Review of the Arbitration Act

Summary of consultation paper

Law Commission
Reforming the law

INTRODUCTION

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 by issuing an award. They might appoint a panel of arbitrators to act as an arbitral tribunal.

1.2 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.

1.3 Arbitration is a major area of activity. For example, the Chartered Institute of Arbitrators, headquartered in London, has more than 17,000 members across 149 countries. Industry estimates suggest that international arbitration has grown by about 26% between 2016 and 2020, with London the world's most popular seat. Domestic arbitration also continues to grow. Overall, we estimate that there are at least 5,000 domestic and international arbitrations in England and Wales every year, potentially worth at least £2.5 billion to the British economy. The actual figures may be much higher.

1.4 The Arbitration Act 1996 ("the Act") provides a framework for arbitration in England and Wales and Northern Ireland. For example, it upholds arbitration agreements, preventing one party from unilaterally disregarding 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 can be enforced or challenged.

1.5 It has been 25 years since the Act came into force. This anniversary presents a good opportunity to revisit the Act, to ensure that it remains state of the art, so that it provides an excellent basis for domestic arbitration, and continues to support London's world-leading role in international arbitration.

1.6 In preparing our consultation paper, we have spoken with a wide range of stakeholders, and we have conducted our own research into the provisions of the Act. Overall, we have heard repeatedly from stakeholders how the Act works very well, with major reform neither needed nor wanted. That is also our provisional assessment. Nevertheless, there are several discrete topics, discussed below, where we ask consultees whether reform might be merited to ensure that the Act remains at the cutting edge.

1.7 Our proposals are provisional, and subject to this formal consultation exercise. We hope that as many interested parties as possible will respond to the consultation exercise in the manner detailed below.

The consultation

1.8 This document is a summary of our full consultation paper on the Arbitration Act 1996, available at https://www.lawcom.gov.uk/project/review-of-the-arbitration-act-1996/.

Duration of the consultation: We invite responses from 22 September 2022 to 15 December 2022.

Responses to the consultation may be submitted using an online form at: https://consult.justice.gov.uk/law-commission/arbitration. Where possible, it would be helpful if this form was used.

Alternatively, comments may be sent:

By email to arbitration@lawcommission.gov.uk

OR

By post to Commercial and Common Law Team (Arbitration), Law Commission, 1st Floor, Tower, 52 Queen Anne's Gate, London, SW1H 9AG.

If you send your comments by post, it would be helpful if, whenever possible, you could also send them by email.

1.9 We strongly encourage stakeholders to respond to our consultation questions, which can be viewed in full in Chapter 12 of the consultation paper, or at https://consult.justice.gov.uk/law-commission/arbitration. Responses will inform our final recommendations which might, in appropriate cases, depart from our current provisional proposals. We hope that most stakeholders who respond to the consultation paper will read the full consultation paper, or sections of it, in addition to this summary.

1.10 The specific areas which we discuss in detail in the consultation paper, and which are summarised in this document, are as follows.

(1) Confidentiality.

(2) Independence of arbitrators and disclosure.

(3) Discrimination.

(4) Immunity of arbitrators.

(5) Summary disposal of issues which lack merit.

(6) Interim measures ordered by the court in support of arbitral proceedings (section 44 of the Act).

(7) Jurisdictional challenges against arbitral awards (section 67).

(8) Appeals on a point of law (section 69).

1.11 Additionally, in Chapter 10 of the consultation paper, we discuss some minor amendments to various provisions of the Act. These too will be summarised below.

1.12 We received many other helpful suggestions from stakeholders. We have considered them all, but chose to focus on a shortlist of topics. The principal suggestions which we did not take forward to a full review are listed in Chapter 11 of the consultation paper, along with a brief explanation of why they did not make our shortlist. Those suggestions are too many for further discussion in this summary.

1.13 Throughout the consultation paper, we ask consultees for their opinions on our provisional conclusions and proposals.

CONFIDENTIALITY

1.14 In broad terms, confidentiality is about the "secrecy" of information, and who has access to it, and for what purposes.

1.15 In an arbitration context, confidentiality might attach, for example, to things said in an arbitral hearing, or to documents produced to support a claim. Confidentiality would then restrict who could repeat those things, and to whom, and why.

1.16 A duty of confidentiality may arise in several ways. It can arise contractually, for example where the parties agree that their arbitration will be confidential. Confidentiality can also attach in equity, where potentially private information is received in circumstances importing an obligation of confidence. And tort law can protect against some invasions of privacy.

1.17 The Act currently does not contain any provisions about confidentiality in arbitration. We considered whether it should. In particular, one suggestion was that the Act might provide a default rule that arbitrations are confidential, with a list of exceptions.

1.18 We provisionally conclude that the Act should not seek to codify the law of confidentiality, and that the law of confidentiality is better left to be developed by the courts. In summary, our reasons are as follows.

1.19 We are not currently persuaded that all types of arbitration should by default be confidential. Some may well be, like international commercial arbitration, or arbitrations where the parties have agreed confidentiality, or where the law implies confidentiality as a term of the agreement to arbitrate. Indeed, the usual implication of such a term has recently been confirmed by the Supreme Court. However, in other areas, the default is transparency, as with arbitrations involving investor claims against states. There is perhaps a trend towards transparency in other ways too, for example with an increasing practice of publishing arbitral awards. Some areas of activity can occasionally require disclosure, for example when there are child welfare concerns in family law arbitrations. With other areas of activity, there is still a debate to be had about the public interest in increased transparency, for example with arbitrations involving public procurement contracts.

1.20 Where parties agree to confidentiality or transparency, the law gives that weight, and takes the agreement as the starting point, but the law of confidentiality still superimposes mandatory limits. For example, no matter how much secrecy a party might want, an agreement to keep matters confidential cannot preclude investigation into wrongdoing. If the Act did provide a default rule of confidentiality, it would necessarily be qualified by mandatory exceptions.

1.21 The case law has identified a possible list of exceptions. But the extent of that list is not certain, and the courts have attached caveats to it. We are wary about codifying law which is not yet certain. The list of exceptions is also at a very high level of generality, and we are not persuaded that including that list in the Act would provide meaningful practical guidance. The detailed application of those exceptions is a matter of extensive case law and debate, and on-going development.

1.22 We consider it a strength that the law of confidentiality can be developed appropriately by the courts case by case. We note that arbitral rules contain a variety of approaches to confidentiality, and that in practice the current regimes usually work well.

INDEPENDENCE AND DISCLOSURE

1.23 In broad terms, independence is the idea that arbitrators should have no connection to the arbitrating parties or the dispute.

1.24 The Act does not impose a duty of independence on arbitrators. Some arbitral rules and foreign legislation do impose such a duty. We considered whether the Act should do so as well. We provisionally conclude that the Act should not.

1.25 We think that what matters most is impartiality. For example, it is no good requiring an arbitrator to be independent if they are biased. The Act already imposes a duty of impartiality on arbitrators, by section 33.

1.26 Similarly, we think that, if an arbitrator is impartial, it does not matter if they are not perfectly independent – as long as any connections are disclosed to the parties, so that the parties can consider the matter for themselves.

1.27 It is an old but vital adage that justice must be done and be seen to be done. Arbitrators must be impartial and be seen to be impartial. The case law already recognises that an arbitrator must be free from apparent bias: whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased. This is reflected in section 24 of the Act, whereby an arbitrator can be removed by the court if there are justifiable doubts as to the arbitrator's impartiality.

1.28 It is rarely possible for an arbitrator to be free of any connections to the parties or the subject-matter of the dispute. For a start, the parties often choose the arbitrators, although the arbitrators are still required to be impartial towards the party which appointed them. In some areas of activity, professionals are well known to each other. Some arbitrators are chosen precisely because of their immersive experience in a particular field. What matters is that, where an arbitrator does have connections, nevertheless the arbitrator remains impartial, and the reasonable party can have confidence in that impartiality.

1.29 It is therefore important that an arbitrator, who nevertheless thinks themselves capable of being impartial, discloses any connections. This is a show of good faith. It allows the parties to consider for themselves whether the arbitrator appears to be impartial. Withholding that information might in itself give cause for alarm.

1.30 The case law requires an arbitrator to make such disclosure. We provisionally propose that the case law should be codified. We propose that the Act should be amended to provide that arbitrators have a continuing duty to disclose any circumstances which might reasonably give rise to justifiable doubts as to their impartiality.

DISCRIMINATION

1.31 Diversity of arbitral appointments has improved, but not to parity. For example, women are still around three times less likely to be appointed as arbitrators than men. Notable initiatives within the arbitration community working to improve diversity in arbitration include the ERA Pledge (Equal Representation in Arbitration), which is a response to the under-representation of women on arbitral tribunals, and REAL (Racial Equality for Arbitration Lawyers).

1.32 Some arbitration agreements contain terms which require, for example, that the arbitrators be "commercial men". The leading case on discriminatory terms in arbitration agreements is the Supreme Court decision in *Hashwani v Jivraj* (2011). In that case, the court said that an arbitrator, although appointed under a contract, was not appointed under a contract of employment, and so the employment law rules against discrimination did not apply. We think that that decision was correct in law, but it revealed that equality legislation did not extend to arbitration, which must be questioned as a matter of policy.

1.33 There are moral and economic reasons why discrimination is not acceptable and why equality is necessary. Accordingly, we provisionally propose that:

(1) the appointment of an arbitrator should not be susceptible to challenge on the basis of the arbitrator's protected characteristics; and

(2) any agreement between the parties in relation to the arbitrator's protected characteristics 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.

1.34 "Protected characteristics" would be those identified in section 4 of the Equality Act 2010. They are: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation.

1.35 The provisional proposal allows a party or an institution to appoint an arbitrator free of any discriminatory restrictions in the arbitration agreement. Discriminatory terms relating to the appointment of an arbitrator in the arbitration agreement would be unenforceable.

1.36 The proposal does not prescribe whom to appoint. Rather, the proposal applies when Party A makes an appointment, and Party B wants to object. To this extent, the proposal supports the autonomous choice of Party A. It does this only by prohibiting Party B from acting on prejudice.

1.37 The proposal does not provide an additional basis on which to challenge the appointment of an arbitrator. Rather, it limits the grounds on which to challenge an arbitrator, by precluding discriminatory challenges.

1.38 The proposal allows that, in some contexts, it may be appropriate to require an arbitrator to have a particular characteristic. An example might be a requirement that an arbitrator has a nationality different from the arbitral parties. However, there would be no blanket exceptions, and it would depend on the context of each case.

IMMUNITY OF ARBITRATORS

1.39 Section 29 of the Act provides that an arbitrator is not liable for anything done in the purported discharge of their functions as an arbitrator unless done in bad faith. However, this immunity does not extend to two situations, as follows.

1.40 First, an arbitrator potentially incurs liability when they resign. And yet, there might be good reasons for an arbitrator to resign. For example, an arbitrator is expected to resign if they subsequently learn of a conflict of interest which gives rise to justifiable doubts as to their impartiality, or if they think that the parties' agreed procedure is unfair. An arbitrator who resigns can apply to the court for immunity from liability, but such an application involves time and cost, and the courts in England and Wales might not always be readily accessible to non-lawyer or international arbitrators.

1.41 Second, when an arbitral party makes an application to court which impugns an arbitrator, for example an application to remove an arbitrator, case law has held that the arbitrator can be liable for the costs of that application, even if the party making the application is unsuccessful. Those costs can be very sizeable. We have heard that such costs are not covered by professional indemnity insurance.

1.42 We think that it is important to uphold the immunity of arbitrators. It supports the finality of the dispute resolution process, in that it prevents parties who are disappointed by the arbitral proceedings from pursuing further satellite litigation against the arbitrator. It also supports an arbitrator in acting impartially. An arbitrator should feel able to make appropriate decisions without the fear that a disapproving party might seek to cow them into submission by threats of challenge which incur personal liability.

1.43 Accordingly, we provisionally propose that the immunity of arbitrators should be strengthened and, in particular, that the case law which holds them potentially liable for the costs of court applications should be reversed. We also ask consultees whether they consider that arbitrators should incur liability for resignation at all, or perhaps only if their resignation is shown to be unreasonable.

SUMMARY DISPOSAL

1.44 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 when an issue has no real prospect of success, and there is no other compelling reason why it should be disposed of at a trial.

1.45 Summary judgment in court proceedings in England and Wales is well known and well used. It reflects the idea that time and costs can be saved by dealing early and summarily with issues which have no real prospect of success. For example, it may be that, even if a claimant's factual allegations are all true, still they would lose at trial, because the law is inevitably against them. In such circumstances, it would be wasteful to proceed all the way to a full trial when the result was always going to be the same.

1.46 The Act (at section 33(1)(b)) requires the arbitral tribunal to adopt procedures which avoid unnecessary delay and expense. It gives the tribunal the power to decide all procedural and evidential matters, subject to the right of the parties to agree any matter. Together, this probably empowers arbitrators to adopt a summary procedure to dispose of issues which are without any merit.

1.47 However, there is no express provision in the Act to adopt a summary procedure. In those circumstances, we have heard that some arbitrators are reluctant to adopt such a procedure, for fear that their ruling may be challenged in court. This is because arbitrators are also under to a duty to act fairly, and to give each party a reasonable opportunity to put their case (under section 33(1)(a)). Otherwise, an arbitrator's rulings can be challenged for serious irregularity.

1.48 We think that fairness can be ensured with a summary procedure by a combination of procedural due process and a suitable threshold for disposing of issues.

1.49 Procedural due process includes ensuring that the parties are heard on the suitability of adopting a summary procedure, and on what that procedure might entail. The procedure itself will vary according to the circumstances of the case, but should always allow a party a reasonable opportunity to argue that the issue should proceed beyond a summary procedure to a full hearing.

1.50 A suitable threshold recognises that summary disposal should be restricted to those cases which are fanciful, whereas those which are realistic, with an argument that carries a degree of conviction, ought to be heard in full.

1.51 Accordingly, we provisionally propose that the Act should provide explicitly that an arbitral tribunal may adopt a summary procedure to dispose of a claim or defence. We propose that such a provision be non-mandatory: the parties should be able to agree to opt out from it in their arbitration agreement. We propose that it would require an application by one of the parties, and that the summary procedure to be adopted would be a matter for the arbitral tribunal, in the circumstances of the case, in consultation with the parties.

1.52 As for the threshold, there are two main options. First, some arbitral rules use the phrase "manifestly without merit" to describe issues which might be disposed of summarily. Second, court proceedings in England and Wales use the test of "no real prospect of success". We ask consultees which approach they prefer.

1.53 Just because one party has requested summary disposal, that alone should not, of course, mean that the request must be obliged. Unless the parties have agreed otherwise, we think that it should be open to an arbitrator who receives a request for

summary disposal to consider that the more appropriate procedure is to follow an expedited process or a full process as normal.

1.54 Nevertheless, such an express provision could reassure arbitrators that a summary procedure can be fair in appropriate circumstances. It could aid them in their duty to resolve disputes without unnecessary delay and expense. We have heard from some stakeholders that it would be a welcome innovation in terms of improving efficiency.

COURT ORDERS IN SUPPORT OF ARBITRAL PROCEEDINGS

1.55 Section 44 of the Act provides that the court has power to make orders in support of arbitral proceedings. Section 44(2) lists the matters about which the court can make such orders. That list includes such matters as the taking or preservation of evidence, and the granting of an interim injunction.

1.56 Two questions have arisen about the operation of section 44. First, whether the court can make orders against third parties, that is, against those who are not party to the arbitral proceedings. Second, to what extent section 44 is available when arbitral parties have also agreed a regime which provides for an emergency arbitrator.

Section 44 and orders against third parties

1.57 We think that, as for the matters listed in section 44(2), whatever powers the court has in respect of those matters in domestic court proceedings, it also has those powers in arbitral proceedings. In other words, the purpose of section 44 is to import the law on those matters from domestic court proceedings into arbitral proceedings. Section 44 does not try to create a new or separate code for those matters.

1.58 The law on those matters in domestic court proceedings is various. In other words, each matter has its own body of rules. The rules are not identical for each matter. In any given matter, it may be possible for the court to make an order against a third party, but the necessary requirements will vary according to the matter. So too under section 44, whether the court can make a third party order in support of any particular arbitration will depend on the matter in hand and its own body of rules. We think that it is wrong to see section 44 as applying a single set of rules across all matters.

1.59 Accordingly, we think that the court can make orders under section 44 against third parties, in appropriate cases. We ask consultees whether this needs to be made explicit in the Act.

1.60 Further, we provisionally propose that, where orders are made against third parties, those third parties should have the usual full right of appeal, rather than the restricted right of appeal which applies to arbitral parties. After all, arbitral parties have agreed to arbitration, so it is fair to limit their access to the court, whereas third parties have not agreed to arbitration or to limit their recourse to court.

1.61 Additionally, and incidentally, we provisionally propose that section 44(2)(a) be amended to confirm that it relates to the taking of the evidence of witnesses by deposition only. This is to preclude any confusing overlap with section 43, which relates to witness summonses.

Emergency arbitrators

1.62 Some arbitral rules provide for the appointment of an emergency arbitrator. 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.

1.63 Our provisional conclusion is that the provisions of the Act should not apply generally to emergency arbitrators. For example, we think that section 16 (procedure for appointment of arbitrators) is not suited to the appointment of emergency arbitrators. We also conclude that the Act should not include provisions for the court to administer a scheme of emergency arbitrators. We think that this would involve a level of direct management in the arbitral proceedings which is not suited to the courts.

1.64 Nevertheless, if the parties have agreed a regime by which emergency arbitrators can make interim orders, does that limit the ability of the parties to ask the court to make interim orders? Some stakeholders consider that the High Court decision in *Gerald Metals SA v Timis* (2016) leads to this result.

1.65 We think that parties can seek the assistance of the court, despite having agreed the availability of an emergency arbitrator regime, as long as the requirements of section 44 are met in the usual way. There are three subsections which set out those requirements.

1.66 Section 44(3) provides that, if the case is urgent, a party can apply for a court order if necessary to preserve evidence or assets. This section can be invoked whether or not the (main) arbitral tribunal is fully constituted, or an emergency arbitrator has been appointed, or emergency arbitrator provisions have been agreed.

1.67 Section 44(4) provides that, if the case is not urgent, a party can apply to court (for an order about the matters listed in section 44(2)) only with the agreement of the other arbitral parties or with the permission of the tribunal.

1.68 Section 44(5) provides that the court will act only if the tribunal has no power or is unable for the time being to act effectively. The purpose of this section is to prevent the court from overstepping into the proper domain of the arbitral tribunal. However, our provisional view is that this requirement may be redundant for the following reasons.

(1) In regard to section 44(3), the court is only preserving the current state of affairs rather than usurping the decision-making role of the arbitrator. Further, the requirements of urgency and necessity, along with the court's residual discretion, provide sufficient safeguards against the court overreaching.

(2) In regard to section 44(4), the court cannot fairly be accused of trespassing into the domain of the arbitrator, if the arbitrator gives permission, or if the parties, whose agreement defines the jurisdiction of the arbitrator, agree instead to revert to the court for these interim measures.

1.69 Accordingly, we ask consultees whether section 44(5) might be repealed. This might also remove any uncertainty caused by the perception of *Gerald Metals*.

1.70 Nevertheless, what happens if an emergency arbitrator issues an interim order which an arbitral party ignores? The Act does not currently make provision for this. We think that there are two ways in which the Act could be amended to deal with this situation, as follows.

1.71 First, the Act could empower the court to order compliance with a peremptory order of an emergency arbitrator, mirroring the provision currently only available to a fully constituted arbitral tribunal. Alternatively, the requirements for obtaining an interim court order could be extended so that an application to court under section 44(4) could be made with the permission of an emergency arbitrator as well (when permission currently can only come from a fully constituted arbitral tribunal). We ask consultees which approach they prefer.

CHALLENGING THE JURISDICTION OF THE TRIBUNAL

1.72 An arbitrator only has jurisdiction or authority over those parties who have submitted to that jurisdiction. For example, a defendant, threatened with arbitration proceedings, might reply that they never agreed to arbitration. In those circumstances, they might contest the jurisdiction of the arbitral tribunal.

The statutory scheme for objecting to the tribunal's jurisdiction

1.73 A party might make their objection to the tribunal that it lacks jurisdiction, or they might make that objection to the court.

1.74 If a party makes its objection to the tribunal, then under section 30, unless otherwise agreed by the parties, the tribunal is competent to rule on its own jurisdiction. Such a ruling can be an award on jurisdiction, or part of an award on the merits of the main dispute.

1.75 Under section 32, a party may apply to court for the court to determine the jurisdiction of the arbitral tribunal. This requires the agreement of the other arbitral parties, or the permission of the tribunal and the court.

1.76 If an arbitral party asks the tribunal to rule on its own jurisdiction under section 30, that party can, if unsatisfied with that ruling, then apply to court under section 32. Or it can apply straight to court under section 32.

1.77 Where the arbitral tribunal issues an award, an arbitral party can apply to court, under section 67, to challenge that award on the basis that the tribunal lacked jurisdiction.

1.78 An award challenged under section 67 might be an award on jurisdiction, or an award on the merits of the main dispute. If the latter, nevertheless it is only the jurisdiction of the tribunal which is contested; the merits of the main dispute cannot be challenged on this basis.

1.79 An arbitral party can ask the tribunal to rule on its own jurisdiction, under section 30, and, if unsatisfied with that ruling, then apply to court under section 67 (after the tribunal has issued an award).

1.80 Additionally, section 67 can be invoked by an applicant who has otherwise taken no part in the arbitral proceedings.

Rehearing or appeal?

1.81 Our principal concern is with those situations where an arbitral party has participated in the arbitral proceedings. The situation is where a party has asked the tribunal to rule on its own jurisdiction, under section 30, but, unsatisfied with that ruling, asks the court to consider the jurisdiction of the tribunal under section 67.

1.82 Currently, case law states that such a challenge is potentially a full rehearing. The court can rehear the evidence (on jurisdiction), as well as the arguments. The ruling by the tribunal is given no weight.

1.83 The question we consider is whether such a challenge should be a rehearing, or instead an appeal. With an appeal, the court would not ordinarily hear oral evidence or new evidence. It would ordinarily be limited to a review of the tribunal's ruling, allowing the appeal only where the tribunal's ruling was wrong.

1.84 On the one hand, a rehearing might mean reduplication, and so delay and increased costs. There is also a question of fairness. The current law allows a party to raise a challenge before the tribunal, and obtain an award, which will naturally 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 nothing more than a dress rehearsal.

1.85 On the other hand, section 67 is invoked in only a tiny percentage of arbitrations, and the court usually exercises a close control to discourage speculative applications and to limit the introduction of new evidence. There is also a theoretical argument that the tribunal cannot be the final arbiter of its own jurisdiction.

1.86 We provisionally propose that, where a party has participated in arbitral proceedings, and has objected to the jurisdiction of the arbitral tribunal, which has ruled on its jurisdiction in an award, any subsequent challenge under section 67 should be by way of an appeal and not a rehearing.

1.87 For consistency, we also ask consultees whether the same approach should apply to applications under section 32.

1.88 Our proposal would still see the court as the final arbiter of the tribunal's jurisdiction. We also think that it is theoretically sound, as follows. We are considering a situation where both arbitral parties ask the arbitral tribunal to rule on its jurisdiction, under section 30. One party is questioning the arbitral tribunal's jurisdiction to determine the merits of the main dispute, but both parties are asking the arbitral tribunal in the meantime to rule on its jurisdiction. By asking the tribunal to rule on its jurisdiction, the parties are conferring on the tribunal a "collateral" jurisdiction to decide the question as to whether it has jurisdiction over the main dispute. This is why it is theoretically sound for the tribunal to rule on its jurisdiction, even if that ruling is subject to review by the court by way of an appeal.

Two further matters

1.89 We provisionally propose that section 67 should be amended to include the further remedy that the court may declare the award to be of no effect. We make this proposal for consistency within section 67, and with similar remedies available under section 68 (challenge for serious irregularity).

1.90 We also 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. In our view, a tribunal probably has this power already. Our proposal seeks to make the position certain. As a matter of policy, we think that a party who wrongly initiates arbitration proceedings should bear the costs it has caused to be incurred.

APPEALS ON A POINT OF LAW

1.91 In a typical arbitration, the arbitrator will find the facts, and apply the law to those facts in order to reach a decision. What if the arbitrator gets the law wrong? Section 69 of the Act allows a party to appeal to the court, for the court to reconsider the contested question of law, but only in limited circumstances.

1.92 Some have suggested that section 69 should be repealed, to increase the finality of arbitral awards. By contrast, others have suggested that the circumstances in which an appeal under section 69 can be brought should be expanded, so that the court has more opportunity to consider questions of law.

1.93 Overall, we do not currently propose any reform to section 69. There are two competing motivations. One is to ensure the finality of arbitral awards. Another is to ensure that errors of law are corrected, so that the law is applied consistently and in common to everyone. We have provisionally concluded that section 69 strikes a defensible compromise between these two motivations.

1.94 As a percentage of total arbitrations, section 69 is rarely invoked, so that its presence does not appear to be causing any structural or regular delays. On the other hand, a number of appeals are made each year, so there is some opportunity for helpful judicial pronouncements. What is more, section 69 is non-mandatory, and parties can agree a different position on appeals on points of law – whether more generous or less. Arbitration agreements and arbitral rules have long settled on their preferred relationship with section 69, by opting-in or opting-out, and we are not currently persuaded of any need to unsettle that.

MINOR AMENDMENTS

1.95 In Chapter 10 of the consultation paper, we discuss minor amendments to various provisions of the Act, as follows.

Section 7 (separability of arbitration agreement)

1.96 Section 7 of the Act provides a default rule that an arbitration agreement is separable from the main contract in which it appears. This is useful. It allows the arbitration agreement to survive the invalidity of the main contract. For example, assume that one party claims that the main contract is invalid, and the dispute is referred to

arbitration. If the arbitral tribunal rules that the main contract is invalid, including the arbitration clause, that would also invalidate the ruling itself, putting the parties back to square one. If instead the arbitration agreement is separable, then it survives the invalidity of the main contract, and any arbitral ruling also survives to resolve the dispute.

1.97 Section 7 is non-mandatory. For example, it can be disapplied when the parties choose a foreign law to govern the arbitration agreement (by operation of section 4(5)). We ask consultees whether section 7 should be made mandatory.

Appeals from section 9 (stay of legal proceedings)

1.98 Section 9 enables a party to an arbitration agreement to apply to court, to stay court proceedings against them in favour of arbitral proceedings. We provisionally propose to correct what the House of Lords has previously identified as a drafting error, and confirm that an appeal is available from a decision of the court under section 9.

Sections 32 and 45 (court determination of preliminary matters)

1.99 Section 32 concerns an application to court to determine a preliminary point of jurisdiction, and section 45 concerns an application to court to determine a preliminary point of law. Both sections are couched in similar terms. An application under those sections requires either the agreement of all arbitral parties, or the permission of the arbitral tribunal and the "satisfaction" of the court as to a number of matters. Under both sections, the court has a further general discretion whether to accede to the application. We ask consultees whether the sections might benefit from being simplified, so that they require merely the agreement of the parties or the permission of the arbitral tribunal, and not the additional satisfaction of the court. The court would still retain its general discretion.

Modern technology

1.100 We provisionally conclude that the Act is compatible with the use of modern technology and allows, for example: the examination of witnesses remotely (that is, through telecommunication technology); holding hearings remotely; electronic communication; electronic documentation; the presentation of evidence and argument electronically; electronic awards; signing of awards electronically or with a cryptographic key; and notifying awards electronically.

1.101 Nevertheless, we ask consultees whether the Act might expressly empower an arbitral tribunal to order remote hearings and the use of electronic documentation.

Section 39 (power to make provisional awards)

1.102 Section 39 is headed "power to make provisional awards", but the text of section 39 refers, not to awards, but to orders. We ask consultees whether the heading of section 39 should be amended for consistency to refer to orders, rather than awards.

Section 70 (challenge or appeal: supplementary provisions)

1.103 An arbitral award can be challenged on the basis that the tribunal lacked jurisdiction (section 67), or on account of a serious procedural irregularity (section 68), or it can be appealed on a point of law (section 69). In all cases, such a challenge or appeal must comply with the further requirements of section 70. Section 70(3) requires a

challenge or appeal to be brought within 28 days of the award. However, section 70(2) requires a would-be challenger first to make use of any available recourse under section 57, whereby a tribunal can be asked to correct or clarify their award. But a request under section 57 can take longer than 28 days. We provisionally propose that section 70(3) be amended so that time runs from the date when the arbitral party was notified of the result of their request under section 57.

Sections 85 to 87 (domestic arbitration agreements)

1.104 Sections 85 to 87 modify some of the provisions of the Act for domestic arbitrations. Those modified provisions concern the stay of legal proceedings (section 9), determination of a preliminary point of law (section 45), and an appeal on a point of law (section 69). Sections 85 to 87 have never been brought into force. We provisionally conclude that there is no merit in treating domestic arbitrations differently. We propose that these sections be repealed.