless the applicant shows that, at the time the applicant took part in the proceedings, the applicant did not know

[253] For example, see the commentary in *The White Book 2023*, para 12-3.

and could not with reasonable diligence have discovered the ground;

(b) evidence that was not heard by the tribunal must not be heard by the court unless the applicant shows that, at the time the applicant took part in the proceedings, the applicant could not with reasonable diligence have put the evidence before the tribunal;

(c) evidence that was heard by the tribunal must not be re-heard by the court, unless the court considers it necessary in the interests of justice."

CONSISTENCY WITH SECTION 103

Introduction

9.99 Section 103 of the Arbitration Act 1996 gives effect to article V of the New York Convention. Thereunder, the recognition and enforcement of a foreign arbitral award can be resisted on various grounds which include the arbitral tribunal lacking jurisdiction.

9.100 The question we consider here is whether any recommendation in respect of section 67 needs to be repeated with section 103 for consistency. Indeed, some consultees who objected to our proposals for section 67 in our first consultation paper did so on the basis that our proposals would create an inconsistency with section 103.

Our position in the first consultation paper

9.101 In chapter 8 of our first consultation paper, we said that any change to section 67 would not require a matching change to section 103. We said that this is because section 67 is a domestic regime; it is concerned with challenges to awards from tribunals seated in England and Wales. In contrast, the New York Convention is concerned with international enforcement: the enforcement abroad of out-going awards from England and Wales; and the enforcement in England and Wales of in-coming foreign awards (the province of section 103).

9.102 We reached the following provisional conclusion, and asked consultees whether they agreed (CP1 CQ24):

> We provisionally conclude that our proposed change to section 67 of the Arbitration Act 1996 would not require any similar change to section 103.

Consultees' views

9.103 There were 57 responses to CP1 CQ24: 43 agreed, and 14 disagreed.

9.104 Consultees who disagreed with our proposal tended to say that there was no good reason to distinguish between foreign awards and awards seated here when challenging the jurisdiction of a tribunal.

9.105 Consultees who supported our proposal tended to agree with the reasons in our first consultation paper. They said that enforcement of foreign awards, and challenges to domestic awards, were two different regimes. They noted that section 103 enshrines the New York Convention, which in turn is aligned with the UNCITRAL Model Law, but that the Act does not adopt the UNCITRAL Model Law, and already departs from the language of section 103 when it comes to domestic challenges under section 68. They said that it was legitimate to make the domestic regime more attractive, by reform to section 67. And that the lack of such nuance in section 103 could also be justified, since it was a simpler approach to deal with the wider variety of contexts attendant upon in-coming foreign arbitral awards.

Conclusion

9.106 We continue to think that no reform is needed in respect of section 103, even though we propose reform in respect of section 67. This conclusion is supported by the majority of consultees. Section 103 gives effect to the New York Convention, and is concerned with challenges to foreign awards, whereas section 67 is concerned with challenges to awards seated in England and Wales. They are two different regimes. It is acceptable to make it more attractive to seat tribunals in England and Wales because our regime for challenging awards seated here is fairer or more efficient than the regime under the New York Convention. Indeed, our Act already departs from the language of the New York Convention when it comes to challenges to domestic awards. For these reasons, we do not recommend any reform to section 103.

CONSISTENCY WITH SECTION 32

Introduction

9.107 Section 32 provides that a party can apply to the court for the court to make a preliminary determination as to the jurisdiction of the arbitral tribunal.

9.108 In this section, we consider whether any reforms to section 67 ought to be replicated for section 32, again for consistency.

Our position in the first consultation paper

9.109 In chapter 8 of our first consultation paper, we said that section 32 can be invoked by a party before the tribunal has ruled on its jurisdiction. To that extent, it presents a quick route to a definitive court decision. It also means that the hearing before the court will be the first hearing; there will be no concerns about unfair or wasteful repetition.

9.110 However, we suggested that there is some uncertainty over whether section 32 can be invoked after the tribunal has ruled on its jurisdiction. If there are objections about section 67 being a full rehearing, there is an obvious argument that those objections should apply equally to any second hearing under section 32.

9.111 That said, section 32 requires either the agreement of the parties or the permission of the tribunal. Those extra hurdles might be thought sufficient to ensure that section 32 is not abused. In contrast, section 67 is available as of right.

9.112 Accordingly, we asked the following consultation question (CP1 CQ23):

> If section 67 of the Arbitration Act 1996 is limited, in some circumstances, to an appeal rather than a rehearing, do you think that the same limitation should apply to section 32, and why?

Consultees' views

9.113 There were 61 responses to CP1 CQ23: 41 thought that any limitations to section 67 should apply equally to section 32, 12 disagreed, and 8 gave other responses.

9.114 Some consultees said that section 32 works well enough as it is without the need for reform. One consultee suggested repealing section 32 on the basis that it serves no purpose.

9.115 Some of those who disagreed, including Thomas Raphael KC, argued that section 32 is only available where a tribunal has not ruled on its jurisdiction, on a better reading of the current law. Some consultees who agreed, or gave other responses, including Herbert Smith Freehills LLP, and the Centre of Construction Law & Dispute Resolution at King's College London, said that the better approach would be simply to restrict section 32 so that it is available only where a tribunal has not ruled on its jurisdiction.

Discussion and recommendation

9.116 We have proposed restrictions in the context of section 67 where the court hearing follows a ruling by the tribunal after a contested hearing before the tribunal. If section 32 also allows a court hearing after a ruling by the tribunal following a contested hearing, then we think that the same restrictions should apply, for the same reasons – and the majority of consultees agreed.

9.117 However, we are persuaded that section 32 should not allow a court hearing after a ruling by the tribunal following a contested hearing before the tribunal. If a tribunal has issued an award which rules on its jurisdiction, the proper route to challenge jurisdiction is via section 67. We see no need for an alternative or additional route via section 32. Rather, we think that the better role for section 32 is allowing direct access to the court, for the court to rule first on jurisdiction as a preliminary point. Thus, there are two pathways: the tribunal can rule first, and then be challenged under section 67; or the court can rule directly under section 32.

9.118 We think that this was the intention of the DAC when they drafted the Act.[254] In our first consultation paper, we referenced the case of *Film Finance Inc v Royal Bank of Scotland*,[255] which suggested instead that section 32 could be invoked after a tribunal had ruled on its jurisdiction. It may well be, as some consultees argued, that the case law as a whole tends to view section 32 as an alternative to the tribunal ruling on its jurisdiction,[256] and that *Film Finance* is an outlier.

9.119 Nevertheless, to put the matter beyond doubt, we recommend reform to make it explicit that section 32 is an alternative to the tribunal ruling on its jurisdiction. In such a case, there is no need for further reform to section 32: it would not need to align with section 67, as they would be performing different roles.

9.120 We think that a ruling on one ground by the tribunal need not preclude a ruling by the court on a different ground. In theory, we think it is acceptable for a party to object to the jurisdiction of the tribunal on different grounds at different times. After all, jurisdiction is composed of three different ingredients, as per section 30(1). And different timings for objections are explicitly contemplated by section 31. In these scenarios, there would be no second bite of the cherry to guard against.

9.121 We also think that (the limits to) section 32 apply whether the tribunal has ruled on its jurisdiction pursuant to the power granted by section 30, or whether pursuant to another power. We say this because we note that section 30 is a default rule, which allows the parties to agree (and extend or limit) the ability of the tribunal to rule on its jurisdiction.

9.122 Accordingly, we make the following recommendation.

Recommendation 12.

9.123 We recommend that the Arbitration Act 1996 be amended to confirm that section 32 is available only as an alternative to the tribunal ruling on its jurisdiction.

9.124 This recommendation is given effect by clause 5 of the draft Bill, which provides as follows.

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254 DAC, *Report on the Arbitration Bill* (1996) para 141.

255 [2007] EWHC 195 (Comm), [2007] 1 Lloyd's Rep 382.

256 For example, see: *Azov Shipping Co v Baltic Shipping Co* [1999] 1 All ER 476, 477 to 478 (Rix J); *ABB Lummus Global Ltd v Keppel Fels Ltd* [1999] 2 Lloyd's Rep 24, 30 (Clarke J); *Vale Do Rio Doce Navegacao SA v Shanghai Bao Steel Ocean Shipping Co Ltd* [2000] 2 All ER (Comm) 70 at [54] (Thomas J).

In section 32 of the Arbitration Act 1996 (determination of preliminary point of jurisdiction), after subsection (1) insert –

"(1A) An application under this section must not be considered to the extent that it is in respect of a question on which the tribunal has already ruled."

REMEDIES UNDER SECTION 67

9.125 In this section, we discuss whether the remedies under section 67 should be supplemented for consistency with the remedies available under section 68 (challenging an award for serious irregularity) and section 69 (appealing an award on a point of law).

Our position in the first consultation paper

9.126 The relevant passages from section 67 provide:

(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.

(2) …

(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.

9.127 In chapter 8 of our first consultation paper, we noted that the remedy of declaring the award to be of no effect is available under subsection (1)(b), but seemingly not section (1)(a). Yet declaring the award to be of no effect is available across the board under section 68 (challenges for serious irregularity). Instead, under section 67(3), an award can be set aside. But that remedy is additionally available under section 68.

9.128 We said that, if there is a difference between these remedies, then setting aside allows a tribunal to issue another award, whereas declaring an award to be of no effect means that the award nevertheless continues to exist so that the tribunal cannot revisit it. We thought that either remedy

might be suitable to a challenge under section 67, depending on the circumstances, just as both remedies are available under section 68.

9.129 We made the following provisional proposal, and asked consultees whether they agreed (CP1 CQ25):

> We provisionally propose that, in addition to the existing remedies under section 67(3) of the Arbitration Act 1996, the court should have a remedy of declaring the award to be of no effect, in whole or in part.

Consultees' views

9.130 There were 66 responses to CP1 CQ25: 58 agreed with our proposal, 5 disagreed, and 3 gave other responses.

9.131 Those who agreed tended to share our reasoning. Those who disagreed tended to say simply that there was no need for any reform.

9.132 One consultee, Allen & Overy LLP, suggested that it should be clarified that all remedies could be applied in whole or in part, and that different remedies could be applied to different parts of the award. They also suggested that similar changes be made for consistency to the language of section 69(7).

9.133 Two consultees, Pinsent Masons LLP, and Louis Flannery KC, suggested that it should be a further remedy that the court might remit the award to the tribunal. This might be relevant, for example, where the tribunal had wrongly held that it had no jurisdiction, or where the award is set aside in part.

Discussion

9.134 Section 69(7) provides:

> On an appeal under this section the court may by order –
>
> (a) confirm the award,
>
> (b) vary the award,
>
> (c) remit the award to the tribunal, in whole or in part, for reconsideration in the light of the court's determination, or
>
> (d) set aside the award in whole or in part…

9.135 We agree that, under section 69(7), it appears as though only the remedies at (c) and (d) can be applied to the award in whole or in part.

9.136 However, we think that the phrase "in whole or in part" cannot be applied to the remedy of varying the award. For example, if an award has one paragraph varied, has that varied only part of the award, or all of the award? If it has varied only one part of the award, what does it take to vary all the award? That every word gets varied? An alternative way of

looking at it is to say that, whether an award is changed completely or only partially, either way it has been varied.

9.137 Similarly, we think that when an award is confirmed, it must be confirmed in full. If only part of an award is confirmed, that must be because the other part is varied or remitted or set aside. Which is to say that partial confirmation is already covered by the other remedies.

9.138 Otherwise, although none of sections 67 to 69 says explicitly that different remedies could be applied to different parts of an award, we think that such an approach is available on the current wording of the Act, and some authors assume that this is already the approach in practice.[257] We do not think that any reform is needed to make this approach available.

9.139 Returning to the remedies of section 67, we make the following points.

9.140 First, remitting the award is available under sections 68 and 69, but it is not explicitly mentioned in section 67. Nevertheless, the ability to remit has been assumed in the case law.[258]

9.141 Second, as we noted in our first consultation paper, setting aside the award appears, on a strict reading, to be available only under section 67(1)(a) and (3), and not under section 67(1)(b). But again the courts have assumed that it is available under section 67(1)(b) after all.[259] It is similarly available across the board under sections 68 and 69.

9.142 Third, the remedy of declaring the award to be of no effect, and indeed the remedy of setting aside the award, where it appears in sections 68 and 69, is subject to a further requirement:

> The court shall not exercise its power to set aside or to declare an award to be of no effect, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration.

This proviso is missing from section 67, for no discernible reason.

Recommendations

9.143 We think that there should be consistency of approach to the remedies available across sections 67 to 69. We think that these additional remedies would be useful under section 67 just as they are useful under

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257 *Merkin and Flannery on the Arbitration Act 1996* (6th ed, 2020) §§ 67.16, 68.17.

258 *Egiazaryan v OJSC OEK Finance* [2015] EWHC 3532 (Comm), [2017] 1 All ER (Comm) 207 at [49] by Burton J; *GPF PG Sarl v Republic of Poland* [2018] EWHC 409 (Comm), [2018] 2 All ER (Comm) 618 at [144] by Bryan J; *Reliance Industries Ltd v Union of India* [2020] EWHC 263 (Comm), [2020] 1 Lloyd's Rep 489 at [81] by Knowles J (recording the parties' agreement to remit).

259 *Peterson Farms Inc v C&M Farming Ltd* [2004] EWHC 121 (Comm), [2004] 1 Lloyd's Rep 603 at [68] by Langley J; *Republic of Kazakhstan v Istil Group Inc* [2006] EWHC 448 (Comm), [2006] 2 Lloyd's Rep 370 at [84] by David Steel J.

sections 68 and 69. Reform would give effect to the assumptions in the case law and literature about the current availability of these remedies under section 67. It would prevent any argument that different wording was deliberately chosen to procure different approaches. Nothing in the DAC reports suggest that different approaches were intended, and we cannot see any reason for differences in approach. Reform here is supported by the majority of consultees.

9.144 Accordingly, we make the following recommendations.

Recommendation 13.

9.145 We recommend that section 67 of the Arbitration Act 1996 be amended to provide the remedies of: declaring the award to be of no effect, in whole or in part; and remitting the award to the tribunal, in whole or in part, for reconsideration – with the proviso that the court must not exercise its power to set aside or to declare an award to be of no effect, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration.

9.146 This recommendation is given effect by clause 10 of the draft Bill, which provides as follows.

(1) Section 67 of the Arbitration Act 1996 (challenging the award: substantive jurisdiction) is amended as follows.

(2) In subsection (1), for paragraph (b) substitute –

"(b) challenging an award made by the tribunal on the merits because the tribunal did not have substantive jurisdiction."

(3) For subsection (3) substitute –

"(3) On an application under this section, the court may by order –

(a) confirm the award,

(b) vary the award,

(c) remit the award to the tribunal, in whole or in part, for reconsideration,

(d) set aside the award, in whole or in part, or

(e) declare the award to be of no effect, in whole or in part.

(3A) The court must not exercise its power to set aside or to declare an award to be of no effect, in whole or in part, unless it is

satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration."

SECTION 67 AND COSTS

9.147 In this section, we consider the following question. Where an arbitral tribunal rules that it does not have jurisdiction, can the tribunal nevertheless issue a binding award on costs incurred in the arbitration proceedings up to that point?

9.148 In chapter 8 of our first consultation paper, we said that the answer is probably yes, a tribunal can issue an award on costs in those circumstances. We thought that this would be the preferable position as a matter of policy.

9.149 We said that section 61 of the Arbitration Act 1996 empowers the arbitral tribunal to make an award allocating the costs of the arbitration, subject to any agreement of the parties. An arbitration might be shorter than expected, where the arbitral tribunal rules that it has no jurisdiction to decide the merits of the dispute. Nevertheless, there has been an arbitration up until that dispositive award. We thought that is something which section 61 can fasten upon.

9.150 If, alternatively, costs are not recoverable, we thought that position unattractive in principle. It would allow a party who wrongly initiated arbitral proceedings to walk away free of consequences, in circumstances where it had triggered the costs of bringing arbitration proceedings in the first place and progressing them to the point of their dismissal. That seems unfair.

9.151 We made the following provisional proposal, and asked consultees whether they agreed (CP1 CQ26):

> We provisionally propose that an arbitral tribunal should be able to make an award of costs in consequence of an award ruling that it has no substantive jurisdiction. Do you agree?

9.152 There were 68 responses to CP1 CQ26: 63 agreed, 1 disagreed, and 4 gave other responses.

9.153 Additionally, three consultees, Pinsent Masons LLP, the Commercial Bar Association, and Paul Key KC, raised a further issue, as follows. Where a court rules that the tribunal has no jurisdiction, the court should be able to remit the question of costs in the arbitration back to the tribunal.

9.154 We agree with this further observation. It may well be that the court has no power itself to award the costs of the arbitral proceedings.[260] We think that the losing party should not be able to avoid the arbitral costs it has

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[260] *Crest Nicholson (Eastern) Ltd v Western* [2008] EWHC 1325 (TCC), [2008] All ER (D) 249 (Jun).

triggered just because the arbitral proceedings have been ended by the court rather than by the tribunal. We think that the court should be able to remit the question of costs to the tribunal.

9.155 For these reasons, and in light of the support of consultees, we make the following recommendation.

Recommendation 14.

9.156 We recommend that the Arbitration Act 1996 be amended to provide explicitly that an arbitral tribunal is able to make an award of costs in consequence of a ruling by the tribunal or by the court that the tribunal has no substantive jurisdiction.

9.157 This recommendation is given effect by clause 6 of the draft Bill, which provides as follows.

(1) Section 61 of the Arbitration Act 1996 (award of costs) is amended as follows.

(2) In subsection (1), omit ", subject to any agreement of the parties".

(3) After subsection (1) insert—

"(1A) It is irrelevant for the purposes of subsection (1) whether the tribunal has ruled or a court has held that the tribunal has no substantive jurisdiction or has exceeded its substantive jurisdiction."

(4) In subsection (2), omit "Unless the parties otherwise agree,".

(5) After subsection (2), insert –

"(3) Subsections (1), (1A) and (2) are subject to any agreement of the parties."

Chapter 10: Appeal on a point of law

10.1 Under section 69 of the Arbitration Act 1996, a party can appeal an arbitral award to the court on a point of law. In this chapter, we discuss whether section 69 should be reformed. Ultimately, we do not recommend any reform.

OUR POSITION IN THE FIRST CONSULTATION PAPER

10.2 An application under section 69, to appeal an arbitral award on a point of law, requires either the agreement of all the arbitral parties, or the permission of the court.[261] The court will only give permission if, among other things, the decision of the tribunal is obviously wrong, or is open to serious doubt on a question of general public importance.[262]

10.3 Section 69 is currently "opt-out": the parties can agree that an appeal should be unavailable.[263] Some arbitral rules do opt out.[264] Others do not exclude an appeal,[265] or are explicit about the availability of an appeal on a point of law.[266] Some arbitration clauses contain an express agreement that either party may appeal under section 69.[267]

10.4 In Chapter 9 of our first consultation paper, we considered whether section 69 might be reformed.

10.5 We said that, in the context of section 69, there were two competing goals. One is to enhance the finality of arbitral awards, and thereby the efficient resolution of disputes.

10.6 This tends towards limiting appeals. We noted how, historically, legislation,[268] and case law,[269] had increasingly limited the availability of appeals in respect of arbitral awards. This informed the drafting of section 69.[270] Some stakeholders wished to go further and see section 69

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261 Arbitration Act 1996, s 69(2).

262 Arbitration Act 1996, s 69(3)(c).

263 Section 69 applies "unless otherwise agreed by the parties": Arbitration Act 1996, s 69(1).

264 For example: CIArb Arbitration Rules 2015, art 34(2); ICC Arbitration Rules 2021, art 35(6); LCIA Arbitration Rules 2020, art 26.8; LME Arbitration Regulations, r 12.8; UKJT Digital Dispute Resolution Rules v 1.0 (2021), r 16.

265 The availability of an appeal on a point of law is a familiar feature of maritime arbitrations.

266 For example: ICE Arbitration Procedure 2012, r 21.

267 For example: JCT Standard Form of Building Contract (2016), cl 9.7.

268 Arbitration Act 1979, s 1.

269 *Pioneer Shipping Ltd v BTP Tioxide Ltd, The Nema* [1982] AC 724 (HL).

270 DAC, *Report on the Arbitration Bill* (1996) paras 284 to 292.

repealed, so that there would be no possibility of appealing an arbitral award on a point of law.

10.7 The other goal can be expressed as follows. It is desirable that the law be applied consistently, so that everyone has the same rights and duties (with the result that the law is indeed "common" to everyone). It is undesirable if there are pockets of activity where the law does not apply, or is applied incorrectly. Some mechanism of oversight to correct at least obvious errors of law might be thought appropriate.

10.8 This latter goal tends towards enabling appeals. We noted that some stakeholders wished to see section 69 reformed to allow more appeals. Some suggested making section 69 mandatory. Others suggested enabling the court to give permission to appeal simply where there is a good arguable case that the decision of the arbitral tribunal is wrong on a point of law.

10.9 Some stakeholders had suggested that more appeals would also improve the development of commercial law, by allowing the court to rule on more points of law. Some suggested that there were too few cases being heard by the court, with the result that the commercial law was stultifying.

10.10 We noted that, statistically, section 69 does supply a flow of cases to the court,[271] but perhaps representing fewer than 1% of arbitrations.[272] Perhaps around 10% of applications under (all sections of) the Act reach the Court of Appeal.[273] Meanwhile, the case load of the Commercial Court appears plentiful, with over 800 new claims brought every year.[274] We heard emphatically from the judiciary that the Commercial Court is thriving, and that the development of commercial law is in fine health.

10.11 Overall, we thought that section 69 was a defensible compromise between these two goals. It allows for the possibility of an appeal on a point of law. But it promotes the finality of arbitral awards, by allowing parties to opt out of section 69, or otherwise by restricting intervention to correcting blatant errors.

10.12 Despite occasional lively debate about section 69, we saw no evidence to suggest that section 69 is problematic in practice, or that there is an

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271 For example, there were 35 applications in the year 2020 to 2021, according to the Commercial Court Report 2020-2021 (February 2022) pp 12 to 13.

272 Commercial Court Report 2020-2021 (February 2022) pp 12 to 13; Commercial Court User Committee Meeting (November 2021) p 5; Commercial Court User Group Meeting (November 2020) p 8; Commercial Court Users Group Meeting (November 2019) p 1. All these documents can be found here: <https://www.judiciary.uk/announcement-court/commercial-court/>. For further statistical analysis, see: Osborne Clarke, *Arbitration in Court* (2021) p 3; A Spotorno, "Arbitration and the development of English law" (2019) 85(2) *Arbitration* 106.

273 Osborne Clarke, *Arbitration in Court* (2021) p 5.

274 Commercial Court Report 2020-2021 (February 2022) p 22; Commercial Court Report 2018-2019 (February 2020) p 10.

alternative approach to appeals on a point of law which is obviously better. The current approach has also been acted on; different arbitral rules and clauses have long settled on their preferred relationship with section 69, and we saw no reason to unsettle that.

10.13 We asked the following consultation question (CP1 CQ27):

> We provisionally conclude that section 69 of the Arbitration Act 1996 strikes the right balance between competing interests in respect of the ability to appeal an arbitral award on a point of law. We do not therefore propose any reform to section 69. Do you agree?

CONSULTEES' VIEWS

10.14 There were 80 responses to CP1 CQ27: 66 agreed with our conclusion against reform, and 14 gave other responses.

10.15 Those other responses gave various suggestions for reform. Some consultees said that section 69 should be opt-in (rather than the current opt-out), or opt-in only for international arbitrations. Some said that an appeal should lie (or perhaps already does lie) for a mixed question of fact and law; others objected to this. Some said that permission to appeal the decision of the first instance court should be obtainable, not just from the first instance court (as is currently the case), but also from the Court of Appeal. Others objected to this, and some said that there should be no appeal from the first instance court at all. Some said that the "obviously wrong" test was too vague; that the "general public importance" test was inappropriate in the context of private arbitration; that the "open to serious doubt" test should include the situation where a tribunal follows a first instance decision which itself is open to doubt. Some said that there should be more appeals in insurance cases; and in statutory arbitrations; but no appeals in investment treaty cases.

CONCLUSION

10.16 We continue to think that section 69 is a defensible compromise between promoting the finality of arbitral awards (by limiting appeals) and correcting blatant errors of law. Section 69 is opt-out, and we do not wish to unsettle the preferred relationship with section 69 that has been struck by arbitral rules and arbitration clauses. We are not persuaded that there is any necessity for reform, and we note that the majority of consultees are also against reform. Among those who do favour reform, there is no consensus on what shape that reform should take. We are not persuaded that there is a different approach to appealing a point of law which is obviously better than that currently adopted by section 69.

10.17 For these reasons, we make no recommendation to reform section 69.

Chapter 11: Minor reforms

11.1 In Chapter 10 of our first consultation paper, we discussed a number of provisional proposals for minor reform of the Arbitration Act 1996. We follow those up here. Thus, in this chapter, we consider:

(1) section 7 (separability of arbitration agreement);

(2) appeals from section 9 decisions (stay of legal proceedings);

(3) section 32 (determination of preliminary point of jurisdiction) and section 45 (determination of preliminary point of law);

(4) modern technology;

(5) section 39 (power to make provisional awards);

(6) when time runs under section 70 (challenge or appeal: supplementary provisions); and

(7) sections 85 to 88 (domestic arbitration agreements).

SECTION 7 (SEPARABILITY OF ARBITRATION AGREEMENT)

Current law

11.2 Arbitration usually follows an agreement to arbitrate. The parties can agree to arbitrate after the dispute has arisen, but more usually parties agree at the time of entering a contract that they will arbitrate if any future disputes arise under the contract. These arbitration agreements usually take the form of an arbitration clause in a main contract (also called a matrix contract). Section 7 of the Arbitration Act 1996 provides, in certain circumstances, for the separability of the arbitration agreement from the matrix contract.

11.3 Section 7 states as follows:

> Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement.

11.4 This is a useful principle, as the House of Lords has previously recognised.[275] It enables the arbitration agreement to survive the demise

[275] *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40, [2007] 4 All ER 951.

of the matrix contract. This in turn enables an arbitral tribunal to resolve any dispute about the demise of the matrix contract.

11.5 Section 7 is not mandatory.[276] If foreign law governs the arbitration agreement, then by operation of section 4(5), section 7 may be disapplied,[277] and its utility lost.

Our position in the first consultation paper

11.6 We noted that the principle of separability is mandatory under the UNCITRAL Model Law,[278] and in Scotland,[279] and in other foreign legislation,[280] and some institutional rules,[281] although not all of them.[282]

11.7 We said that, on the one hand, it was unobjectionable in principle to give the parties the choice to disapply section 7. For example, by agreeing a foreign law to govern the arbitration agreement, that would disapply section 7 (through the operation of section 4(5)).[283] Then again, as just noted, many foreign laws (and arbitral rules) have a mandatory principle of separability anyway. So the principle, disapplied in section 7, may often be reintroduced by the foreign law.

11.8 On the other hand, we said that consultees might show a keen desire to make section 7 mandatory. That too would be unobjectionable, given its importance and utility.

11.9 We made no provisional proposal. Instead, we asked the following consultation question (CP1 CQ28):

> Do you think that section 7 of the Arbitration Act 1996 (separability of arbitration agreement) should be mandatory, and why?

Consultees' views

11.10 There were 65 responses to CP1 CQ28: 35 were in favour of making it mandatory, 16 were against, and 14 gave other responses.

11.11 For example, in favour of making it mandatory, Daniel Bovensiepen said:

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276 It begins "unless otherwise agreed by the parties"; it does not appear in sch 1 of the Arbitration Act 1996.

277 *Enka Insaat ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38, [2020] 1 WLR 4117 at [92].

278 UNCITRAL Model Law, art 16(1).

279 Arbitration (Scotland) Act 2010, s 5.

280 For example: Dutch Code of Civil Procedure, Book Four, Arbitration, art 1053; Swedish Arbitration Act, s 3; Swiss Private International Law Act of 1987, art 178(3).

281 LCIA Arbitration Rules 2020, art 23.2; UNCITRAL Arbitration Rules 2021, art 23(1).

282 In ICC Arbitration Rules 2021, art 6(9), separability applies "unless otherwise agreed".

283 We discuss the operation of section 4(5) in CP1 paras 11.37 to 11.42, and in CP2 paras 2.32 to 2.36.

> [S]ection 7 should be mandatory because it reflects a very widely accepted and useful principle in arbitration. That principle avoids generally undesirable and circular arguments/ analysis about the jurisdiction of a tribunal in cases where a main agreement is argued to be invalid, non-existent or ineffective. It is also difficult to see what real commercial advantage/ utility users of arbitration might feel they lose by not being free to agree that the arbitration agreement is separable…
>
> [P]resumably if parties genuinely had a preference for any dispute as to eg validity or effectiveness of the main agreement to be outside the scope of the arbitration agreement, they could still in a more precise and deliberate way circumvent section 7 even if it was mandatory, by delineating the scope of the disputes within their arbitration agreement accordingly. So, if anything, making section 7 mandatory may not actually reduce party autonomy in any practical/ meaningful sense, but rather get parties to focus on the relevant real question of what disputes they want to be within their arbitration agreement

11.12 Some consultees said that section 7 should remain not mandatory. The main reason given was to preserve party autonomy.

11.13 Some consultees said that the problem was not so much section 7, but current rules on the governing law of the arbitration agreement, following *Enka v Chubb*.[284] They said that those current rules too easily led to the application of foreign law, and so the disapplication of section 7. They said that the solution was to address the governing law of the arbitration agreement.

Conclusion

11.14 We note that, while 35 consultees were in favour of making section 7 mandatory, 30 consultees were against or were non-committal. There was only a small majority in support of reform.

11.15 We remind ourselves of section 1(b) of the Act:

> the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest

11.16 Overall, we think that separability is a principle of great utility, but, on reflection, we are not persuaded that its mandatory application is necessary in the public interest, particularly when we are recommending reform to the rules which identify the governing law of the arbitration agreement. This latter reform would likely see more arbitration agreements governed by the law of England and Wales, rather than by foreign law. In turn, section 7 will tend to be applicable by default, rather than automatically disapplied. The end result is that the principle of separability will usually be available – unless the parties actively choose

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[284] *Enka Insaat ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38, [2020] 1 WLR 4117. In answering CQ 28, 11 consultees (17%) referenced *Enka v Chubb*.

otherwise. In the absence of a significant call for change, we think that this strikes the right balance between party autonomy and an important principle of practical utility.

11.17 Accordingly, we do not recommend any reform to section 7.

APPEALS FROM SECTION 9 (STAY OF LEGAL PROCEEDINGS)

Our position in the first consultation paper

11.18 Section 9 allows a party to an arbitration agreement to apply to court to stay legal proceedings. It is in Part 1 of the Arbitration Act 1996. It does not state expressly that a party can appeal a decision of the High Court under section 9 to the Court of Appeal. Other sections of the Arbitration Act 1996 do provide expressly for appeal.

11.19 An express right to appeal might appear to be necessary. Paragraph 37(2) of Schedule 3 to the Arbitration Act 1996 amended section 18(1) of the Senior Courts Act 1981, by adding paragraph (g), so that the Senior Courts Act 1981 reads as follows.

> (1) No appeal shall lie to the Court of Appeal –
>
> > (g) except as provided by Part I of the Arbitration Act 1996, from any decision of the High Court under that Part.

11.20 The result is that section 18(1) of the Senior Courts Act 1981 would appear to preclude an appeal to the Court of Appeal from a decision of the High Court under section 9 of the Arbitration Act 1996, because section 9 does not expressly provide for such an appeal.

11.21 In our first consultation paper, we noted that there is nothing in the DAC reports to suggest that it intended to preclude an appeal from section 9. The House of Lords has held that the apparent preclusion of an appeal on an application under section 9 was a drafting error,[285] and has proceeded on the basis that an appeal should be available. Authors agree with this approach.[286] We provisionally proposed taking the opportunity to correct the error.

11.22 We asked the following consultation question (CP1 CQ29):

> We provisionally propose to confirm that an appeal is available from a decision of the court under section 9 of the Arbitration Act 1996. Do you agree?

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285 *Inco Europe Ltd v First Choice Distribution* [2000] 1 WLR 586, 590, 592 (by Lord Nicholls).

286 *Russell on Arbitration* (24th ed 2015) para 7-039; *Merkin and Flannery on the Arbitration Act 1996* (6th ed 2020) p 213.

Consultees' views and recommendation

11.23 There were 57 responses to CP1 CQ29: 52 agreed, 4 disagreed, and 1 gave another response.

11.24 Four consultees objected on the basis that an appeal might lead to more court intervention and delay. However, the law (through case law) already allows an appeal; our proposal was simply to codify case law so that the Act reflects those corrections. We have not heard strong views that the House of Lords' approach should be reversed; indeed, it has found favour with commentators and stakeholders. We also think it is correct in principle that there should be a right of appeal.

11.25 Accordingly, we make the following recommendation.

Recommendation 15.

11.26 We recommend that the Arbitration Act 1996 be amended to confirm that an appeal is available from a decision of the court under section 9.

11.27 This recommendation is given effect by clause 13 of the draft Bill, which provides as follows.

> In section 9 of the Arbitration Act 1996 (stay of legal proceedings), at the end insert—
>
> > "(6) The leave of the court is required for any appeal from a decision of the court under this section."

11.28 This puts section 9 on the same footing as other sections in Part 1 of the Act.[287]

SECTIONS 32 AND 45 (COURT DETERMINATION OF PRELIMINARY MATTERS)

Current law

11.29 Section 32 concerns an application to the court to determine a preliminary point of jurisdiction. Section 45 concerns an application to the court to determine a preliminary point of law. Both contain similar subsections which must be satisfied before such an application can be considered by the court.

11.30 At present, an application under either section will not be considered by the court unless the following subsections are satisfied:

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[287] Similar phrasing can be found throughout the Act, for example: ss 24(6), 25(5), 42(5), 44(7) … 67(4), 68(4) and so on.

(1) the application is made with the agreement of all parties (subsection (2)(a)); or

(2) the application is made with the permission of the arbitral tribunal, and the court is satisfied that further requirements are met (subsection (2)(b)).

11.31 Those further requirements are: that the determination of the question is likely to produce substantial savings in costs (subsection (2)(b)(i)); that the application is made without delay (subsection (2)(b)(ii)); and, only in the case of section 32, that there is good reason why the matter should be decided by the court (subsection (2)(b)(iii)).

Our position in the first consultation paper

11.32 We considered the suggestion that an application to court might require either the agreement of the parties, or the permission of the tribunal – without any further requirements. We noted the views of authors that the courts rarely seem to labour over subsections (2)(b)(i) to (iii) anyway.[288] Reform could make the sections more streamlined, and perhaps more attractive to use.

11.33 We also made the following points.

11.34 First, the concern about costs in subsection (2)(b)(i) seems out of place. The parties have agreed, or the tribunal has decided, that the application is warranted. In any case, costs of the arbitration will be decided later by the tribunal. Meanwhile, the costs of the application to court, under section 32 or section 45, are costs which the court itself can rule on.

11.35 Similarly, the concern about delay in subsection (2)(b)(ii) also seems out of place, again when the parties have agreed, or the tribunal has decided, that the application is warranted, and any costs consequences are yet to be decided. At any rate, timeliness is already built into an application under section 32: a party who delays in objecting to the jurisdiction of the arbitral tribunal can lose the right to object.[289]

11.36 Second, subsection (2)(b)(iii) of section 32, which requires the court to be satisfied that there is good reason why the matter should be decided by the court, is absent from section 45. If it is dispensable in section 45, it is probably not needed in section 32 either.

11.37 Third, it is peculiar that the permission of the tribunal is not sufficient to allow the court to consider the application; the court must be satisfied as to further requirements. By contrast, the agreement of the parties is sufficient to allow the court to consider the application. If the agreement of the parties suffices, so too should the permission of the tribunal. There

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[288] *Merkin and Flannery on the Arbitration Act 1996* (6th ed 2020) pp 360 to 361, 507; *Russell on Arbitration* (24th ed 2015) para 7-162.

[289] By virtue of s 73, and this point is made explicitly in s 32(1).

can be no question of the court usurping the role of the arbitral tribunal, if the tribunal gives permission, or if the parties, whose agreement defines the jurisdiction of the tribunal, agree instead to revert to the court on these matters.

11.38 We noted also that the application must be made by a party;[290] the tribunal cannot refer the matter of its own motion (and thereby too readily divest itself of its duty to decide such matters).

11.39 Fourth, both sections 32 and 45 give the court a discretion to entertain the application (the court "may" determine the question raised).[291] So the court can already refuse inappropriate applications. This is not hampered by the loss of subsections (2)(b)(i) to (iii). And section 45 is not mandatory, so the parties can agree to opt-out of its availability. (In contrast, section 32 is mandatory.)

11.40 On the other hand, we asked, if the court has a discretion, then what factors influence its exercise? If it would still consider factors such as whether the application was made without undue delay, and whether a determination is likely to lead to substantial savings in costs, then the repeal of the requirements in subsections (2)(b)(i) to (iii) would have less impact. They would be re-introduced by the back door of discretion, so the impact of reform would be diminished.

11.41 We made no provisional proposal. Instead, we asked the following consultation question (CP1 CQ30):

> Do you think that an application under section 32 of the Arbitration Act 1996 (determination of preliminary point of jurisdiction) and section 45 (determination of preliminary point of law) should merely require either the agreement of the parties or the permission of the tribunal, and why?

Consultees' views

11.42 There were 56 responses to CP1 CQ30: 37 were in favour of simplifying, 16 were against, and 3 gave other responses.

11.43 In favour of simplifying, for example, Skadden, Arps, Slate, Meagher & Flom LLP said that to make the change:

> reinforces the importance the Act gives to party autonomy by having courts consider applications which either the parties or a party and the tribunal consider to be necessary.

11.44 Those who objected tended to say simply that the sections worked well enough in their current form.

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290 By virtue of subsection (1).

291 In *Taylor Woodrow Holdings Ltd v Barnes & Elliott Ltd* [2006] EWHC 1693 (TCC), [2006] 2 All ER (Comm) 735 at [56] by Jackson J, it was held that "may" gave a discretion whether to entertain an application under s 45.

Recommendation

11.45 We are also mindful of the following. In Chapter 3 of our second consultation paper, we noted that it might only be the court, not the tribunal, which can safely resolve the question of whether a matrix contract and its arbitration clause were ever agreed in the first place.[292] In *Azov Shipping Co v Baltic Shipping Co*,[293] the judge suggested that an early application under section 32 might be an appropriate route to deal with such a situation.[294] We think that this is an extra reason for simplifying section 32, to ensure such cases can reach the court more efficiently.

11.46 For the reasons above, and given the support of the majority of consultees, we recommend that sections 32 and 45 be simplified as follows.

Recommendation 16.

11.47 We recommend that the Arbitration Act 1996 be amended so that an application under section 32 (determination of preliminary point of jurisdiction), or under section 45 (determination of preliminary point of law), should merely require either the agreement of the parties or the permission of the tribunal.

11.48 This recommendation is given effect by clause 14 of the draft Bill, which provides as follows.

(1) The Arbitration Act 1996 is amended as follows.

(2) In section 32 (determination by court of preliminary point of jurisdiction)—

(a) in subsection (2)(b), omit the words from "and the court" to the end;

(b) omit subsection (3);

(c) in subsection (5), for "conditions specified in subsection (2) are" substitute "condition specified in subsection (2) is".

(3) In section 45 (determination by court of preliminary point of law)—

(a) in subsection (2)(b), omit the words from "and the court" to the end;

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292 CP2 paras 3.39 to 3.43.

293 [1999] 1 All ER 476.

294 [1999] 1 All ER 476, 479.

(b) in subsection (3), omit the words from "and, unless" to the end;

(c) in subsection (5), for "conditions specified in subsection (2) are" substitute "condition specified in subsection (2) is".

11.49 Subsections 5 refer to "condition" (in the singular) because, by subsections 2, a party must now satisfy only one of two alternative conditions (agreement of the parties or permission of the tribunal).

MODERN TECHNOLOGY

Our position in the first consultation paper

11.50 Naturally, the Arbitration Act 1996 does not refer explicitly to more recent technological developments or modern ways of working. However, we noted that various arbitral rules do provide for: the examination of witnesses remotely;[295] holding hearings remotely;[296] electronic communication;[297] electronic documentation;[298] the presentation of evidence and argument electronically, with no right to an oral hearing;[299] an electronic award;[300] signing the award electronically,[301] or with a cryptographic key;[302] and notifying the award electronically.[303] We also noted that some foreign legislation makes reference to remote hearings and electronic documentation.[304]

11.51 We thought that all this is compatible with the Arbitration Act 1996 without the need for explicit reference. For example, by section 52(3), the award shall be in writing and signed. By section 5(6), "in writing" includes its being recorded by any means. That can include an electronic document.[305] What counts as a signature is not defined by the Act, but,

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295 UNCITRAL Arbitration Rules 2021 / CIArb Arbitration Rules 2015, art 28(4).

296 ICC Arbitration Rules 2021, art 24(4), art 26(1); LCIA Arbitration Rules 2020, art 19.2; ICSID Arbitration Rules 2022, r 29(4)(f); LMAA Terms 2021, r 15(c); LME Arbitration Regulations 2022, r 7.4; AMINZ Arbitration Rules 2022 r 9.3; ACICA Rules 2021 rr 25.4, 35.5; LSAC 2020, cl 6.2(vi).

297 ICC Arbitration Rules 2021, art 3(2); LCIA Arbitration Rules 2020, art 4.

298 ICSID Arbitration Rules 2022, r 4(2). This is also encouraged in court proceedings: Commercial Court Guide (11th ed, 2022) J 2.1 to 2.2.

299 UKJT Digital Dispute Resolution Rules v 1.0 (2021), r 10.

300 UKJT Digital Dispute Resolution Rules v 1.0 (2021), r 12.

301 LCIA Arbitration Rules 2020, art 26.2; ICSID Arbitration Rules 2022, r 59(2); LMAA Terms 2021, r 24.

302 UKJT Digital Dispute Resolution Rules v 1.0 (2021), r 12.

303 LMAA Terms 2021, r 24; ACICA Rules 2021 r 42.5.

304 Federal Law No 6 of 2018 on Arbitration (UAE), art 33(3); Dutch Code of Civil Procedure, Book Four, Arbitration, art 1072b.

305 The DAC sought to be as broad as possible, saying that "in view of rapidly evolving methods of recording we have made clear that 'writing' includes recording by any means": *Report on*

as the Law Commission has previously reported, an electronic signature is capable in law of being used to execute a document, provided that there is an intention to authenticate the document.[306] By section 55(2), an award shall be notified to the parties by service on them of copies of the award. By section 76(3), a notice or any document may be served by "any effective means". This can include service by email.[307]

11.52 Some arbitral institutions tend to frame the benefits of technology in terms of improved cost and efficiency.[308] The International Centre for Settlement of Investment Disputes talks explicitly about leveraging technology to reduce their environmental footprint.[309] This is also the message of the Campaign for Greener Arbitrations,[310] which explains, for example, how remote hearings instead of flights can reduce carbon emissions.[311]

11.53 Under section 34 of the Act, the arbitral tribunal decides all procedural matters, subject to the right of the parties to agree any matter. We said that this is wide enough to include giving directions for remote hearings and electronic documentation. Nevertheless, to underline the importance of these procedural matters, we asked consultees whether it might be worth making explicit reference to them in the Act.

11.54 We made no provisional proposal. Instead, we asked the following consultation question (CP1 CQ31):

> Do you think that the Arbitration Act 1996 should make express reference to remote hearings and electronic documentation as procedural matters in respect of which the arbitral tribunal might give directions, and why?

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the Arbitration Bill (1996) para 34. The Law Commission has recently confirmed that English law is progressive and adaptive, so that "in writing" and signature requirements can be met in an electronic context: Electronic execution of documents (2019) Law Com No 386, from para 2.13. See too *Merkin and Flannery on the Arbitration Act 1996* (6th ed 2020) p 54.

306 Electronic Execution of Documents (2019) Law Com No 386.

307 See too *Merkin and Flannery on the Arbitration Act 1996* (6th ed 2020) pp 809 to 810.

308 CIArb, *Framework Guideline on the Use of Technology in International Arbitration* (2021) para 1.1; LCIA Arbitration Rules 2020, art 14.6(iii); UKJT Digital Dispute Resolution Rules v 1.0 (2021), r 9.

309 <https://icsid.worldbank.org/resources/rules-amendments>

310 <https://www.greenerarbitrations.com/>

311 <https://www.greenerarbitrations.com/impact>. Further environmental initiatives include the following: the Net Zero Lawyers Alliance, at <https://www.netzerolawyers.com/>, which commits to reducing emissions and providing net zero aligned advice; and the Chancery Lane Project, at <https://chancerylaneproject.org/>, which encourages the use of climate aligned clauses in contracts.

Consultees' views and conclusion

11.55 There were 68 responses to CP1 CQ31: 30 were in favour of making express reference to remote hearings, 34 were against, and 4 gave other responses.

11.56 Some consultees agreed with the idea of making such an express reference. Their reasons included that it would encourage the reduction of an arbitration's carbon footprint, or put beyond doubt that a remote hearing can be fair, and that a physical hearing is not always necessary.[312]

11.57 One consultee, Pinsent Masons LLP, suggested that the better approach was to make reducing the environmental impact of arbitration one of the general principles in section 1 of the Act.

11.58 As for those who disagreed with reform, their reasons included that: permitting one type of procedure might risk giving the impression that other types are not permitted; there is no need for reform, given that remote hearings already can and do happen; it risks making the Act outdated in the advent of newer technology.

11.59 For example, the Central Association of Agricultural Valuers said:

> We are not clear that these need to be stated at the risk of inadvertently precluding something else that might become appropriate. The current broad powers seem to cover the matter.

11.60 John Tackaberry KC said:

> Technology will go on evolving and the Act is sufficiently widely formulated for it to embrace such evolution. Condescending to specifics runs the risk of having to amend on a regular basis in future. Given the powers of the tribunal to decide how the proceedings are to be conducted it seems unnecessary to amend the Act.

11.61 We accept these majority views. Accordingly, we do not recommend reform to make express reference in the Act to remote hearings and electronic documentation.

SECTION 39 (POWER TO MAKE PROVISIONAL AWARDS)

Our position in the first consultation paper

11.62 Section 39 allows the parties to agree that the tribunal may order, on a provisional basis, any relief which it would have power to grant in a final award.[313] This explicitly includes, for instance, making provisional orders

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312 See too: ICCA, "Does a Right to a Physical Hearing Exist in International Arbitration?" (2022), available at <https://www.arbitration-icca.org/right-to-a-physical-hearing-international-arbitration>.

313 Arbitration Act 1996, s 39(1).

for the payment of money, disposition of property, or an order to make an interim payment on account of the costs of the arbitration.[314] Such orders are made subject to the tribunal's final adjudication.[315]

11.63 In the first consultation paper, we questioned whether a ruling under section 39 is a provisional award, as the heading of section 39 suggests, or a provisional order, as the body of section 39 suggests. This matters because there are different court enforcement mechanisms for awards and orders.

11.64 Specifically, tribunal awards can be enforced by the court under section 66, or challenged before the court under section 67, on the basis that the tribunal lacks jurisdiction, or section 68, on the basis of a serious irregularity, or section 69, which governs an appeal on a point of law. Whereas with tribunal orders, if a party fails to comply, the tribunal itself might issue a peremptory order under section 41, and if that is still not complied with, the peremptory order might be enforced by the court under section 42. Sections 67 to 69 do not apply to tribunal orders (only tribunal awards).

11.65 We referred to two cases. One was *BMBF*,[316] which upheld an award under section 39 without expressly discussing whether it should be an award rather than an order. The other was *Pearl Petroleum*,[317] which said that the body of section 39 (referring to orders) was "decisive", and gave the power to make an order, "not simply an award".[318] We noted that some authors thought that section 39 might concern both awards and orders.[319]

11.66 Ultimately, given that any ruling under section 39 is explicitly provisional, and subject to reconciliation in a final award, or even "reversal",[320] we thought that it would be premature to subject a ruling under section 39 to the full range of challenges against awards (under sections 67 to 69). We said that it may therefore be preferrable to amend the heading of section 39 to refer to orders (not awards).

11.67 We asked the following consultation question (CP1 CQ32):

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314 Arbitration Act 1996, s 39(2).

315 Arbitration Act 1996, s 39(3).

316 *BMBF (No 12) Ltd v Harland & Wolff Shipbuilding and Heavy Industries Ltd* [2001] EWCA Civ 862, [2001] 2 All ER (Comm) 385.

317 *Pearl Petroleum Co Ltd v Kurdistan Regional Government of Iraq* [2015] EWHC 3361 (Comm), [2016] 4 WLR 2.

318 [2015] EWHC 3361 (Comm), [2016] 4 WLR 2 at [18] by Burton J.

319 *Merkin and Flannery on the Arbitration Act 1996* (6th ed 2020) pp 408 to 410; *Russell on Arbitration* (24th ed 2015) para 6-021.

320 So said the DAC, *Report on the Arbitration Bill* (1996) para 202.

Do you think that section 39 of the Arbitration Act 1996 should be amended to refer to "orders" (rather than "awards"), and why?

11.68 There was a further issue, as follows. Section 39(1) provides that an arbitral tribunal can order on a provisional basis any "relief" which it could grant in a final award. The default powers of an arbitral tribunal are set out in section 48, which is headed "remedies". For internal consistency, we asked the following consultation question (CP1 CQ33):

Do you think that section 39(1) of the Arbitration Act 1996 should be amended to refer to "remedies" (rather than "relief"), and why?

Consultees' views

11.69 There were 55 responses to CP1 CQ32 (on orders versus award): 42 agreed that section 39 should refer to orders, 4 disagreed, and 9 gave other responses.

11.70 Some consultees said that there was no need for reform. Some said that section 39 should apply to both awards and orders. One consultee, Toby Landau KC, said that the reference to awards in section 39 was a "drafting glitch".

11.71 There were 49 responses to CP1 CQ33 (on remedies versus relief): 37 agreed that section 39 should refer to remedies, 6 disagreed, and 6 gave other responses.

11.72 Some consultees said that there was no problem here which needs addressing. Some said that there might be a difference between remedies and relief after all. For those who supported reform, the main reasons were: for consistency; and to avoid arguments based on a perceived linguistic difference.

Discussion and conclusion

11.73 Since the publication of our first consultation paper, judgment was handed down in *EGF v HVF*.[321] In that case, arbitrators issued an interim payment order, under section 39, in the form of a partial award.

11.74 Mr Justice Andrew Baker was not required to rule on section 39, but nevertheless he said as follows.[322] An interim payment is not "final and binding". Yet section 58 of the Act makes awards "final and binding". So that would be inconsistent with an interim payment taking the form of an award.

11.75 However, he said, section 58 applies "unless otherwise agreed by the parties". If the parties agree that the arbitrator has powers under section 39, that would be an agreement otherwise for the purposes of section 58.

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321 [2022] EWHC 2470 (Comm).

322 [2022] EWHC 2470 (Comm) at [110] to [115], and [117] to [120] (Andrew Baker J).

That would potentially make it possible for a ruling under section 39 to take the form of an award after all.

11.76 In this case, he said, the parties had agreed that the UNCITRAL Arbitration Rules would govern the arbitration. Article 26 of those Rules empowers an arbitrator to require an interim payment. This agreement, to apply the UNCITRAL Arbitration Rules, and in particular article 26, constituted an agreement within the scope of section 39. This would mean that an interim payment could take the form of an award in this case, at least compatibly with the Arbitration Act 1996. Except, however, that the UNCITRAL Arbitration Rules continue, by article 34, to require all awards to be final and binding after all, without any derogation (unlike section 58). Thus, he concluded, even if under the Act an interim payment could take the form of an award, that is not compatible with the UNCITRAL Arbitration Rules, and so not available on the facts of this case.[323]

11.77 We make the following points about *EGF v HVF*. First, what the judge said about section 39 was obiter (that is, not part of the binding decision). Second, neither *BMBF* nor *Pearl Petroleum* was cited, and therefore their differing analysis was not discussed. Third, there was also no reference to *Berkeley Burke Sipp Administration LLP v Charlton*,[324] in which Mr Justice Teare said that the purpose of the phrase "unless otherwise agreed by the parties" in section 58 was (merely) to allow for an arbitral appeal procedure.[325]

11.78 We continue to question whether something provisional can be an "award" properly so called. However, we are mindful that our original proposal was only a "minor" reform to tidy a perceived inconsistency between the heading and the body of section 39. But with the advent of *EGF v HVF*, the issue appears to be live, and the scope of the debate appears to have expanded beyond section 39 to consider its relationship with section 58, and its interaction with a major set of arbitral rules. In these changing circumstances, we think that it would be unwise to insist upon our original proposal. The application of section 39 does not appear to be causing a significant problem in practice, and we do not wish to risk unintended consequences, which may well be the result of recommending an amendment merely for the sake of neatness when the substantive implications have subsequently shown themselves to be greater than we originally estimated.

11.79 Accordingly, we make no recommendation to amend section 39.

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323 [2022] EWHC 2470 (Comm) at [121] to [124].

324 [2017] EWHC 2396 (Comm), [2018] 1 Lloyd's Rep 337.

325 [2017] EWHC 2396 (Comm), [2018] 1 Lloyd's Rep 337 at [17]. This view is endorsed in *Merkin and Flannery on the Arbitration Act 1996* (6th ed, 2020) § 58.2.

SECTION 70: TIME PERIODS

Our position in the first consultation paper

11.80 Under section 57, a tribunal can correct a clerical error in an award, or clarify any ambiguity. It can also make an additional award in respect of any claim which was presented to the tribunal but which was not dealt with in the award. The tribunal can do this, either of its own initiative, or on the application of a party.[326] An application by a party must be made within 28 days of the date of the award.[327] Any correction of an award must usually be made within 28 days of the date the application was received by the tribunal.[328] Any additional award must usually be made within 56 days of the date of the original award.[329]

11.81 Tribunal awards can be challenged before the court under section 67, on the basis that the tribunal lacks jurisdiction, or section 68, on the basis of a serious irregularity, or section 69, which governs an appeal on a point of law. Where a party makes an application under sections 67 or 68, or seeks to appeal under section 69, it must also comply with the further requirements of section 70.

11.82 Section 70 provides as follows:

> (1) …
>
> (2) An application or appeal may not be brought if the applicant or appellant has not first exhausted –
>
> (a) any available arbitral process of appeal or review, and
>
> (b) any available recourse under section 57 (correction of award or additional award).
>
> (3) Any application or appeal must be brought within 28 days of the date of the award or, if there has been any arbitral process of appeal or review, of the date when the applicant or appellant was notified of the result of that process.

11.83 It appears that the time limit in section 70(3) for making an application or bringing an appeal takes account of section 70(2)(a) but not section 70(2)(b). This matters because the time limits in section 57, as we have just seen, extend past the 28 day time limit of section 70(3).

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326 Arbitration Act 1996, s 57(3).

327 Arbitration Act 1996, s 57(4).

328 Arbitration Act 1996, s 57(5).

329 Arbitration Act 1996, s 57(6).

11.84 This is not the case in the UNCITRAL Model Law,[330] or in Scottish legislation,[331] which defer the running of time until after any correction or additional award.[332]

11.85 This matter has been partially corrected in England and Wales through case law.[333] That case law states that, if there has been an application under section 57 for a correction, then time runs from the date of that correction.

11.86 We said, in our first consultation paper, that it is appropriate to delay time running. It is unfair on a would-be appellant, and of little use to the court, to require a would-be appellant to launch an appeal to court before they understand the (uncorrected) arbitral award, or even before the additional award deals with the issue to be appealed.

11.87 The case law stresses that the application to the tribunal for correction or clarification must be *material* to the application or appeal under sections 67 to 69. A correction is material if it is necessary to enable a party to know if they have grounds to challenge an award.[334]

11.88 Again, we said that this is appropriate. For example, an appellant should not be able to ask the arbitral tribunal to make a correction of an inconsequential typographical error in an undisputed part of the arbitral award and, while that request is considered or acted upon, thereby win itself more time in which to appeal. The strict time limit of 28 days should not be circumvented in that way.

11.89 We provisionally proposed that section 70(3) be amended to codify the case law so that the time for bringing an application or appeal does not start to run until the outcome of any material application under section 57 is known.

11.90 The case law says that time runs from the date of the correction.[335] But what if the request for correction is rejected by the arbitral tribunal? The UNCITRAL Model Law says that time runs from when "the request has

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330 UNCITRAL Model Law, art 34(3).

331 Arbitration (Scotland) Act 2010, sch 1, r 71(4).

332 Scottish legislation allows for the correction of an award: Arbitration (Scotland) Act 2010, sch 1, r 58. Whereas the UNCITRAL Model Law allows for correction, interpretation, and an additional award: art 33.

333 *K v S* [2015] EWHC 1945 (Comm), [2015] 2 Lloyd's Rep 363; *Daewoo Shipbuilding & Marine Engineering Co Ltd v Songa Offshore Equinox Ltd* [2018] EWHC 538 (Comm), [2018] 1 Lloyd's Rep 443.

334 *K v S* [2015] EWHC 1945 (Comm), [2015] 2 Lloyd's Rep 363 at [24] by Teare J; *Daewoo Shipbuilding & Marine Engineering Co Ltd v Songa Offshore Equinox Ltd* [2018] EWHC 538 (Comm), [2018] 1 Lloyd's Rep 443 at [62] by Bryan J.

335 *K v S* [2015] EWHC 1945 (Comm), [2015] 2 Lloyd's Rep 363 at [20] by Teare J; *Daewoo Shipbuilding & Marine Engineering Co Ltd v Songa Offshore Equinox Ltd* [2018] EWHC 538 (Comm), [2018] 1 Lloyd's Rep 443 at [61] by Bryan J.

been disposed of" by the arbitral tribunal.[336] Scottish legislation says that time runs from "the date on which the tribunal decides whether to correct the award".[337] We provisionally thought that, for simplicity and consistency, it is best to adopt the language already found in section 70(3), so that time runs from the date when the applicant or appellant was notified of the result of its request.

11.91 We asked the following consultation question (CP1 CQ34):

> We provisionally propose that section 70(3) of the Arbitration Act 1996 should be amended so that, if there has been a request under section 57 for a correction or additional award material to the application or appeal, time runs from the date when the applicant or appellant was notified of the result of that request. Do you agree?

Consultees' views

11.92 There were 60 responses to CP1 CQ34: 57 agreed, 2 disagreed, and 1 gave another response.

11.93 As for the two consultees who disagreed, one said that there was no need for any reform, and the other was concerned that the reform might be used frivolously to buy time.

11.94 Two consultees, Allen & Overy LLP, and the Commercial Bar Association, agreed with our proposal, but added the following suggestion. Section 57 provides for a tribunal to correct an award or make an additional award. It is a default provision; the parties are explicitly free to agree other powers for the tribunal. In this regard, some institutional rules provide alternative regimes. These consultees suggested that time should run from when the process under either section 57 or any agreed replacement regime has been concluded.

11.95 We see the sense in this suggestion. Our proposal sought to uphold the requirement in section 70 to exhaust arbitral processes of review, while correcting the self-contradicting timescale. We think that it makes sense to correct the timescale, not just for default arbitral processes of review (under section 57), but also agreed arbitral processes (in lieu of section 57). This suggestion also finds support in the case law.[338]

Recommendation

11.96 For the reasons above, and given the majority support of consultees, we make the following recommendation.

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336 UNCITRAL Model Law, art 34(3).

337 Arbitration (Scotland) Act 2010, sch 1, r 71(4)(b).

338 *K v S* [2015] EWHC 1945 (Comm), [2015] 2 Lloyd's Rep 363 at [16] by Teare J; *Xstrata Coal Queensland Pty Ltd v Benxi Iron & Steel (Group) International Economic & Trading Co Ltd* [2020] EWHC 324 (Comm), [2020] 1 Lloyd's Rep 436 at [30] by Butcher J.

Recommendation 17.

11.97 We recommend that section 70(3) of the Arbitration Act 1996 be amended as follows. If there has been a request, under section 57 or an alternative regime agreed by the parties, for a correction or additional award material to the application or appeal, time runs from: the date of the correction or additional award; or (if the request is refused) the date when the applicant or appellant was notified of the result of that request.

11.98 This recommendation is given effect by clause 12 of the draft Bill, which provides as follows.

(1) Section 70 of the Arbitration Act 1996 (challenge or appeal: supplementary provisions) is amended as follows.

(2) In subsection (3), for the words from "the date of the award" to the end, substitute "the applicable date".

(3) After subsection (3) insert—

"(3A) In subsection (3), "the applicable date" means—

(a) in a case where there has been any arbitral process of appeal or review, the date when the applicant or appellant was notified of the result of that process;

(b) in a case where the tribunal has, under section 57, made a material correction to an award or has made a material additional award, the date of the correction or additional award;

(c) in a case where a material application for a correction to an award or for an additional award has been made to the tribunal under section 57 and the tribunal has decided not to grant the application, the date when the applicant or appellant was notified of that decision;

(d) in any other case, the date of the award.

(3B) For the purposes of subsection (3A)—

(a) an application under section 57,

(b) a correction to an award, or

(c) an additional award,

is "material" if any matter to which it relates is material to the application or appeal under section 67, 68 or 69."

(4) At the end insert—

"(9) In this section, a reference to available recourse, or to anything done, under section 57 includes a reference to available recourse, or to anything equivalent done, pursuant to agreement reached between the parties as mentioned in section 57(1)."

SECTION 70: APPEAL SUBJECT TO CONDITIONS

Our position in the first consultation paper

11.99 Section 70(6) provides that the court may order the applicant or appellant to provide security for costs. Section 70(7) provides that the court may order the applicant or appellant to bring into court any money payable under an arbitral award. Section 70(8) provides:

> The court may grant leave to appeal subject to conditions to the same or similar effect as an order under subsection (6) or (7).

11.100 We noted that section 70(8) has attracted criticism from authors for being circular,[339] and has no equivalent in Scottish legislation.[340]

11.101 Nevertheless, we said that section 70(8) could be given a sensible meaning. The first instance court can require security for costs or payment into court pending the determination of the application under sections 67 to 69. If an arbitral party then wishes to appeal the substantive decision of the first instance court, any appeal can similarly require security for costs or payment into court. In other words, section 70(8) is concerned, not with appealing a decision under sections 70(6) and (7), which would indeed risk being circular, but appealing the substantive decision under sections 67 to 69.

11.102 We asked the following consultation question (CP1 CQ35):

> We provisionally conclude that section 70(8) of the Arbitration Act 1996 (granting leave to appeal subject to conditions) should be retained as we consider that it serves a useful function. Do you agree?

Consultees' views and conclusion

11.103 There were 55 responses to CP1 CQ35: 48 agreed with our reasoning and proposal, and 7 gave other responses.

11.104 Among those who gave other responses, some consultees suggested changing the language of section 70(8) to match more clearly our interpretation. However, we think that the language of section 70(8) is

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339 *Merkin and Flannery on the Arbitration Act 1996* (6th ed 2020) p 776,

340 Arbitration (Scotland) Act 2010, sch 1, r 71.

already consistent with our interpretation; and any controversy over section 70(8) is limited. Accordingly, we recommend no reform to section 70(8).

SECTIONS 85 TO 88 (DOMESTIC ARBITRATION AGREEMENTS)

Our position in the first consultation paper

11.105 Sections 85 to 87 concern domestic arbitration agreements, but have never been brought into force. Section 85 defines domestic arbitration agreements as those where the seat of the arbitration is in the UK, and all the parties are resident or incorporated or managed in the UK. Section 86 gives the court an additional discretion to refuse to stay legal proceedings in favour of domestic arbitration. Section 87 restricts the ability of the parties in domestic arbitrations to opt-out of section 45 (preliminary determination of a point of law) and section 69 (appeal on a point of law).

11.106 Section 88, which is in force,[341] provides a power to repeal the previous sections.

11.107 The DAC were not persuaded that there should be any distinction between domestic and international arbitrations, but acknowledged that they had "not had an opportunity to make all the soundings we would like on this subject", and so preserved some distinctions in these separate sections.[342]

11.108 We said that there should not be any distinction between domestic and international arbitrations. After 25 years of the Arbitration Act 1996 operating without these sections, we did not think it necessary or appropriate to reintroduce distinctions from earlier legislation. Accordingly, we provisionally proposed that the power in section 88 be exercised to repeal sections 85 to 87.

11.109 We asked the following consultation question (CP1 CQ36):

> We provisionally propose that sections 85 to 87 of the Arbitration Act 1996 (on domestic arbitration agreements) should be repealed. Do you agree?

Consultees' views and recommendation

11.110 There were 51 responses to CP1 CQ36: 44 agreed, 5 disagreed, and 2 gave other responses.

11.111 In favour of repeal, for example, Ben Giaretta said:

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341 Arbitration Act 1996 (Commencement No 1) Order 1996 (SI 1996/3146), art 3.

342 DAC, *Report on the Arbitration Bill* (1996) paras 317 to 331.

Arbitration in England has survived for a long time without these sections and it is anomalous (and potentially confusing to someone unfamiliar with arbitration) to find them in the Act.

11.112 Against repeal, some consultees said that the sections should be brought into force, or at least that bringing them into force ought to be further explored in light of Brexit. Some consultees were in favour of bringing section 87 into force as a backdoor way to secure more appeals under section 69. (We have already concluded in Chapter 10 against any reform to increase the number of appeals under section 69.)

11.113 We continue to think that there should not be any distinction between domestic and international arbitrations. Arbitration in England and Wales has thrived without these distinctions for a quarter of a century. We think it appropriate to remove such possible distinctions from the Act. We note that most consultees agree. Therefore, we make the following recommendation.

Recommendation 18.

11.114 We recommend that sections 85 to 88 of the Arbitration Act 1996 be repealed.

11.115 This recommendation is given effect by clause 15 of the draft Bill, which provides as follows.

Omit the following provisions of the Arbitration Act 1996—

(a) sections 85 to 87 (domestic arbitration agreements) (which are not in force), together with the italic heading immediately before section 85, and

(b) section 88 (power to repeal or amend sections 85 to 87).

Chapter 12: Governing law

12.1 In this chapter, we discuss the rules for identifying which law will govern an arbitration agreement with an international dimension.

12.2 In broad terms, we recommend a new default rule be added to the Arbitration Act 1996, to provide that the arbitration agreement is governed by the law of the seat unless the parties expressly agree otherwise.

INTRODUCTION

12.3 Consider the following example. A Polish company and a Chinese company agree to build a factory in Germany. One of the clauses of the contract provides that any dispute will be resolved through arbitration in London (as a neutral venue).

12.4 Contract law guides us in resolving disputes about contracts (like what the contract means, or who is party to it). Where there is an international dimension to the contract, we need to identify which country's contract law will be relevant. In the above example, the contract to build a factory might be governed by Polish or Chinese or German or English law, or by another law. We need to identify which is the governing law of the contract.

12.5 When it comes to the governing law of an arbitration agreement, there are extra layers of complexity.

12.6 First, it is common, as in the example above, for an arbitration agreement to be a clause in a main contract (also called the matrix contract). Although the agreement to arbitrate is a clause in a matrix contract, the law sometimes treats the agreement to arbitrate as a free-standing or separable agreement.[343] It may be that the arbitration agreement and the matrix contract have different governing laws.

12.7 Second, the law of the matrix contract and arbitration agreement may or may not align with the law of the seat. The seat is the place where the arbitration is deemed to occur as a matter of law (even though a hearing might happen elsewhere, or it might be online). In the above example, the seat is England and Wales (London). The courts of the seat will be the ones to supervise the arbitral proceedings. In doing so, they will apply the curial law. The curial law is the mandatory arbitration law which the courts must apply to any arbitration seated in their jurisdiction (regardless of which law governs the arbitration agreement). For an arbitration with a seat in England and Wales, the curial law includes the mandatory

343 Arbitration Act 1996, s 7.

sections of the Arbitration Act 1996 (for example, prescribing how an arbitral award can be challenged).

CURRENT LAW

12.8 We discussed the current law in detail in our second consultation paper.[344] We include a summary here for convenience.

12.9 The leading case on the governing law of an arbitration agreement is the Supreme Court decision in *Enka v Chubb*.[345] It was a majority decision which, in summary, set out the following approach.[346]

(1) The law applicable to the arbitration agreement will be the law chosen by the parties to govern it or, in the absence of such a choice, the system of law with which the arbitration agreement is most closely connected.

(2) Where the law applicable to the arbitration agreement is not specified, a choice of governing law for the matrix contract will generally apply (as an implied choice) to the arbitration clause.

(3) However, other factors may instead imply that the arbitration agreement was intended to be governed by the law of the seat. Such factors include:

(a) any provision of the law of the seat which indicates that, where an arbitration is subject to that law, the arbitration agreement will also be treated as governed by that country's law; or

(b) the existence of a serious risk that, if governed by the same law as the matrix contract, the arbitration agreement would be ineffective.

(4) In the absence of any choice of law, the arbitration agreement is governed by the law with which it is most closely connected. According to the majority in the Supreme Court, where the parties have chosen a seat of arbitration, the closest connection will generally be to the law of the seat. (The minority said that the closest connection was to the law of the matrix contract.)

FIRST CONSULTATION PAPER

12.10 In the lead up to our first consultation paper, there was little discussion by stakeholders to suggest that we needed to review the rules about which law governs an arbitration agreement. Accordingly, at that stage we were

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344 CP2 paras 2.11 to 2.36.

345 *Enka Insaat ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38, [2020] 1 WLR 4117.

346 [2020] UKSC 38, [2020] 1 WLR 4117 at [170].

unpersuaded that the approach in *Enka v Chubb* was wrong or otherwise caused difficulties.[347]

12.11 However, we asked generally whether any topic which we had not shortlisted for potential reform needed to be reconsidered.[348] Thirty-one responses to our first consultation paper raised the issue of governing law.

12.12 Two of these consultees were in favour of leaving the law as it is. One consultee was in favour of codifying the minority view in *Enka v Chubb*. One suggested that, where the seat is specified, the governing law should be the law of the seat, otherwise the governing law should be that of the matrix contract. One suggested that the governing law should depend on whether the dispute was more closely connected to the matrix contract (like who was party to the agreement) or to the curial law (like questions of arbitrability). Four consultees encouraged us to revisit the issue without committing themselves to a particular view.

12.13 A further twenty-two consultees were in favour of reform. Although they used different language, a consistent theme emerged: they were generally in favour of a rule to the effect that the law of the seat should govern the arbitration agreement, unless the parties expressly agree otherwise. The reasons given by consultees were developed in our second consultation paper.

SECOND CONSULTATION PAPER

Our position

12.14 Because of the responses to our first consultation paper, we revisited the issue of governing law in a second consultation paper.

12.15 We made the following proposal, and asked consultees whether they agreed with it (CP2 CQ1):

> We provisionally propose that a new rule be included in the Arbitration Act 1996 to the effect that the law of the arbitration agreement is the law of the seat, unless the parties expressly agree otherwise in the arbitration agreement itself.

12.16 Our principal reasons adopted or developed the reasons given by consultees who responded to the first consultation paper in favour of reform, and were as follows.

12.17 We suggested that the effect of *Enka v Chubb* would be that many arbitration agreements would be governed by foreign law, even where the seat of the arbitration is specified as England and Wales. This is because

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347 CP1 paras 11.8 to 11.12.

348 CP1 CQ37; CP1 CQ 38.

arbitration agreements do not always specify a governing law, but matrix contracts do often specify a foreign governing law.

12.18 The law of England and Wales is supportive of arbitration. Foreign law might not be as supportive, particularly on questions of: arbitrability (whether this dispute can be resolved through arbitration); scope (whether this dispute falls within the arbitration agreement); and separability (whether the arbitration clause survives any invalidity of the matrix contract, enabling arbitration to resolve disputes about such invalidity). There is a risk that foreign law rules on these issues might preclude the arbitration from happening at all. It would be strange, we suggested, if an express choice to arbitrate in England and Wales could be negated by the workings of an implied choice of foreign governing law.

12.19 Further, if a foreign law governs the arbitration agreement, then, by virtue of section 4(5) of the Arbitration Act 1996, this will disapply the non-mandatory provisions of the Act. At least, it will disapply the non-mandatory provisions which are concerned with substantive matters. Procedural matters will remain governed by the curial law. Classifying statutory provisions as either substantive or procedural can produce some extra complexity.

12.20 We also suggested that the law in *Enka v Chubb* was complex and unpredictable. We noted that the Supreme Court itself was divided both on the law and how to apply the law to the facts of the case before it.

Consultees' views

12.21 There were 52 responses to CP2 CQ1: 36 were in favour of the proposal, 10 were against, and 6 expressed other views.

12.22 The principal reason given in favour of reform was that *Enka v Chubb* was complex and unpredictable. For example, Three Crowns LLP said that the big gain from our proposal would be simplicity and certainty. Bryan Cave Leighton Paisner LLP said that having a default rule in the Act would promote certainty, whereas the principles set out in *Enka v Chubb* are not straightforward to apply. Fenwick Elliott LLP said that reform would reduce conflict which often diverts energy from the real dispute, whereas *Enka v Chubb* had over-complicated matters.

12.23 Some consultees agreed with our analysis on the issues of arbitrability, scope, and separability. For example, Bird & Bird LLP said:

> Without this amendment, parties may be surprised to find they have chosen England & Wales as the safe seat of a foreign law governed contract, and then find themselves facing arguments about the arbitrability of their dispute or the severability of the arbitration agreement under the foreign law, which undermines the predictability of the arbitration regime they thought they were choosing.

12.24 Some consultees thought that it also made sense for there to be alignment between the law of the seat, which regulates the grounds on which a challenge could be brought against the jurisdiction of an arbitral tribunal, and the law of the arbitration agreement, which would determine substantively such jurisdiction.[349]

12.25 Some consultees in favour of reform nevertheless suggested that an express choice of governing law for the arbitration agreement ought not to be limited to being contained in the arbitration agreement itself. An express choice might be recorded in another clause, or agreed separately or later. In contrast, Reed Smith LLP approved of this limitation, saying that it would remove any discussion about where the parties' choice must be found and whether a choice of law in the matrix contract could be seen as a choice of law for the arbitration agreement.

12.26 Some consultees suggested that any reform which departs from *Enka v Chubb* should apply only to arbitration agreements entered into after the reform takes effect, in case parties had organised their existing affairs by reference to *Enka v Chubb*.

12.27 Against our proposal, some consultees made the following points. Some said that the approach in *Enka v Chubb* provides greater flexibility than our proposal. Some said that choice of court clauses and arbitration clauses should not have different regimes for identifying their governing law. Some said that a better approach is to decide factually what were the subjective intentions of the parties as regards governing law. Some said that the complexities involved with the operation of section 4(5) of the Arbitration Act 1996 are over-stated.

12.28 Some consultees were worried about misalignment between the substantive laws of the matrix contract and the arbitration agreement. In contrast, other consultees, who supported our proposal, said that the main problem of misalignment is between the procedural and substantives laws of the arbitration (which our proposal avoids).

DISCUSSION

12.29 The points made against our proposal are all reasonable concerns. We accept that there is no conclusive argument in favour of our proposal. Any approach to governing law will have its strengths and weaknesses. However, we think these concerns against our proposal are outweighed by the problems we have identified with the current approach, and by the potential gains from our proposal.

12.30 That said, there are further arguments against our proposal which require detailed analysis, which follows below.

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[349] See too: Ashford, P, "The proper law of the arbitration agreement" (2019) 85(3) *Arbitration* 276, 287.

12.31 Before that, however, we wish to make one further observation. The Supreme Court in *Enka v Chubb* acknowledged that the law of the seat might indicate that, where an arbitration is subject to that law, the arbitration agreement will also be treated as governed by that law. They said that this might be an exception which precludes a choice of law for the matrix contract applying to the arbitration clause.[350] It is compatible with that analysis for our proposal to suggest a default rule in favour of the law of the seat. A similar observation was made by Lord Hamblen and Lord Leggatt in their response to us. Which is to say, it is not an heretical response to *Enka v Chubb* to propose a situation which *Enka v Chubb* acknowledged could legitimately occur.

Party expectations

12.32 Some consultees, for example Linklaters LLP, and Lloyd's Market Association, said that parties have an expectation that, where they agree a law to govern the matrix contract, that law will govern all clauses in the matrix contract, including the arbitration clause – perhaps especially if that foreign law does not recognise the separability of arbitration agreements. And anyway, it was said, the fact that an arbitration agreement is separable does not mean it is separate. The criticism is that our proposal defeats these expectations.

12.33 In response, other consultees said that separability is a legal fiction (albeit a worthwhile one), which means its boundary is not a logical necessity, but is open to debate.[351] For example, it has been argued that the common law doctrine of separability goes further than the (on this basis, partial) codification in section 7 of the Arbitration Act 1996.[352] (Section 7 provides that an arbitration agreement will not be regarded as invalid, non-existent or ineffective just because the matrix contract is itself invalid, non-existent or ineffective.)

12.34 We also think that there is some logical inconsistency in the current approach of *Enka v Chubb*, as follows.[353]

12.35 Where a matrix contract has a governing law clause which says, for example, that "this contract is governed by law X", that is treated, quite rightly, as an express choice of law for the matrix contract. But it is not treated as an express choice of law for the arbitration clause.

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350 [2020] UKSC 38, [2020] 1 WLR 4117 at [70], [107(vi)].

351 Camilleri, S, "Sense and Separability" (2023) 72(2) *International & Comparative Law Quarterly* 509.

352 Ashford, P, "The proper law of the arbitration agreement" (2019) 85(3) *Arbitration* 276, 290.

353 See too: Nazzini, R, "The problem of the law governing the arbitration clause between national rules and transnational solutions" in Nazzini (ed), *Construction Arbitration and Alternative Dispute Resolution: Theory and Practice around the World* (2021); Waincymer, J, "Much Ado About ... The Law of the Arbitration Agreement - Who Wants to Know and For What Legitimate Purpose?" (2023) 40(4) *Journal of International Arbitration* (forthcoming).

12.36 In *Enka v Chubb*, the majority said that a choice of law for the matrix contract would "generally apply" to the arbitration clause, but it is only an "inference". They said that some factors may negate that inference to "imply" that the arbitration clause would be governed by the law of the seat.[354] The minority said that it was a "presumption" that a choice of law for the matrix contract would apply to the arbitration agreement, but that presumption could be rebutted.[355]

12.37 The court explained the existence of this inference or presumption on the basis that, when the parties say "this contract is governed by law X", they expect law X to govern the whole contract, including the arbitration clause.[356] However, we would suggest that, if that were true, then the choice of law clause would be an express choice for the arbitration clause too. It is inconsistent to say that an express choice of law which the parties expect to govern the whole contract only implicitly extends to the whole contract.

12.38 What is more, the law with the closest connection to the arbitration clause is the law of the seat, according to the majority in *Enka v Chubb*. It is again odd that a choice of law for the matrix contract would be implied to cover the arbitration clause when it is not the law most closely connected to the arbitration clause.

12.39 At any rate, other consultees said that, when parties choose to arbitrate at a particular seat, they expect the law of that seat to govern the arbitration, including the interpretation of the arbitration agreement.

12.40 A third view is that the expectation of the parties, when they choose, say, to arbitrate in London, is nothing more than an expectation that an arbitration will happen, and in London. Which governing law might apply is of no particular concern – until, for example, a foreign law deems the dispute non-arbitrable.

12.41 For example, the London Solicitors Litigation Association said:

> While it is acknowledged that international parties may not have appreciated that a different law to the governing law of the matrix contract may apply to the arbitration agreement and/or expect that the same law applies, it is equally likely that they would not have appreciated the consequences of such an outcome notwithstanding choosing London as the seat. The implications of a foreign law governed contract, including party evidence as to how foreign law governs the arbitration (which is likely to be time consuming and costly) and the ousting (unless also observed as part of foreign law) of English law on important topics often heralded as the benefits of an arbitration

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354 [2020] UKSC 38, [2020] 1 WLR 4117 at [170].

355 [2020] UKSC 38, [2020] 1 WLR 4117 at [257].

356 [2020] UKSC 38, [2020] 1 WLR 4117 at [43] (Lord Hamblen and Lord Leggatt), [231] (Lord Burrows).

> under English law, such as separability, arbitrability, scope and facilitation of a confidential resolution, are in many cases likely to be unintended consequences. A number of our members have expressed the view that when a party is electing London as a seat and its curial law, they are selecting English law to govern the arbitration agreement. This is often due to the fact that there may be many factors which mandate the choice of the governing law of the matrix agreement, but the choice of seat is intended to be a deliberate decision about the law governing the arbitration agreement. In any event, if there is a clear statement of the position as intended by the Law Commission, the parties know where they stand and any presumption can be displaced by agreement.

12.42 Similarly, the Commercial Bar Association said:

> The dominant expectation of parties who agree to arbitrate their disputes is that the process will be clear, certain, speedy and effective and not one mired in complex arguments as to differences between procedural law and substantive law governing the arbitration agreement… If parties refer their disputes to arbitration in England and Wales, particularly as a neutral country, they would not expect to become mired in the finer points of the arbitration law of another country.

12.43 We doubt that a singular expectation can be attributed to all arbitral parties. This is perhaps further reflected in the variety of approaches by foreign courts to the question of which law governs an arbitration agreement. For example, one study suggests that, across 80 jurisdictions, 51% apply the law of the seat, 34% apply the law of the matrix contract, 9% adopt a validation approach (like Switzerland), and 6% adopt an approach not aligned with a national law (like France).[357]

12.44 At any rate, a clear rule, like our proposal, would help establish expectations. Parties could reliably expect our proposal to apply the law of the seat by default. If they would rather have a different governing law, our proposal allows them to make a different express choice, and reliably expect that choice to be upheld.

Party autonomy

12.45 Some consultees, for example Professor Andrew Dickinson, suggest that our proposal limits party autonomy because it does not allow for implied choices.[358] Allen & Overy LLP also said that allowing for implied choices takes the edge off any argument about whether a choice was sufficiently express. Some consultees said that implied choices were allowed under

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357 Scherer, M, and O Jensen, "Towards a Harmonized Theory of the Law Governing the Arbitration Agreement" (2021) 10(4) *Indian Journal of Arbitration Law* 1, 4.

358 On the difference between party autonomy and party expectations, see: Mills, A, *Party Autonomy in Private International Law* (2018) pp 19 to 20.

the New York Convention, so that discounting them might be incompatible with the New York Convention.

12.46 Article V.1(a) of the New York Convention provides that recognition and enforcement of an award can be refused where the arbitration agreement "is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made". This is given effect by section 103(2)(b) of the Arbitration Act 1996. The Supreme Court has said that an "indication" could take the form of an express or an implied choice of governing law.[359]

12.47 There is a difference between the New York Convention being compatible with implied choices, and the New York Convention requiring the recognition of implied choices. We do not think that the New York Convention requires the recognition of implied choices.

12.48 Similarly, we acknowledge that section 4(5) of the Arbitration Act 1996 also allows for implied choices, but we do not think that this mandates the recognition of implied choices of law to govern the arbitration agreement.

12.49 Foreign law does not necessarily recognise implied choices, and there seems to be no suggestion that foreign law is incompatible with the New York Convention. Indeed, in *Enka v Chubb*, the Supreme Court acknowledged that there were rival views internationally on whether article V(1)(a) required an express choice or also allowed an implied choice.[360]

12.50 For example, the Arbitration (Scotland) Act 2010, section 6, applies Scots law as the law governing the arbitration agreement "unless the parties otherwise agree". The Explanatory Notes say that this is so unless the parties "explicitly" agree otherwise. In his commentary on the Act, Professor Davidson also talks in terms (only) of express choice.[361] *Redfern & Hunter* similarly reports that only an express choice will defeat the application of the law of the seat in China,[362] and in Sweden.[363] Of French courts (and those which follow their approach), Professor Scherer and Dr Jensen have said:

> [They] neither assess whether there was an implied choice of law, nor do they apply an objective connecting factor such as the law of the seat or the arbitration agreement's closest connection. Instead, they directly apply a substantive rule according to which it is only decisive whether,

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359 *Enka v Chubb* [2020] UKSC 38, [2020] 1 WLR 4117 at [129]; *Kabab-Ji SAL v Kout Food Group* [2021] UKSC 48, [2022] 2 All ER 911 at [33] to [34].

360 [2020] UKSC 38, [2021] 2 All ER 1, at [129].

361 *Davidson: Arbitration* (2nd ed 2012) para 9.02.

362 *Redfern & Hunter: Law and Practice of International Commercial Arbitration* (7th ed 2022) para 3.14.

363 *Redfern & Hunter: Law and Practice of International Commercial Arbitration* (7th ed 2022) para 3.31.

as a matter of fact, the parties intended to arbitrate and whether their agreement is in line with French mandatory law and international public policy.[364]

12.51 Conversely, other consultees said that our proposal aligns more definitively with the clear default rule in article V.1(b) of the New York Convention in favour of the law of the seat. In contrast, the default rule in *Enka v Chubb* is the closest connection test, which will (only) "generally" be the law of the seat.

12.52 For these reasons, we do not think that our proposal is incompatible with the New York Convention.

12.53 As for party autonomy more generally, our proposal preserves party autonomy in two ways. First, it allows the parties to make an express choice of governing law for the arbitration agreement. Second, it ensures that their express choice of arbitration is not undermined by an implied choice of governing law. This requires giving priority to the express choice of arbitration over an implied choice of governing law. We doubt that results in any overall reduction in party autonomy. Even if it does, we think that the reduction is modest, and is more than compensated by an increase in certainty, which is another value for parties.

The validation principle

12.54 To repeat, the Supreme Court in *Enka v Chubb* said that the existence of a serious risk that the arbitration agreement would be ineffective, if governed by the law of the matrix contract, was a factor which might imply that the arbitration agreement was intended to be governed by the law of the seat. This is known as the validation principle.

12.55 Some consultees suggested that our proposal should contain a validation principle. They said that this would address any concerns about arbitrability or separability, because the validation principle would trump any foreign law. Conversely, other consultees have said that the validation principle is itself uncertain, or should be erased.

12.56 We think that the validation principle applies to negate the inference (or rebut the presumption) that the choice of governing law for the matrix contract also applies to the arbitration agreement. This is primarily how the validation principle is positioned in *Enka v Chubb*. But since we are eschewing that starting inference, we do not need the validation principle for that purpose.

12.57 Another suggestion was to adopt a validation approach like Switzerland: the arbitration agreement is valid if it would be valid under the law of the matrix contract, or the law of the seat, or the chosen law. Others criticised

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[364] Scherer, M, and O Jensen, "Towards a Harmonized Theory of the Law Governing the Arbitration Agreement" (2021) 10(4) *Indian Journal of Arbitration Law* 1, 2 to 3.

this approach: if the arbitration agreement would be valid under more than one of these laws, still it does not identify which law governs.

12.58 Without the validation rule, there was said to be a risk that an arbitration agreement might be invalid under the law of England and Wales, as the law of the seat, when it might have been valid under a different law. Indeed, in *Enka v Chubb*, the majority suggested that even the closest connection test might itself be further subject to the validation principle.[365] However, Dr Manuel Penades said that, where the seat is England and Wales, it would be odd for the law of England and Wales to hold that the arbitration agreement is invalid, only for the law of England and Wales to defeat its own conclusion by applying a different law.[366]

12.59 Overall, given the pro-arbitration stance taken by the law of England and Wales, we think it would be rare for an arbitration agreement to be invalid under our law. Where it is invalid, we are not persuaded that our law should have a rule which helps circumvent itself. And anyway, the parties could avoid the problem by expressly choosing (at any stage) a different governing law.

No choice of seat

12.60 Professor Dickinson queried what would happen under our proposal if the seat is not chosen or designated. There cannot be a floating law. If it is unclear what the seat is, Edward Album suggested that the law of the matrix contract might apply. Similarly, Professor Alex Mills suggested that, if a seat is not specified, the closest connection might be the law of the matrix contract.

12.61 A pragmatic answer is that, under the current law, it is still uncertain what the governing law is. *Enka v Chubb*, for example, went all the way to the Supreme Court where the justices divided on what should be the governing law on the facts (as well as dividing on how in law to determine it) – after already divergent views in the courts below.[367] Realistically, in *Enka v Chubb*, no-one knew what law governed that arbitration agreement until after the Supreme Court rendered its decision.

12.62 A principled answer can also be found in the case law, as follows. Initially, the court said that a contract cannot have a floating law to be fixed at some later point in time, and that it was not possible for the governing law

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365 [2020] UKSC 38, [2020] 1 WLR 4117 at [146].

366 We note that, in Singapore, even if a dispute is arbitrable under the governing law of the arbitration agreement, it must also be arbitrable under Singaporean law if Singapore is the seat: *Anupam Mittal v Westbridge Ventures II Investment Holdings* [2023] SGCA 1.

367 At first instance, the judge thought the matter should be addressed, not by the English courts, but by the Russian courts: [2019] EWHC 3568 (Comm), [2020] Bus LR 463. The Court of Appeal thought that the choice of seat implied its law to govern the arbitration agreement, so that English law applied: [2020] EWCA Civ 574, [2020] 3 All ER 577. In the Supreme Court, the majority said that English law applied, not as an implied choice, but for having the closest connection; and the minority thought that Russian law applied: [2020] UKSC 38, [2020] 1 WLR 4117.

of a contract to change.[368] Subsequently, the court held that, while a contract cannot have a floating law, it was possible for the governing law of a contract to change.[369] And in other cases the court has indeed held that a governing law can be varied retrospectively, for example even by one party exercising a contractual option.[370]

12.63 Under the law of England and Wales, an arbitration always has to have a seat – but the seat need not be designated until after the arbitration is commenced.[371] Indeed, the Arbitration Act allows that a seat can be chosen after concluding the arbitration agreement: by section 3, the seat can be designated by the parties, or the tribunal, or an arbitral institution, or otherwise determined – presumably by the court.[372] The seat can also be changed by one of these methods.[373] In the meantime, the court can exercise powers under the Act even where a seat has not been designated.[374]

12.64 Some arbitral rules specify a default seat,[375] or provide (in the absence of agreement by the parties) for the seat to be determined by the tribunal,[376] or by the arbitral institution.[377]

12.65 What all this suggests for the present discussion is as follows. The seat of an arbitration can be designated after the arbitration agreement has been concluded. Where a seat is subsequently designated, that designation could trigger a retrospective change to the governing law – so that the arbitration agreement is now governed by the law of the seat. This appears, for example, to be an acceptable analysis in German law too.[378]

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368 *Armar Shipping Co Ltd v Caisse Algérienne d'Assurance et de Réassurance, The Armar* [1981] 1 WLR 207, 215 to 216 (Megaw LJ).

369 *Mauritius Commercial Bank Ltd v Hestia Holdings Ltd* [2013] EWHC 1328 (Comm), [2013] 2 All ER (Comm) 898 (Popplewell J).

370 *BP plc v National Union Fire Insurance Co* [2004] EWHC 1132 (Comm) at [31] to [38] (Colman J); *El Du Pont de Nemours & Co v Agnew* [1987] 2 Lloyd's Rep 585, 592 (Bingham LJ).

371 *Russell on Arbitration* (24th ed 2015) para 5-076; *Merkin and Flannery on the Arbitration Act 1996* (6th ed 2020) § 3.7.3.

372 *Merkin and Flannery on the Arbitration Act 1996* (6 th ed 2020) § 3.7

373 *Dubai Islamic Bank PJSC v Paymentech Merchant Services Inc* [2001] 1 All ER (Comm) 514, [2001] 1 Lloyd's Rep 65 at [41] to [42], [49] (by Aikens J).

374 Arbitration Act 1996, s 2.

375 LCIA Arbitration Rules 2020, art 16.2 (London); HKIAC Administered Arbitration Rules 2018, art 14.1 (Hong Kong); LMAA Terms 2021, r 6 (England); GAFTA Arbitration Rules No 125, r 1.2 (England); LME Arbitration Regulations 2022, s 7.7 (England and Wales).

376 LCIA Arbitration Rules 2020, art 16; HKIAC Administered Arbitration Rules 2018, art 14; SIAC Rules 2016, r 21.1; UNCITRAL Arbitration Rules 2021, art 18.1.

377 ICC Arbitration Rules 2021, art 18.1; SCC Arbitration Rules 2023, art 25.

378 Scherer, M, and O Jensen, "The Law Governing the Arbitration Agreement: A Comparative Analysis of the United Kingdom Supreme Court's Decision in Enka v Chubb" [2021] *IPRax* 177, 187.

12.66 Until the seat is designated, there cannot be a floating law. But if it was necessary to identify an initial governing law for the arbitration agreement, prior to the designation of a seat, that would fall to the usual common law principles (as in *Enka v Chubb*). We think that would be rare. Indeed, if there was ever any doubt about an initial governing law, by the time the matter ended up before the court, in all likelihood the seat would have been designated by then – or perhaps could be designated by the court itself – thus overwriting any previous uncertainty by identifying the law of the seat as the governing law (both now and retrospectively).

12.67 An alternative approach might be to limit our proposal only to those situations where the parties agree the seat in the arbitration agreement, or agree that the seat is England and Wales. This is the position under the Arbitration (Scotland) Act 2010, section 6. However, Professor Davidson suggested that there was no need for the Scottish legislation to have been so limited. He said that the legislation might have extended to cases where the seat was designated, rather than chosen by the parties.[379] To that extent, his analysis of the position in Scotland supports our approach to reform of our Act.

12.68 By applying our proposed default rule to an arbitration with *any* seat, and not just a seat in England and Wales, we think that the default rule potentially captures and resolves a wider range of circumstances.

12.69 For example, a response co-ordinated by some members of Brick Court Chambers said:[380]

> we are of the view … that the application of the rule to all arbitrations (and not simply to arbitrations seated in England and Wales) is important. It will have the benefit of clarity and avoid further arguments as to the law applicable to the arbitration agreement in enforcement proceedings. It will put paid to any argument that the proposed rule in favour of the law of the seat is a parochial one in favour of English law. It will resolve problems such as those which arose in Kabab-ji v Kout Food … resulting in different outcomes as to the validity of the award in England and in France.

12.70 Other rules similarly apply the law of any seat. For example, the Swedish Arbitration Act states that, where the parties have not agreed a governing law for the arbitration agreement, it shall be the law of the country where the arbitration had or shall have its seat.[381] That Act also states that the seat can be designated by the arbitrators.[382]

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379 *Davidson: Arbitration* (2nd ed 2012) para 9.02.

380 Those who subscribed to this response are listed in Appendix 2.

381 Swedish Arbitration Act, s 48.

382 Swedish Arbitration Act, s 47.

12.71 Similarly, the LCIA Arbitration Rules state that the law of the seat will be the governing law of the arbitration agreement[383] – having already acknowledged that the parties may agree the seat after concluding the arbitration agreement,[384] and that the tribunal may rule so as to change the seat.[385]

RECOMMENDATION

12.72 We reiterate that a default rule in favour of the law of the seat would see more arbitration agreements governed by the law of England and Wales, when those arbitrations are also seated here. This would ensure the applicability of the doctrine of separability, along with its practical utility. It would give effect to the more generous rules on arbitrability and scope which our courts have seen fit to develop. It would remove a layer of uncertainty surrounding the effects of section 4(5).

12.73 A new default rule would preserve party autonomy in the choice to arbitrate, without that express choice being undermined by an implied choice of foreign governing law with potentially less generous provisions on arbitrability, scope, and separability. It would avoid satellite arguments about the position taken by a foreign arbitration law on arbitrability, scope, and separability, and any need to overcome deficiencies by applying a validation principle. It would also preserve party autonomy in the ability of the parties to override the default rule by making an express choice of law to govern the arbitration agreement. For example, we think that if parties agree to arbitral rules, or incorporate them by reference, and those rules contain a choice of governing law for the arbitration agreement, that too could count as an express choice.[386]

12.74 A new default rule would have the virtues of simplicity and certainty. In contrast, the approach in *Enka v Chubb* is legally complex and can be unpredictable in its application to the facts. The current law risks being an opportunity for satellite argument, which in turn is productive of unnecessary cost and delay.

12.75 Under a new default rule, any doubt over which law governs the matrix agreement would not infect the question of which law governs the arbitration agreement. The new rule would apply whether the arbitration was seated in England and Wales, or elsewhere. It would apply whether the seat was chosen by the parties, or otherwise designated.

12.76 Accordingly, we make the following recommendation.

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383 LCIA Arbitration Rules 2020, art 16.4.

384 LCIA Arbitration Rules 2020, art 16.1.

385 LCIA Arbitration Rules 2020, art 16.2.

386 See too: Arbitration Act 1996, s 4(3); *Davidson: Arbitration* (2nd ed 2012) para 9.02.

Recommendation 19.

12.77 We recommend that the Arbitration Act 1996 be amended to provide that the arbitration agreement is governed by the law of the seat, unless the parties expressly agree otherwise.

12.78 This recommendation is given effect by clause 1 of the draft Bill, which provides as follows.

(1) The Arbitration Act 1996 is amended as follows.

(2) After section 6 insert—

"6A Law applicable to arbitration agreement

(1) The law applicable to an arbitration agreement is—

(a) the law that the parties expressly agree applies to the arbitration agreement, or

(b) where no such agreement is made, the law of the seat of the arbitration in question.

(2) For the purposes of subsection (1), agreement between the parties that a particular law applies to an agreement of which the arbitration agreement forms a part does not, of itself, constitute express agreement that that law also applies to the arbitration agreement.

(3) This section does not apply in relation to an arbitration agreement that was entered into before the day on which section 1 of the Arbitration Act 2023 comes into force."

(3) In section 2 (scope of application of provisions), in subsection (2) after the opening words insert—

"(za) section 6A (law applicable to arbitration agreement),".

Chapter 13: Recommendations

Recommendation 1.

13.1 We recommend that the Arbitration Act 1996 should provide that arbitrators have a continuing duty to disclose any circumstances which might reasonably give rise to justifiable doubts as to their impartiality.

Paragraph 3.75

Recommendation 2.

13.2 We recommend that an arbitrator should be under a duty to disclose what they actually know and what they ought reasonably to know.

Paragraph 3.99

Recommendation 3.

13.3 We recommend that an arbitrator should incur no liability for resignation unless the resignation is shown to be unreasonable.

Paragraph 5.35

Recommendation 4.

13.4 We recommend that an arbitrator should not incur costs liability in respect of an application for their removal under section 24 of the Arbitration Act 1996 unless the arbitrator has acted in bad faith.

Paragraph 5.65

Recommendation 5.

13.5 We recommend that the Arbitration Act 1996 should provide that, subject to the agreement of the parties, an arbitral tribunal may, on the application of a party, issue an award on a summary basis.

Paragraph 6.24

Recommendation 6.

13.6 We recommend that the procedure adopted to determine any application for summary disposal should be a matter for the tribunal, having consulted with the parties.

Paragraph 6.34

Recommendation 7.

13.7 We recommend that an arbitral tribunal may make an award on a summary basis in respect of an issue only if the tribunal considers that a party has no real prospect of succeeding on that issue.

Paragraph 6.51

Recommendation 8.

13.8 We recommend that section 44 of the Arbitration Act 1996 be amended to confirm that court orders thereunder can be made against third parties.

Paragraph 7.27

Recommendation 9.

13.9 We recommend that the requirement for the court's consent to an appeal of a decision made under section 44 of the Arbitration Act 1996 should not apply to third parties, who should have the usual rights of appeal.

Paragraph 7.40

Recommendation 10.

13.10 We recommend that the Arbitration Act 1996 be amended as follows:

(1) to empower an emergency arbitrator, whose order has been ignored, to issue a peremptory order, which, if still ignored, might result in the court ordering compliance;

(2) to allow an emergency arbitrator to give permission for an application under section 44(4).

Paragraph 8.42

Recommendation 11.

13.11 We recommend that legislation confer the power to make rules of court to implement the following.

13.12 Where an objection has been made to the tribunal that it lacks jurisdiction, and the tribunal has ruled on its jurisdiction, then in any subsequent challenge under section 67 by a party who has taken part in the arbitral proceedings:

(1) the court will not entertain any new grounds of objection, or any new evidence, unless even with reasonable diligence it could not have been put before the tribunal;

(2) evidence will not be reheard, save in the interests of justice.

Paragraph 9.96

Recommendation 12.

13.13 We recommend that the Arbitration Act 1996 be amended to confirm that section 32 is available only as an alternative to the tribunal ruling on its jurisdiction.

Paragraph 9.123

Recommendation 13.

13.14 We recommend that section 67 of the Arbitration Act 1996 be amended to provide the remedies of: declaring the award to be of no effect, in whole or in part; and remitting the award to the tribunal, in whole or in part, for reconsideration – with the proviso that the court must not exercise its power to set aside or to declare an award to be of no effect, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration.

Paragraph 9.145

Recommendation 14.

13.15 We recommend that the Arbitration Act 1996 be amended to provide explicitly that an arbitral tribunal is able to make an award of costs in consequence of a ruling by the tribunal or by the court that the tribunal has no substantive jurisdiction.

Paragraph 9.156

Recommendation 15.

13.16 We recommend that the Arbitration Act 1996 be amended to confirm that an appeal is available from a decision of the court under section 9.

Paragraph 11.26

Recommendation 16.

13.17 We recommend that the Arbitration Act 1996 be amended so that an application under section 32 (determination of preliminary point of jurisdiction), or under section 45 (determination of preliminary point of law), should merely require either the agreement of the parties or the permission of the tribunal.

Paragraph 11.47

Recommendation 17.

13.18 We recommend that section 70(3) of the Arbitration Act 1996 be amended as follows. If there has been a request, under section 57 or an alternative regime agreed by the parties, for a correction or additional award material to the application or appeal, time runs from: the date of the correction or additional award; or (if the request is refused) the date when the applicant or appellant was notified of the result of that request.

Paragraph 11.97

Recommendation 18.

13.19 We recommend that sections 85 to 88 of the Arbitration Act 1996 be repealed.

Paragraph 11.114

Recommendation 19.

13.20 We recommend that the Arbitration Act 1996 be amended to provide that the arbitration agreement is governed by the law of the seat, unless the parties expressly agree otherwise.

Paragraph 12.77

Appendix 1: Terms of reference

The Law Commission is asked to undertake a review of the current legal framework for arbitration, and in particular the Arbitration Act 1996.

The review will determine whether there are any amendments which could and should be made to the current legal framework to ensure that it is fit for purpose and that it continues to promote the UK as a leading destination for commercial arbitrations.

The Commission and the Department recognise the value of arbitration to the UK economy, and resolve that the review should be conducted in a manner which aims to enhance the competitiveness of the UK as a global centre for dispute resolution and the attractiveness of English and Welsh law as the law of choice for international commerce. The review will be conducted in close consultation with non-Governmental stakeholders, particularly legal practitioners involved in arbitrations, to ensure their views are accurately taken into account.

The Commission will publish a scoping study or report with recommendations for law reform, depending on the outcome of its consultation with stakeholders and in agreement with the Department.

Appendix 2: List of consultees

Following the publication of our first consultation paper –

We received responses from the following consultees:

Edward Album

Allen & Overy LLP

Clare Ambrose

ARIAS (UK)

Association of Consumer Support Organisations (ACSO)

Bargate Murray Ltd

Imran Benson

Beth Din of the Federation of Synagogues

Daniel Bovensiepen

The following members of Brick Court Chambers: Lord Hoffmann, Lord Phillips, Sir Richard Aikens, Sir Christopher Clarke, Hilary Heilbron KC, Vernon Flynn KC, Salim Moollan KC, Kyle Lawson, Zahra Al-Rikabi, Emilie Gonin, Jessie Ingle, Allan Cerim, Andris Rudzitis, Sir Gerald Barling Craig Morrison, Sir Paul Walker Georgina Petrova, Simon Thorley KC, Jonathan Scott, Richard Lord KC, Charlotte Thomas, Fionn Pilbrow KC, Sarah Bousfield, Klaus Reichert SC, Ben Woolgar – together with Lord Mance, Sir Bernard Rix, and Ricky Diwan KC

British Coffee Association

British Insurance Law Association

Bryan Cave Leighton Paisner LLP

Andrew Burr

Mark Campbell

Guido Carducci

Central Association of Agricultural Valuers

Centre of Construction Law & Dispute Resolution, King's College London

City of London Law Society, Arbitration Committee

YK Chan

Chartered Institute of Arbitrators

Graham Chase

Cyril Chern

Claimspace Limited

James Clanchy

Chancery Bar Association

Cleary Gottlieb Steen & Hamilton LLP

Clifford Chance LLP

Commercial Bar Association

Rhodri Davies KC

Lisa Dubot, Raid Abu-Manneh, and Rachael O'Grady

Stuart Dutson

Falcon Chambers

Federation of Commodity Associations

Fieldfisher LLP

Louis Flannery KC

Sir Julian Flaux, Mrs Justice O'Farrell DBE, Mr Justice Foxton, and Mr Justice Henshaw, on behalf of the judges of the Business & Property Courts in London

FOSFA International

Dr Robert Gay

General Council of the Bar of England and Wales

Ben Giaretta

Gowling WLG (UK) LLP

Grain and Feed Trade Association (GAFTA)

Greenberg Traurig LLP

Jan Grimshaw

Dr Uglješa Grušić

John Habergham

Lord Hamblen and Lord Leggatt

Geoffrey Beresford Hartwell

Haynes and Boone CDG, LLP

Hilary Heilbron KC

Herbert Smith Freehills LLP

Holman Fenwick Willan LLP

Dr Sara Hourani

Michael Howard KC

ICC International Court of Arbitration

ICC UK Arbitration & ADR Committee

Institute of Family Law Arbitrators

Emmanuel Thomas Mathai Kandamchira

Anthony Kennedy

Paul Key KC

Michael Kotrly

Martin Y C Kwan

Toby Landau KC

Louise Lanzkron and Nick Peacock

Law Society of England and Wales

Michael Lever, on behalf of The Rent Review Specialist

Linklaters LLP

Lloyd’s Market Association

London Beth Din

London Court of International Arbitration

London Maritime Arbitrators Association

Dr Paul MacMahon

Dr Aygun Mammadzada

Joseph Michael Matthews

Alex McIntosh and Chris Ward

Professor Alex Mills

Ethan Naish

Charles Oliver

Orrick, Herrington & Sutcliffe (UK) LLP

Dr Manuel Penades

Pinsent Masons LLP

Rowan Planterose

Property Bar Association

Nigel Puddicombe

John Pugh-Smith

Thomas Raphael KC

Reed Smith LLP

Klaus Reichert SC

Dr Michael Reynolds

Royal Institution of Chartered Surveyors

Ian Salisbury

Adam Samuel

Audley Sheppard KC

Aditya Singh

Skadden, Arps, Slate, Meagher & Flom (UK) LLP

Matthew Skinner and Garreth Wong of Shearman & Sterling LLP

Spotlight on Corruption

Sugar Association of London, and the Refined Sugar Association

John Tackaberry KC, and on behalf of 39 Essex Chambers, and the Society of Construction Law, and the Society of Construction Arbitrators

Technology and Construction Bar Association

Simon Tolson

Travers Smith LLP

University of Aberdeen School of Law

University of Southampton Law School

Gilberto José Vaz

Glenda Vencatachellum

Rebecca Warder

Allan W Wood

Timothy Young KC

We also received two anonymous responses.

We heard from consultees at events hosted by the following:

All Party Parliamentary Group on ADR

Ankura Consulting Group LLC

Arbitration Support and Know-How (ASK) Group

Brick Court Chambers

British Institute of International and Comparative Law / Debevoise & Plimpton LLP

Bryan Cave Leighton Paisner LLP

Chartered Institute of Arbitrators

Mr Justice Foxton and members of HM Judiciary

International Arbitration Club

International Chamber of Commerce

London Shipping Law Centre

Society of Construction Arbitrators

Université Paris-Panthéon-Assas

We had discussions or correspondence with the following:

Freshfields Bruckhaus Deringer LLP

Jacob Grierson

Baron Hoffmann

Professor Julian Lew KC

London Beth Din

London Maritime Arbitrators Association

Poonam Melwani KC

Salim Moollan KC

Professor Russell Sandberg

Slaughter and May

Swithun Still

Melanie Willems

Withers LLP

Antony Woodhouse

We read the following articles and commentary written about our first consultation paper:

“Law Commission Releases Preliminary Findings on EAA 1996” (2022) CIArb News

"Law Commission consults on arbitration reforms" (2022) Construction Law

"Reforming the Arbitration Act 1996" (2022) New Law Journal

"New reforms to ensure UK retains position as leader in international arbitration" (2022) Politics Home

Ambrose, C, "Review of the Arbitration Act 1996: Responses to the Law Commission Consultation Paper" (2022) 88(4) Arbitration 494

Ames, J, "Lawyers back arbitration act update to boost City" (2022) The Times

Baldwin, A, "Law agency says arbitration can't always be confidential" (2022) Law 360

Ballantyne, J, "Reforms proposed for England's 1996 Act" (2022) Global Arbitration Review

Bell, G, E Crowther and C Richards, "Arbitration Act – consultation launched on proposed reforms" (2022) Mondaq

Berard, M, and B Barrat, "Law Commission of England and Wales proposes refresh rather than overhaul of Arbitration Act 1996" (2022) The International Law Office

Brekoulakis, S, "Review of the Arbitration Act 1996: Responses to the Law Commission Consultation Paper" (2022) 88(4) Arbitration 475

Chong, P, J Carter, E Thomas and B Fletcher, "The Law Commission's review of the Arbitration Act 1996 – polishing 'a gold standard'?" (2022) Lexology

Drummond, I, "Law Commission consultation provides opportunity to shape future practice" (2022) Lexology

Evans, J, and N Osborne, "The diversity problem in arbitration" (2022) The Global Legal Post

Flannery, L, "Review of the Arbitration Act 1996: Responses to the Law Commission Consultation Paper" (2022) 88(4) Arbitration 509

Gearon, P, and D Alhouti, "Proposed changes to the Arbitration Act 1996: anything contentious?" (2022) Lexology

Giaretta, B, "The Law Commission's Review of the Arbitration Act 1996" (2022) Lexology

Giaretta, B, "Review of the Arbitration Act 1996: Responses to the Law Commission Consultation Paper" (2022) 88(4) Arbitration 506

Lord Goldsmith KC, S Rowe, P Taylor, C Blake, S Aren, S Ewad, D Moise, A Mozetič and M Epishkin, "The Future of Arbitration in England: The Law Commission's Consultation on the English Arbitration Act 1996" (2022) Mondaq

Goss, L, “Lawyers welcome plans to boost arbitration laws to secure London’s status as leading disputes hub” (2022) City AM

Grierson, J, “Two Brief Comments on the Law Commission’s Proposed Reform of the Arbitration Act 1996” (2022) 39(6) Journal of International Arbitration 765

Hewing, N, and A Marshall, “Proposed updates to the Arbitration Act 1996” (2022) The Law Society Gazette

Hilborne, N, “Law Commission seeks ban on discrimination in appointing arbitrators” (2022) Legal Futures

Hodges, P, C Tevendale, C Parker KC, A Cannon, E Kantor and V Naish, “Fine-tuning the English Arbitration Act: reactions to the Law Commission’s consultation paper” (2022) Lexology

Horvath-Franco, D, and D Reed, “Consultation on changes to the 1996 Arbitration Act: what you need to know” (2022) The Global Legal Post

Hyde, J, “Lawyers pleased with proposals to ‘evolve’ arbitration rules” (2022) The Law Society Gazette

Leonard, E, and A Ehtash, “The future of arbitration in construction” (2022) The Construction Index

Malek, A, C Harris, P Bonner Hughes, “Review of the Arbitration Act 1996: Responses to the Law Commission Consultation Paper” (2022) 88(4) Arbitration 516

Marsden, O, J Kelly, C Everett, “Summary Dismissal in Arbitration” (2023) 4(3) *Amicus Curiae* 669

Miles, J, D Newbound, P Rosher and B Rutkowski, “A short guide to the Law Commission of England and Wales’ consultation on the Arbitration Act 1996” (2023) Lexology

Miles, W, “Review of the Arbitration Act 1996: Responses to the Law Commission Consultation Paper” (2022) 88(4) Arbitration 534

Moody, S, “‘Evolution’ not ‘Revolution’: BCLP survey examines England’s 1996 Act” (2022) Global Arbitration Review

Parsons, A, “How the UK plans to remain a world leader in international arbitration” (2022) Lexology

Quinn, J, “Law Commission publishes consultation paper on its review of the Arbitration Act 1996” (2022) Lexology

Rigby, B, “‘Fine-tuning rather than root and branch reform’: top lawyers welcome plans to update UK’s Arbitration Act” (2022) The Global Legal Post

Storrs, N, and G Broughall, “The Law Commission’s Consultation on the Arbitration Act 1996: Fine-tuning or full-on reform?” (2022) Lexology

Vasani, S, G Pendell and L Reimschussel, “Law Commission releases proposed reforms to English Arbitration Act” (2022) Lexology

Woods, L, and B Lindsay, “The Law Commission’s proposed revisions to the Arbitration Act 1996” (2022) Lexology

Following the publication of our second consultation paper –

We received responses from the following consultees:

Acorn Rural Property Consultants LLP

Edward Album

Allen & Overy LLP

Dr Simon Allison

Clare Ambrose

Professor Georgia Antonopoulou

Peter Ashford

David Barnett

Bird & Bird LLP

Professor Ronald A Brand

The following members of Brick Court Chambers: Lord Hoffmann, Lord Phillips, Sir Richard Aikens, Sir Christopher Clarke, Hilary Heilbron KC, Vernon Flynn KC, Salim Moollan KC, Kyle Lawson, Zahra Al-Rikabi, Emilie Gonin, Jessie Ingle, Allan Cerim, Andris Rudzitis, Sir Gerald Barling Craig Morrison KC, Sir Paul Walker Georgina Petrova, Simon Thorley KC, Jonathan Scott, Richard Lord KC, Charlotte Thomas, Fionn Pilbrow KC, Sarah Bousfield, Klaus Reichert SC – together with Lord Mance, Sir Bernard Rix, and Ricky Diwan KC.

Professor Adrian Briggs

British Coffee Association

British Insurance Law Association

Bryan Cave Leighton Paisner LLP

Centre of Construction Law & Dispute Resolution, King's College London

YK Chan

Chartered Institute of Arbitrators

City of London Law Society, Arbitration Committee

Clifford Chance LLP

Commercial Bar Association

Jacques Covo

Professor Andrew Dickinson

Professor Can Eken

Falcon Chambers

Federation of Commodity Association

Fenwick Elliott LLP

Sir Julian Flaux, Mrs Justice O'Farrell DBE, Mr Justice Foxton and Mr Justice Henshaw, on behalf of the judges of the Business & Property Courts in London

Bruce Friedman

GAFTA

Dr Robert Gay

General Council of the Bar of England and Wales

Geoffrey Beresford Hartwell

Professor Uglješa Grušić

Hilary Heilbron KC

Herbert Smith Freehills LLP

ICC International Court of Arbitration

International Cotton Association, Arbitration Strategy Committee

Paul Key KC

Toby Landau KC

Law Society of England & Wales

Linklaters LLP

Lloyd's Market Association

London Court of International Arbitration

London Maritime Arbitrators Association

London Solicitors Litigation Association

Professor Alex Mills

Dr Manuel Penades

Pinsent Masons LLP

Reed Smith LLP

Royal Institution of Chartered Surveyors

Ian Salisbury

Adam Samuel

Professor Maxi Scherer

Spotlight on Corruption

The following members of Three Crowns LLP: Constantine Partasides KC, Leilah Bruton, Hamid Abdulkareem, Jonathan Fernandes, Maanas Jain, Himmy Lui

Pierre-Yves Tschanz

University of Aberdeen School of Law

We had discussion or correspondence with the following:

Edward Album

Professor Georgia Antonopoulou

Leilah Bruton

Professor Andrew Dickinson

Dr Elizabeth Dalgarno

Nikki Dhillon Keane

Penningtons Manches Cooper LLP

Three Crowns LLP

Professor Jeffrey Waincymer

Withers LLP

We heard from consultees at events hosted by the following:

International Bar Association, Insurance Committee

London Court of International Arbitration, European Users Group / Herbert Smith Freehills LLP

London International Disputes Week

London Maritime Arbitrators Association

Thought Leaders 4 x Cooke, Young & Keidan LLP

The following commented on a draft of the Bill:

Clare Ambrose

Daniel Bovensiepen

Ben Giaretta

Mr Justice Henshaw and Mr Justice Foxton

Herbert Smith Freehills LLP

Toby Landau KC

We read the following written about our second consultation paper:

Ashford, P, K Troiani, and B Giaretta, “The Arbitration Act 1996: The way forward”, (2023) Fox Williams Insights,

https://www.foxwilliams.com/2023/05/02/the-arbitration-act-1996-the-way-forward/.

Bell, G, and C Richards, “Arbitration Act 1996, What You Need to Know – Law Commission Issues Second Consultation Paper”, (2023) Gowling WLG Insights, https://gowlingwlg.com/en/insights-resources/articles/2023/arbitration-act-1996-what-you-need-to-know/.

Brick Court Chambers, “Law Commission adopts proposal advanced at Brick Court Annual Commercial Conference in Second Consultation Paper”, (2023) Brick Court Chambers News and Events, https://www.brickcourt.co.uk/news/detail/law-commission-adopts-proposal-advanced-at-brick-court-annual-commercial-conference-in-second-consultation-paper.

Burrell, A, “Law Commission’s Second Consultation Paper on Review of the Arbitration Act 1996”, (2023) 39 Essex Chambers Blog, https://www.39essex.com/information-hub/blog/law-commissions-second-consultation-paper-review-arbitration-act-1996.

Chong, P, B Fletcher, M Scott, and L James, “Law applicable to arbitration agreements: Law Commission consults on new statutory rule”, (2023) DLA Piper Insights, https://www.dlapiper.com/en/insights/publications/arbitration-matters/2023/law-applicable-to-arbitration-agreements-law-commission-consults-on-new-statutory-rule.

CMS, “Law Commission Releases Second Consultation Paper in Relation to the Arbitration Act 1996” (2023), CMS Law-Now, https://cms-lawnow.com/en/ealerts/2023/03/law-commission-releases-second-consultation-paper-in-relation-to-the-arbitration-act-1996.

Freeman, J, R Gal, and L Adams, “Law Commission publishes Second Consultation Paper on reforming the Arbitration Act 1996”, (2023) Allen & Overy Arbitration Insights, https://www.allenovery.com/en-gb/global/blogs/arbitration-insights/law-commission-publishes-second-consultation-paper-on-reforming-the-arbitration-act-1996.

Hilborne, N, “Law Commission widens planned discrimination ban in arbitration”, (2023) Legal Futures, https://www.legalfutures.co.uk/latest-news/law-commission-widens-planned-discrimination-ban-in-arbitration.

Hodges, P, C Tevendale, C Parker KC, A Cannon, L Kantor, and V Naish, “The Law Commission’s Second Consultation Paper – an evolving approach”, (2023) Herbert Smith Freehills Arbitration Notes, https://hsfnotes.com/arbitration/2023/03/29/the-law-commissions-second-consultation-paper-an-evolving-approach/

Horne, L, C Edworthy, and J Pratt, “Second consultation paper on reform of the Arbitration Act 1996”, (2023) MacFarlanes What We Think, https://www.macfarlanes.com/what-we-think/in-depth/2023/second-consultation-paper-on-reform-of-the-arbitration-act-1996/.

J Haywood, “Should discrimination in arbitration be banned?”, (2023) Serle Court SerleShare, https://www.serlecourt.co.uk/images/uploads/documents/Should_discrimination_in_arbitration_be_banned_17.5.23.pdf.

Keenan, K, “The Second Law Commission's Consultation Paper on Reforming The Arbitration Act 1996”, (2023) Charles Russell Speechlys Expert Insights, https://www.charlesrussellspeechlys.com/en/news-and-insights/insights/real-estate/2023/the-second-law-commissions-consultation-paper-on-reforming-the-arbitration-act-1996/.

Nascimbene, J, and O Anderson, “1996 Arbitration Act Review Continues: Law Commission Publishes Second Consultation Paper”, (2023) Cooley – On The Record, https://uklitigation.cooley.com/1996-arbitration-act-review-continues-law-commission-publishes-second-consultation-paper/.

Newing, N, and A Marshall, “Revamping England's 1996 Act – the latest consultation paper”, (2023) Global Arbitration Review.

Osborne Clarke, “The Law Commission consults in England and Wales on determining the law of an arbitration agreement”, (2023) Osborne Clarke Insights, https://www.osborneclarke.com/insights/law-commission-consults-england-and-wales-determining-law-arbitration-agreement.

Sleave, L, “Arbitration Act Review 2: The Proper Law of an Arbitration Agreement”, (2023) Stevens & Bolton Viewpoints, https://viewpoints.stevens-bolton.com/post/102idjf/arbitration-act-review-2-the-proper-law-of-an-arbitration-agreement.

Thomas, C, K Duggal, and A Lee, “Reform of arbitration law: the Law Commission’s consultation on Enka”, (2023) *Arbitration Law Monthly*.

Vishnyakov, M “Law Commission's 'herculean' task of reform”, (2023) *The Law Society Gazette*, https://www.lawgazette.co.uk/practice-points/law-commissions-herculean-task-of-reform/5116022.article.

Waldron, D, J Gordon, and R Bolgar-Smith, “UK Law Commission Publishes Second Consultation Paper for Review of Arbitration Act 1996”, (2023) Morgan Lewis Lawflash, https://www.morganlewis.com/pubs/2023/04/uk-law-commission-publishes-second-consultation-paper-for-review-of-arbitration-act-1996.

Wenn, C, “The Arbitration Act 1996 – the Law Commission releases a second Consultation Paper”, (2023) Burges Salmon News and Insight, https://www.burges-salmon.com/news-and-insight/legal-updates/disputes/the-arbitration-act-1996-the-law-commission-releases-a-second-consultation-paper.

Appendix 3: Other consultee suggestions

3.1 In our first consultation paper, we asked the following question (CP1 CQ38):

> Is there any significant topic within the Arbitration Act 1996, not addressed in this consultation paper, which you think is in need of review and potential reform? If so, what is the topic, and why does it call for review?

3.2 We received many suggestions. We received yet further suggestions in response to our second consultation paper. We have considered them all. Those which we have not taken forward or otherwise discussed, we list here. We have expressed them in our own words, in our efforts to be concise.

3.3 We have not taken forward these suggestions, and the reasons why are uniform. We were mindful, once again, of the consensus that the Act works well, and that root and branch reform is not needed or wanted. Almost all suggestions listed here were raised by only one consultee; there was no widespread clamour for reform in respect of these topics. Some of the suggestions were incompatible with each other. The potential for impact, or the arguable case for reform, was not so certain or significant as to justify extending the timescale and cost of this project. None of this detracts from the intelligence and sincerity with which these suggestions were made.

LIST OF OTHER CONSULTEE SUGGESTIONS

3.4 Address the issues of artificial intelligence and automation in dispute resolution.

3.5 Address the issues of electronic signatures (for example, on awards), and electronic arbitration agreements.

3.6 Stipulate that arbitral parties should disclose that they have third party funding; render third party funders liable to an adverse costs order made by the arbitral tribunal.

3.7 Enable trust law arbitration.

3.8 Statute should require that an arbitrator has sufficient qualification to act, in terms of knowledge and skill.

3.9 Arbitration clauses in standard terms should not be enforceable against an individual or a small or medium sized business, perhaps especially in the context of insurance contracts.

3.10 Stipulate that, unless the parties agree otherwise, all contracts are deemed to include a provision that refers all disputes to arbitration, except: (a) contracts that specify a seat outside England and Wales; (b) matrimonial or civil partnership disputes; (c) arbitration agreements deemed unfair under sections 89 or 91. Empower the court to refer any matter to arbitration because of the specialised or technical nature of the dispute, or for any other reason.

3.11 If a party has been represented in an arbitration by a person within the jurisdiction, then that person shall be deemed to have the authority of that party to accept service of court process relating to the arbitration unless and until some other person within the jurisdiction is designated as so authorised.

3.12 High Court and County Courts (Allocation of Arbitration Proceedings) Order 1996 be amended, along with the Civil Procedure Rules, to provide that arbitration applications can be issued in, or transferred to, the Family Court. This would allow arbitrations under the Inheritance (Provision for Family and Dependants) Act 1975, and under the Trusts of Land and Appointment of Trustees Act 1996, to be suitably supervised. This might also require amendment (to add reference to the Family Court) of section 25(1) of the 1975 Act, and section 23(3) of the 1996 Act.

3.13 Clarify to what extent the General Data Protection Regulation applies to arbitration.

3.14 Any confidentiality should be removed where there is a reasonable suspicion that the proceedings are tainted by corruption.

3.15 Stipulate that sections 1 to 6 are mandatory.

3.16 Have each mandatory section of the Act identify itself as such.

3.17 Section 4 (mandatory provisions): make section 4(5) applicable such that, if foreign law is to govern an issue, that issue must be explicitly identified as being governed by that foreign law.

3.18 Revisit section 7 (separability of arbitration agreement) to codify *The Newcastle Express* [2022] EWCA Civ 1555.

3.19 Amend section 9 (stay of legal proceedings) so that: an applicant for a stay need only show, under section 9(1), a good arguable case that there is an applicable arbitration agreement; a respondent can defeat an application only by showing, under section 9(4), that any arbitration agreement is manifestly void.

3.20 Section 12 (power of court to extend time): stipulate that the court can extend time bars which appear in the matrix contract and not just in the arbitration agreement.

3.21 Section 18 (failure of appointment procedure): the claimant's choice should be appointed sole arbitrator by default (like section 17); alternatively, the application should be resolved by the court on papers.

3.22 Appointment under section 18 should be made by the President of Chartered Institute of Arbitrators instead of the court.

3.23 The court should not appoint an arbitrator without deciding conclusively that they have jurisdiction.

3.24 Make section 30 (competence of tribunal to rule on its own jurisdiction) mandatory.

3.25 Section 33 (general duty of the tribunal): delete the word "falling" in section 33(1)(b).

3.26 Revisit section 34 (procedural and evidential matters) to stipulate that the parties' right to agree procedure is constrained such that it cannot require the tribunal to infringe their duties under section 33.

3.27 Section 34 should empower the tribunal to make amendments for closely related but new issues.

3.28 Make express provision for the tribunal to grant a stay of the arbitral proceedings to allow an alternative, more facilitative process to be engaged; consider adding forward looking language recognising the use of alternative dispute resolution mechanisms within arbitration.

3.29 Section 35 (consolidation of proceedings and concurrent hearings): give arbitrators greater powers to consolidate arbitrations in the absence of party agreement.

3.30 Section 38 (general powers exercisable by the tribunal): security for costs should be available against both the claimant and the respondent.

3.31 Section 38 should state explicitly that the tribunal has the power to grant interim measures even in the absence of the parties' agreement.

3.32 Section 39 (power to make provisional orders): repeal section 39(4) so that this section is available by default.

3.33 Section 40 (general duties of parties) should make explicit reference to arbitrators' powers in section 41.

3.34 Section 41 (powers of tribunal in case of party's default): give arbitrators more powers to deal with delay.

3.35 Tribunals should have power to stay proceedings for non-compliance.

3.36 Allow a tribunal to make a default award (rather than having to make a substantive finding on the perhaps limited materials then before it).

3.37 Following non-compliance with a tribunal order, the court to issue an unless order, which, if ignored, results in the recalcitrant party being required to provide security for costs.

3.38 Revisit section 44 (court powers exercisable in support of arbitration proceedings), so that the rule in section 44(6) applies by default, such that a court order shall cease to have effect should a tribunal subsequently so order.

3.39 Applications under section 44 should require a certificate from the arbitrator, except for applications under section 44(3).

3.40 Amend section 44(3): include, as an alternative to urgency, the liberty to make an order where the nature of the application justifies it; remove the requirement that the order be "for the purpose of preserving evidence or assets".

3.41 Include a provision indicating that section 44 does not exclude the court's powers to issue orders based on its inherent jurisdiction.

3.42 Stipulate that section 44 is not excluded by a *Scott v Avery* clause.

3.43 Section 48 (remedies): delete the words "(other than a contract relating to land)" in section 48(5)(b).

3.44 Make section 58 (effect of award) mandatory.

3.45 Section 60 (agreement to pay costs in any event): give the tribunal discretion to uphold an existing agreement as to costs between the parties.

3.46 Revisit section 60 to allow parties to agree, prior to any dispute arising, that each will bear its costs in any event.

3.47 Have specific provisions for rent review, including that costs awards are restricted to the costs of the arbitrator (and do not include the costs of the parties), and are shared equally in any event.

3.48 Section 67 (challenging the award: substantive jurisdiction) should be available to challenge orders, not just awards.

3.49 An application under section 68 (challenging the award: serious irregularity) should require the permission of the court, like an application under section 69 (appeal on point of law).

3.50 Replace "leave" with "permission".

3.51 Clarify whether it is possible to challenge an award on public policy grounds, under section 68(2)(g) or section 81(1)(c).

3.52 Allow challenges under section 68 and section 103, as an excess of mandate, where the arbitrators have failed to apply mandatory law, especially mandatory environmental or climate change law.

3.53 Section 69 (appeal on point of law) should be available to challenge orders, not just awards.

3.54 If the High Court gives permission to appeal under section 69, one option should be to give permission for the appeal to be heard directly by the Court of Appeal.

3.55 Permission to appeal from the decision of the High Court should be available, not just from the High Court, but also from the Court of Appeal.

3.56 Any application to court should be limited solely to the High Court without further appeal.

3.57 Revisit section 78 (reckoning periods of time), so that section 78(5) applies to periods of five days or less (not seven days), to align with rule 2.8(4) of the Civil Procedure Rules.

Appendix 4: Draft Arbitration Bill

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Arbitration Bill

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B I L L

TO

Amend the Arbitration Act 1996.

BE IT ENACTED by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present

Parliament assembled, and by the authority of the same, as follows:—

Applicable law

1 Law applicable to arbitration agreement

(1) The Arbitration Act 1996 is amended as follows.

(2) After section 6 insert—

"6A Law applicable to arbitration agreement

(1) The law applicable to an arbitration agreement is—

(a) the law that the parties expressly agree applies to the arbitration agreement, or

(b) where no such agreement is made, the law of the seat of the arbitration in question.

(2) For the purposes of subsection (1), agreement between the parties that a particular law applies to an agreement of which the arbitration agreement forms a part does not, of itself, constitute express agreement that that law also applies to the arbitration agreement.

(3) This section does not apply in relation to an arbitration agreement that was entered into before the day on which section 1 of the Arbitration Act 2023 comes into force."

(3) In section 2 (scope of application of provisions), in subsection (2) after the opening words insert—

"(za) section 6A (law applicable to arbitration agreement),".

2 Impartiality: duty of disclosure

(1) The Arbitration Act 1996 is amended as follows.

(2) After section 23 insert—

"23A Impartiality: duty of disclosure

(1) An individual who has been approached by a person in connection with the individual's possible appointment as an arbitrator must, as soon as reasonably practical, disclose to the person any relevant circumstances of which the individual is, or becomes, aware.

(2) An arbitrator must, as soon as reasonably practical, disclose to the parties to the arbitral proceedings any relevant circumstances of which the arbitrator is, or becomes, aware.

(3) For the purposes of this section—

(a) "relevant circumstances", in relation to an individual, are circumstances that might reasonably give rise to justifiable doubts as to the individual's impartiality in relation to the proceedings, or potential proceedings, concerned, and

(b) an individual is to be treated as being aware of circumstances of which the individual ought reasonably to be aware."

(3) In Schedule 1 (mandatory provisions), after the entry for section 13, insert— "section 23A (impartiality: duty of disclosure);".

3 Immunity of arbitrator: application for removal

(1) The Arbitration Act 1996 is amended as follows.

(2) In section 24 (power of court to remove arbitrator), after subsection (5) insert—

"(5A) The court may not order the arbitrator to pay costs in proceedings under this section unless any act or omission of the arbitrator in connection with the proceedings is shown to have been in bad faith."

(3) In section 29(1) (general immunity of arbitrator), at the end insert "(and see section 24(5A) (immunity in respect of costs of proceedings for removal)".

4 Immunity of arbitrator: resignation

(1) The Arbitration Act 1996 is amended as follows.

(2) In section 25 (resignation of arbitrator)—

(a) in subsection (1), omit paragraph (b) (together with the "and" before it);

(b) for subsections (3) and (4) substitute—

"(3) Where an arbitrator resigns, a relevant person may (upon notice to the other relevant persons) apply to the court to make such order as it

thinks fit with respect to the arbitrator's entitlement (if any) to fees or expenses or the repayment of any fees or expenses already paid.

(4) For the purposes of subsection (3), each of the parties and the arbitrator is a "relevant person".";

(c) in the heading, at the end insert ": entitlement to fees or expenses".

(3) In section 29 (immunity of arbitrator)—

(a) omit subsection (3);

(b) at the end insert—

"(3A) An arbitrator's resignation does not give rise to any liability for the arbitrator unless it is shown that the resignation was, in all the circumstances, unreasonable.

(3B) But subsection (3A) is subject to—

(a) agreement reached between the parties and the arbitrator as mentioned in section 25(1)(a);

(b) an order made under section 25(3)."

(4) In Schedule 2 (modifications in relation to judge-arbitrators), in paragraph 10(2), for "25(3)(b)" substitute "25(3)".

Jurisdiction of tribunal

5 Court determination of jurisdiction of tribunal

In section 32 of the Arbitration Act 1996 (determination of preliminary point of jurisdiction), after subsection (1) insert—

"(1A) An application under this section must not be considered to the extent that it is in respect of a question on which the tribunal has already ruled."

6 Power to award costs despite no substantive jurisdiction

(1) Section 61 of the Arbitration Act 1996 (award of costs) is amended as follows.

(2) In subsection (1), omit ", subject to any agreement of the parties".

(3) After subsection (1) insert—

"(1A) It is irrelevant for the purposes of subsection (1) whether the tribunal has ruled, or a court has held, that the tribunal has no substantive jurisdiction or has exceeded its substantive jurisdiction."

(4) In subsection (2), omit "Unless the parties otherwise agree,".

(5) After subsection (2) insert—

"(3) Subsections (1), (1A) and (2) are subject to any agreement of the parties."

7 Power to make award on summary basis

After section 39 of the Arbitration Act 1996 insert—

"39A Power to make award on summary basis

(1) Unless the parties otherwise agree, the arbitral tribunal may, on an application made by a party to the proceedings (upon notice to the other parties), make an award on a summary basis in relation to a claim, or a particular issue arising in a claim, if the tribunal considers that—

(a) a party has no real prospect of succeeding on the claim or issue, or

(b) a party has no real prospect of succeeding in the defence of the claim or in relation to the issue.

(2) For the purposes of subsection (1), an arbitral tribunal makes an award "on a summary basis" in relation to a claim or issue if the tribunal has exercised its power under section 34(1) (to decide all procedural and evidential matters) with a view to expediting the proceedings on the claim or issue.

(3) Before exercising its power under section 34(1) as mentioned in subsection (2), an arbitral tribunal must afford the parties a reasonable opportunity to make representations to the tribunal."

8 Emergency arbitrators

(1) The Arbitration Act 1996 is amended as follows.

(2) After section 41 insert—

"41A Emergency arbitrators

(1) This section applies where—

(a) the parties have agreed to the application of rules that provide for the appointment of an individual as an emergency arbitrator, and

(b) an emergency arbitrator has been appointed pursuant to those rules.

(2) Unless otherwise agreed by the parties, if without showing sufficient cause a party fails to comply with any order or directions of the emergency arbitrator, the emergency arbitrator may make a peremptory order to the same effect, prescribing such time for compliance with it as the emergency arbitrator considers appropriate."

(3) In section 42 (enforcement of peremptory orders of tribunal)—

(a) in subsection (1), at the end insert "or (as the case may be) the emergency arbitrator";

(b) in subsection (2)(a) and (b), after "the tribunal" insert "or the emergency arbitrator";

(c) in subsection (3), for "tribunal's order" substitute "peremptory order";

(d) in subsection (4), for "tribunal's order" substitute "peremptory order";

(e) in the heading, at the end insert "or emergency arbitrator".

(4) In section 44 (court powers exercisable in support of arbitral proceedings)—

(a) for subsection (4) substitute—

"(4) If the case is not one of urgency, the court may act only on the application of a party to the arbitral proceedings made with—

(a) the permission of the tribunal or (as the case may be) the emergency arbitrator, or

(b) the agreement in writing of the other parties.

(4A) An application under subsection (4) may be made only upon notice to the other parties and to the tribunal or the emergency arbitrator.";

(b) in subsection (5), after "tribunal" insert "or the emergency arbitrator";

(c) in subsection (6), after "tribunal" insert ", the emergency arbitrator".

(5) In section 82(1) (minor definitions)—

(a) after the definition of "dispute" insert—

""emergency arbitrator" means an individual appointed as mentioned in section 41A(1);";

(b) in the definition of "peremptory order", after "section 41(5)" insert "or 41A(2),".

(6) In section 83 (index of defined expressions), after the entry for "dispute" insert—

"emergency arbitrator	section 82(1) (and see section 41A(1))".

9 Court powers exercisable in support of arbitral proceedings in respect of third parties

(1) Section 44 of the Arbitration Act 1996 (court powers exercisable in support of arbitral proceedings) is amended as follows.

(2) In subsection (1), after "making orders" insert "(whether in relation to a party or any other person)".

(3) For subsection (7) substitute—

"(6A) Subject to subsection (7), an appeal lies from a decision of the court under this section.

(7) The leave of the court is required for any such appeal by a party or proposed party to the arbitral proceedings."

10 Challenging the award: remedies available to the court

(1) Section 67 of the Arbitration Act 1996 (challenging the award: substantive jurisdiction) is amended as follows.

(2) In subsection (1), for paragraph (b) substitute—

"(b) challenging an award made by the tribunal on the merits because the tribunal did not have substantive jurisdiction."

(3) For subsection (3) substitute—

"(3) On an application under this section, the court may by order—

(a) confirm the award,

(b) vary the award,

(c) remit the award to the tribunal, in whole or in part, for reconsideration,

(d) set aside the award, in whole or in part, or

(e) declare the award to be of no effect, in whole or in part.

(3A) The court must not exercise its power to set aside or to declare an award to be of no effect, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration."

11 Procedure on challenge under section 67 of the Arbitration Act 1996

(1) In section 67 of the Arbitration Act 1996 (challenging the award: substantive jurisdiction) after subsection (3) insert—

"(3A) Rules of court about the procedure to be followed on an application under this section may, in particular, include provision within subsection (3B) in relation to a case where the application—

(a) relates to an objection as to the arbitral tribunal's substantive jurisdiction on which the tribunal has already ruled, and

(b) is made by a party that took part in the arbitral proceedings.

(3B) Provision is within this subsection if it provides that—

(a) a ground for the objection that was not raised before the arbitral tribunal must not be raised before the court unless the applicant shows that, at the time the applicant took part in the proceedings, the applicant did not know and could not with reasonable diligence have discovered the ground;

(b) evidence that was not heard by the tribunal must not be heard by the court unless the applicant shows that, at the time the applicant took part in the proceedings, the applicant could not with reasonable diligence have put the evidence before the tribunal;

(c) evidence that was heard by the tribunal must not be re-heard by the court, unless the court considers it necessary in the interests of justice."

12 Challenging the award: time limit

(1) Section 70 of the Arbitration Act 1996 (challenge or appeal: supplementary provisions) is amended as follows.

(2) In subsection (3), for the words from "the date of the award" to the end substitute "the applicable date".

(3) After subsection (3) insert—

"(3A) In subsection (3), "the applicable date" means—

(a) in a case where there has been any arbitral process of appeal or review, the date when the applicant or appellant was notified of the result of that process;

(b) in a case where the tribunal has, under section 57, made a material correction to an award or has made a material additional award, the date of the correction or additional award;

(c) in a case where a material application for a correction to an award or for an additional award has been made to the tribunal under section 57 and the tribunal has decided not to grant the application, the date when the applicant or appellant was notified of that decision;

(d) in any other case, the date of the award.

(3B) For the purposes of subsection (3A)—

(b) a correction to an award,

(c) an additional award, or

(d) an application under section 57,

is "material" if any matter to which it relates is material to the application or appeal under section 67, 68 or 69."

(4) At the end insert—

"(9) In this section, a reference to available recourse, or to anything done, under section 57 includes a reference to available recourse, or to anything equivalent done, pursuant to agreement reached between the parties as mentioned in section 57(1)."

Miscellaneous minor amendments

13 Right of appeal against court decision on staying legal proceedings

In section 9 of the Arbitration Act 1996 (stay of legal proceedings), at the end insert—

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

14 Requirements to be met for court to consider applications

(1) The Arbitration Act 1996 is amended as follows.

(2) In section 32 (determination by court of preliminary point of jurisdiction)—

(a) in subsection (2)(b), omit the words from "and the court" to the end;

(b) omit subsection (3);
(c) in subsection (5), for "conditions specified in subsection (2) are" substitute "either condition specified in subsection (2) is".

(3) In section 45 (determination by court of preliminary point of law)—
(a) in subsection (2)(b), omit the words from "and the court" to the end;
(b) in subsection (3), omit the words from "and, unless" to the end;
(c) in subsection (5), for "conditions specified in subsection (2) are" substitute "either condition specified in subsection (2) is".

15 Repeal of provisions relating to domestic arbitration agreements

Omit the following provisions of the Arbitration Act 1996—

(a) sections 85 to 87 (domestic arbitration agreements) (which are not in force), together with the italic heading before section 85, and
(b) section 88 (power to repeal or amend sections 85 to 87).

Final provisions

16 Extent

This Act extends to England and Wales only.

17 Commencement and transitional provision

(1) This section and sections 16 and 18 come into force on the day on which this Act is passed.

(2) The rest of this Act comes into force on such day as the Secretary of State may by regulations appoint.

(3) The Secretary of State may by regulations make transitional or saving provision in connection with the coming into force of any provision of this Act.

(4) A power to make regulations under this section includes power to make different provision for different purposes.

(5) Regulations under this section are to be made by statutory instrument.

18 Short title

This Act may be cited as the Arbitration Act 2023.

Appendix 5: Explanatory notes

5.1 These explanatory notes relate to the draft Arbitration Bill in Appendix 4. They have been prepared to assist the reader of the Bill, by explaining what each part of the Bill will mean in practice. They are best read alongside the Bill. They are not intended to be a comprehensive description of the Bill.

OVERVIEW OF THE BILL

5.2 The Bill is concerned with arbitration, which is typically when disputes are resolved by an arbitrator who is privately appointed rather than by a judge sitting in court. Arbitration in England, Wales and Northern Ireland is regulated by the Arbitration Act 1996. The Bill gives effect to the recommendations of the Law Commission of England and Wales (the "Law Commission") to reform the Arbitration Act 1996 as it extends and applies to England and Wales.

COMMENTARY ON PROVISIONS OF THE BILL

Clause 1: Law applicable to arbitration agreement

5.3 The Arbitration Act 1996 applies when the parties have agreed in writing to arbitrate their dispute. Often the agreement to arbitrate is a clause in a main contract. For example, there might be a main contract to build a factory, and one of the clauses provides that any dispute will be resolved through arbitration. Although the agreement to arbitrate is a clause in a main contract, the law sometimes treats the agreement to arbitrate as a free-standing or separable agreement.

5.4 There may be an international dimension to a main contract and its agreement to arbitrate. For example, one party might be German, and the other party Chinese, with both agreeing to resolve their dispute by way of arbitration in London (as a neutral venue). In such circumstances, it is necessary to determine which country's laws govern the agreement to arbitrate. In the present example, the agreement to arbitrate could be governed by the law of Germany, or China, or England and Wales, or another law entirely. Determining the governing law is important, as different governing laws may give different answers to important questions like who is party to the agreement (for example, whether the agreement extends to a subsidiary company), and whether this type of dispute is even capable of resolution by arbitration (as a matter of public policy, some types of dispute must be resolved by the courts rather than through arbitration).

5.5 In its decision in *Enka v Chubb* (2020), the Supreme Court said, broadly, as follows. The agreement to arbitrate is governed by the law chosen by the parties. In the absence of any such choice, the agreement to arbitrate is governed by the law chosen to govern the main contract – unless, for example, that law would invalidate the agreement to arbitrate. Otherwise the agreement to arbitrate will be governed by the law with which it is most closely connected, which is usually the law of the seat. The seat is the place where the arbitration is deemed legally to occur (even if hearings

take place elsewhere or online). In the above example, the seat of the arbitration is England and Wales (London).

5.6 It is common for there to be an express choice of law to govern the main contract, and an express choice of seat for an arbitration, but no choice of law to govern the agreement to arbitrate. It is therefore common for an arbitration to be seated in England and Wales, but with the agreement to arbitrate governed by the foreign law of the main contract.

5.7 Clause 1 replaces the common law in *Enka v Chubb* with a statutory rule. By inserted section 6A(1), the law governing the arbitration agreement will be the law expressly chosen by the parties, otherwise it will be the law of the seat. Where the arbitration is seated in England and Wales, then the agreement to arbitrate will usually be governed by the law of England and Wales. By inserted section 6A(2), any law chosen to govern the main contract does not count as an express choice of law to govern the agreement to arbitrate.

Clause 2: Impartiality: duty of disclosure

5.8 The Arbitration Act 1996 imposes a duty of impartiality on arbitrators (by section 33). Additionally, a duty of disclosure was recognised by the Supreme Court in its decision in *Halliburton v Chubb* (2020). Clause 2 codifies the general duty of disclosure as articulated in that case.

5.9 Clause 2 requires an arbitrator to disclose circumstances that might reasonably give rise to justifiable doubts as to their impartiality. It applies prior to the arbitrator's appointment, when they are being approached with a view to appointment. It is a continuing duty which also applies after their appointment. Where an arbitrator is appointed by someone other than the parties, the arbitrator may need to repeat their disclosure to the parties upon appointment. The duty extends to circumstances of which the arbitrator is aware, and of which they ought reasonably to be aware. Inserted section 23A will be a mandatory provision (like the duty of impartiality in section 33); the parties cannot agree to dispense with the duty of disclosure.

Clause 3 (Immunity of arbitrator: application for removal) and Clause 4 (Immunity of arbitrator: resignation)

5.10 The Arbitration Act 1996, section 29, provides that an arbitrator is not liable for anything done in the discharge of their functions unless they acted in bad faith. Such immunity supports an arbitrator to make robust and impartial decisions without fear that a party will express their disappointment by suing the arbitrator. It also supports the finality of the dispute resolution process by preventing a party who is disappointed with losing the arbitration from bringing further proceedings against the arbitrator. Judges enjoy a similar immunity for similar reasons.

5.11 There are still ways of dealing with a recalcitrant arbitrator. For example, the parties can revoke an arbitrator's authority (by section 23), or apply to court to remove an arbitrator (by section 24). In both cases, the arbitrator may lose their entitlement to fees and expenses.

5.12 Clauses 3 and 4 extend the scope of arbitrator immunity, up to a limit, as follows.

5.13 Clause 3 provides that an arbitrator will not be liable for the costs of an application to court under section 24 for their removal, unless the arbitrator has acted in bad faith. This aligns with the general immunity already provided by section 29. This reverses case law which held that an arbitrator could be liable for those costs.

5.14 Clause 4 provides that an arbitrator will no longer be liable for resignation, unless the resignation is shown by a complainant to be unreasonable.

Clause 5: Court determination of jurisdiction of tribunal

5.15 By sections 82 and 30 of the Arbitration Act 1996, an arbitral tribunal has jurisdiction if there is a valid arbitration agreement, if the tribunal is properly constituted, and in respect of matters which have been submitted to arbitration in accordance with the arbitration agreement.

5.16 A party who participates in the arbitration proceedings might object that the arbitral tribunal lacks jurisdiction. The tribunal itself is usually empowered to decide, in the first instance, whether it has jurisdiction (by section 30). The court can be asked to rule on whether the tribunal has jurisdiction, including as follows. One way is to wait until the tribunal has issued a ruling, and then challenge that ruling under section 67, which allows a challenge to an arbitral award on the basis that the tribunal lacked jurisdiction. Another way is by invoking section 32, which allows the court to decide whether the tribunal has jurisdiction as a preliminary point. Sections 32 and 67 have different requirements.

5.17 Clause 5 amends section 32 to make it clear that it can only be invoked instead of the tribunal ruling on its jurisdiction. If the tribunal has already ruled, then any challenge must be brought through section 67.

Clause 6: Power to award costs despite no substantive jurisdiction

5.18 The arbitral tribunal or the court might rule that the tribunal has no jurisdiction to resolve a particular dispute. In this case, the arbitration proceedings must come to an end. Clause 6 provides that, in those circumstances, the tribunal can nevertheless award the costs of the arbitration proceedings up until that point.

Clause 7: Power to make award on summary basis

5.19 Clause 7 confers express power on arbitrators to make an award on a summary basis to dispose of an issue where an arbitrating party has no real prospect of succeeding on that issue. “Summary basis” means that the tribunal has adopted an expedited procedure to consider whether a party has a real prospect of succeeding on that issue. Inserted section 39A will not be mandatory; the parties can agree to disapply it (they can “opt out”). Arbitrators can exercise the power to make an award on a summary basis only upon an application by one of the arbitrating parties. The “no real prospect of success” threshold is the same as that applied in court proceedings in England and Wales. As for the expedited procedure, this is not prescribed by clause 7 but will be a matter for the arbitrator to decide on a case-by-case basis after consulting with the parties.

Clause 8: Emergency arbitrators

5.20 Arbitral rules sometimes provide a regime for the appointment of emergency arbitrators. An emergency arbitrator is appointed on an interim basis, pending the constitution of the full arbitral tribunal, to make orders on urgent matters, for example for the preservation of evidence. Once constituted, the full tribunal can usually review the orders of the emergency arbitrator.

5.21 Under the Arbitration Act 1996, when a normal arbitrator makes an order during arbitration proceedings, and an arbitrating party fails to comply with that order, possible consequences include the following. The arbitrator can issue a peremptory order (by section 41), and if there is still no compliance, an application can be made to court for the court to order compliance with the arbitrator's order (by section 42). Alternatively, an application can be made directly to court, for the court to make its own order (by section 44). Clause 8 amends the Act to extend that scheme to emergency arbitrators.

Clause 9: Court powers exercisable in support of arbitral proceedings in respect of third parties

5.22 By section 44 of the Arbitration Act 1996, the court can make orders in support of arbitration proceedings on the following matters: taking of witness evidence, preservation of evidence, orders relating to relevant property, sale of goods, interim injunctions, and the appointment of a receiver. Arbitrating parties require the leave (permission) of the court to appeal under section 44.

5.23 Clause 9 amends section 44 to make it clear that court orders under that section are available against third parties (people who are not party to the arbitration proceedings). For example, orders might be made against third parties who hold relevant evidence, or against banks which hold relevant funds. This aligns the position in arbitration proceedings with the position in court proceedings. Also, clause 9 provides that third parties will not require the leave of the court to bring an appeal, thereby giving third parties the full rights of appeal usually available in court proceedings.

Clause 10: Challenging the award: remedies available to the court

5.24 An arbitral tribunal can issue an award on whether it has jurisdiction, and it can issue an award on the merits of the dispute. Either type of award can be challenged under section 67 of the Arbitration Act 1996 on the basis that the arbitral tribunal did not have jurisdiction.

5.25 Awards can also be challenged for serious irregularity (by section 68), where the remedies are: remit the award to the tribunal for reconsideration, vary, or set aside the award. And awards can be appealed on a point of law (by section 69), where the remedies are: confirm, vary, remit for reconsideration, or set aside the award. In both sections there is a proviso that an award will not be set aside unless it is inappropriate to remit the award to the tribunal.

5.26 Clause 10 amends section 67 to provide the remedies of remittance for reconsideration, and setting aside any type of award. This will render section 67

consistent with the scheme of remedies in sections 68 and 69, and consistent with the assumptions in the case law that these remedies were intended to be available.

Clause 11: Procedure on challenge under section 67 of the Arbitration Act 1996

5.27 By sections 82 and 30 of the Arbitration Act 1996, an arbitral tribunal has jurisdiction if there is a valid arbitration agreement, if the tribunal is properly constituted, and in respect of matters which have been submitted to arbitration in accordance with the arbitration agreement.

5.28 A party who participates in the arbitration proceedings might object that the arbitral tribunal lacks jurisdiction. The tribunal itself is usually empowered to decide, in the first instance, whether it has jurisdiction (by section 30). Once the tribunal has issued an award, either on its jurisdiction or also on the merits of the dispute, a party can challenge that award before the court under section 67 on the basis that the tribunal had no jurisdiction after all.

5.29 In its decision in *Dallah v Pakistan* (2010), the Supreme Court said that, even where the question of the tribunal's jurisdiction has been fully debated before the tribunal, a challenge under section 67 is a full rehearing before the court.

5.30 Clause 11 amends section 67 to confer power for rules of court to provide as follows. Where an application is made under section 67, by a party who took part in the arbitration proceedings, that relates to an objection on which the tribunal has already ruled, then there will generally be no full rehearing before the court. This would be a departure from *Dallah v Pakistan*. Specifically, rules of court will be able to provide that there should be no new grounds of objection, and no new evidence, before the court, unless it was not reasonably possible to put these before the tribunal; and evidence should not be reheard by the court, unless necessary in the interests of justice.

Clause 12: Challenging the award: time limit

5.31 Under the Arbitration Act 1996, an arbitral award can be challenged before the courts on the basis that the tribunal lacked jurisdiction (section 67), or on the basis of serious irregularity (section 68), or the award can be appealed on a point of law (section 69). In all cases, the challenge must comply with the further requirements of section 70.

5.32 By section 70, an applicant must first exhaust any available arbitral process of appeal or review (section 70(2)(a)) and any available recourse under section 57 to correct the award or issue an additional award (section 70(2)(b)). The application to court must be made within 28 days.

5.33 Clause 12 amends section 70 to clarify that the time limit of 28 days begins to run after any arbitral appeal or any application under section 57. (In any other case, it begins to run from the date of the award.)

Clause 13: Right of appeal against court decision on staying legal proceedings

5.34 Under section 9 of the Arbitration Act 1996, a party can apply to court to stay legal proceedings in favour of arbitration proceedings. Clause 13 amends section 9 to state expressly that an appeal is available. This is consistent with the decision of the House

of Lords in *Inco Europe v First Choice Distribution* (2000), which assumed that an ability to appeal was intended.

Clause 14: Requirements to be met for court to consider applications

5.35 Under section 32 of the Arbitration Act 1996, an arbitrating party can apply to the court for the court to make a preliminary ruling on whether the arbitral tribunal has jurisdiction. Under section 45, a party can apply to the court for the court to rule on a preliminary point of law arising in the arbitration.

5.36 Clause 14 amends both sections so that an application will require either the agreement of the parties or the permission of the tribunal. It removes the further requirement to satisfy the court on a list of matters. Nevertheless, the court still retains a general discretion whether to accede to the application.

Clause 15: Repeal of provisions relating to domestic arbitration provisions

5.37 Sections 85 to 88 of the Arbitration Act 1996 concern domestic arbitration agreements, which is when all the parties are from the United Kingdom and the arbitration is seated in the United Kingdom. (The seat of an arbitration is where the arbitration is deemed legally to occur, even if hearings are held elsewhere or online.) Sections 85 to 87 have never been brought into force. Section 88 was brought into force, but only grants the Secretary of State the power to repeal sections 85 to 87. Clause 15 repeals all these unused sections.

Clause 16: Extent

5.38 The Arbitration Act 1996 extends to England and Wales and to Northern Ireland. The Bill implements the recommendations of the Law Commission of England and Wales and, accordingly, its extent is limited to England and Wales only.

Clause 17: Commencement and transitional provision

5.39 The amendments made to the Arbitration Act 1996 will be commenced by regulations made by the Secretary of State.