



**Law
Commission**
Reforming the law

Review of the Arbitration Act 1996 Second Consultation Paper Summary



March 2023

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, or a panel of arbitrators acting as an arbitral tribunal, to resolve the dispute by issuing an award. In England and Wales, arbitration is regulated by the Arbitration Act 1996 (“the Act”).
- 1.2 In March 2021, the Ministry of Justice asked the Law Commission to conduct a review of the Arbitration Act 1996. We began our review in January 2022, and in September 2022, we published our first consultation paper. The consultation period closed in December 2022, and we received responses from around 118 consultees.
- 1.3 We are now conducting a second consultation exercise. In this second consultation we discuss only three topics, as set out below.
- 1.4 As with our first, our proposals in this second consultation are provisional and subject to this formal consultation exercise. The responses to this second consultation will, along with any responses to the first consultation which relate to the same topics, inform our final report.

This second consultation

- 1.5 This document is a summary of our full second 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 27 March to 22 May 2023.

Responses to the consultation may be submitted using an online form at: <https://consult.justice.gov.uk/law-commission/second-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.

- 1.6 We strongly encourage stakeholders to respond to our consultation questions, which can be viewed in full in Chapter 5 of the second consultation paper, or at <https://consult.justice.gov.uk/law-commission/second-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 this

second consultation will read the full consultation paper, or sections of it, in addition to this summary.

1.7 The specific areas which we discuss in detail in the second consultation paper, and which are summarised in this document, are as follows:

- (1) the proper law of the arbitration agreement;
- (2) challenges to awards under section 67 on the basis that the tribunal lacked jurisdiction; and
- (3) discrimination in the context of arbitration.

1.8 We did not make any proposals in respect of the proper law of the arbitration agreement in our first consultation paper. Nevertheless, subsequent to our first consultation paper, responses from and discussions with consultees have persuaded us that this is a topic which requires discussion. We now make proposals about this topic, and ask consultees for their views.

1.9 Since we are consulting again, we are also taking the opportunity to revisit the topics of section 67, and discrimination. These are perhaps the most controversial of the topics of potential reform. Responses from and discussions with consultees have enabled our analysis to develop and have led us to revise our proposals. We seek the views of consultees on those revised proposals, and on this new iteration of our analysis.

PROPER LAW OF THE ARBITRATION AGREEMENT

Introduction

1.10 Thirty-one responses to our first consultation paper asked us to reconsider the question of the proper law of an arbitration agreement. They offered new reasons in support of reform. Accordingly, in this second consultation we have considered and made proposals about this topic.

1.11 Contract law guides us in resolving disputes about contracts. Where there is an international dimension to the contract, which jurisdiction's law will be relevant? For example, if a German company enters into a contract with a French company to build a factory in Belgium, is this contract governed by German, French, or Belgian law, or some other law altogether? The governing law of a contract is also known as its "proper law", and the process for identifying the proper law is part of what is called "conflict of laws".

1.12 Identifying the proper law of an arbitration agreement involves some additional complexities compared to other contracts.

1.13 First, this is because an arbitration agreement is usually a clause in a main contract (also called the "matrix contract"). It may be that the arbitration agreement and the matrix contract have different governing laws.

1.14 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 juridical place where the arbitration occurs. A

physical hearing might happen anywhere, or it might be online, but the seat is where the arbitration is legally deemed to occur.

- 1.15 An arbitration agreement might expressly record its governing law. However, this is not usual. When the arbitration agreement is silent as to its governing law, it is necessary to determine what its governing law might be.

The current law

- 1.16 The current law in England and Wales for determining the proper law of an arbitration agreement was set out in the Supreme Court decision in *Enka v Chubb* (2020). Although two judges gave dissenting judgments, the views of all five judges were unanimous on most issues, and the court held as follows.

- (1) If there is a choice of law, express or implied, directed to the arbitration agreement itself, then that chosen law will govern the arbitration agreement, unless that choice of law is contrary to public policy.
- (2) If there is no such choice, and if the arbitration agreement forms part of a matrix contract, and if there is a choice of law, express or implied, for the matrix contract, then that chosen law will also govern the arbitration agreement.
- (3) However, that chosen law “may” be displaced in some circumstances (for example, where the law of the seat itself provides that the arbitration agreement is governed by the law of the seat, or where there is a serious risk that the chosen law might render the arbitration agreement invalid).
- (4) If there is no choice of law anywhere, the arbitration agreement will be governed by the law with which it has the closest and most real connection. According to the majority, this will be the law of the seat of the arbitration (although, again, that chosen law may perhaps be displaced if there is a serious risk that the chosen law might render the arbitration agreement invalid).

- 1.17 The process set out in *Enka v Chubb* is complex, and its application in any given case is likely to leave room for argument. Indeed, it is notable that the Supreme Court itself was divided on what the proper law of the arbitration agreement was in that case.

- 1.18 Furthermore, while the approach of the Supreme Court in *Enka v Chubb* might have been orthodox in terms of applying conflict of laws rules to contracts, in the specialist realm of arbitration agreements it leads to a number of potential problems.

Reasons in favour of reform

- 1.19 The decision in *Enka v Chubb* would result in many more arbitration agreements being governed by foreign law. This is simply because many international contracts, despite providing for an arbitration to be seated in England and Wales, have a foreign choice of law clause in the matrix contract.
- 1.20 In turn, this may lead to an increased need for parties to present expert evidence on how that foreign law governs the arbitration agreement, which might increase delay and costs. Also, the applicability of foreign law would also oust the law of England and

Wales on a number of important topics, including: separability, arbitrability, scope and confidentiality, as follows.

- 1.21 First, where an arbitration agreement is governed by the law of England and Wales, it will benefit from the principle of separability under section 7 of the Act. The principle of separability provides that if an arbitration agreement is contained within a matrix agreement, and that matrix agreement is found to be invalid, this will not necessarily mean that the arbitration agreement is also invalid. In other words, the arbitration agreement survives to resolve the dispute about the validity of the matrix agreement. However, under the current law, if an arbitration agreement is not governed by the law of England and Wales, section 7 would be disapplied and the practical utility provided by the principle of separability might be lost.
- 1.22 Second, the law of England and Wales is generally considered to be generous in terms of arbitrability. In other words, the law of England and Wales tends to accept that more types of dispute can be arbitrated. If an arbitration agreement is governed by a foreign law which is less generous in terms of arbitrability, the parties may be required to litigate their dispute in the courts of that foreign law. The parties could thereby lose both the ability to arbitrate, and the siting of that dispute resolution process in England and Wales.
- 1.23 Third, the law of England and Wales is generally considered to be generous when it comes to the scope of an arbitration agreement. In other words, the law of England and Wales tends to presume that the parties wanted all aspects of their dispute to be settled through one arbitration, rather than having different aspects resolved through different processes. Again, if an arbitration agreement is governed by a foreign law which takes a narrower view of scope than the law of England and Wales, then it may be that the parties lose both the ability to arbitrate (all aspects of dispute), and the siting of that dispute resolution process in England and Wales.
- 1.24 Fourth, confidentiality can be a term of the arbitration agreement implied by the law of England and Wales. If instead a foreign law applies to the arbitration agreement, that might create uncertainty about the extent to which the arbitral proceedings are confidential.
- 1.25 Largely for these reasons, the majority of consultees who addressed the issue of governing law called for an approach different from *Enka v Chubb*. Although different consultees used different language, a consistent theme is clearly apparent. The majority of consultees were generally in favour of a rule 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.

Reasons against reform

- 1.26 Reasons against reform include the following.
- 1.27 First, parties may have an expectation that the law they have chosen to govern their contract governs all the terms of their contract, including the arbitration clause.
- 1.28 Second, if the law of the matrix contract and the law of the arbitration clause do not align, that can create problems. For example, it might lead to someone being held a

party to the arbitration clause, under its governing law, and yet not a party to the matrix contract, under its different governing law.

- 1.29 Third, to the extent that the matrix contract is governed by foreign law, evidence of that foreign law will be before the tribunal or court anyway. The fact that the arbitration clause might need evidence of that same foreign law will therefore add little extra cost or delay.
- 1.30 Fourth, while the law of England and Wales is generous when it comes to questions of arbitrability and scope, there could be sound public policy reasons why another jurisdiction's law is more restrictive. We would not want our arbitration law to be viewed as something analogous to money laundering, as a means of circumventing foreign public law duties.
- 1.31 A final argument against reform is simply that the Supreme Court has recently ruled on the proper law of an arbitration agreement, in *Enka v Chubb*. Its view that the chosen law of the matrix contract carries across to the arbitration agreement was unanimous. We are aware that any proposal which seeks to overturn the unanimous view of a recent Supreme Court decision needs to be approached with caution.

Provisional proposal

- 1.32 On balance, although the arguments against reform are well made, nevertheless, we provisionally conclude that the arguments in favour of reform carry the day.
- 1.33 We provisionally propose that a new rule be introduced into the Act 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.
- 1.34 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, and would give effect to the more generous rules on arbitrability and scope which the courts have seen fit to develop. More than that, it would remove uncertainty over which law governs an arbitration agreement. We think that the ruling in *Enka v Chubb* is complex; a simple default rule removes much of the opportunity for argument and satellite litigation.
- 1.35 We ask consultees whether they agree with this proposal.

CHALLENGING JURISDICTION UNDER SECTION 67

- 1.36 Under section 67 of the Arbitration Act 1996, a party can make an application to court, challenging an award by an arbitral tribunal on the basis that the tribunal lacked jurisdiction.
- 1.37 The focus of our concern is on the following situation. An objection has been made to the tribunal itself that it lacks jurisdiction, and the tribunal has ruled on its jurisdiction in an award. There is then a subsequent challenge under section 67 by a party who has participated in the arbitral proceedings.

- 1.38 Under the current law, that challenge before the court comprises a full rehearing. In our first consultation paper, we suggested that this could increase delay and cost, and that it might also be unfair to allow the party making the challenge to have a second bite of the cherry. We therefore proposed that the challenge should take the form of an appeal instead of a rehearing.
- 1.39 We are reconsulting on this topic because, in response to our first consultation paper, consultees expressed strong views on both sides of the debate. This has enabled our analysis to move forward. We have also modified our proposals, as follows.

Revised proposal

- 1.40 We continue to think that, where an objection has been made that the tribunal lacks jurisdiction, and the tribunal has ruled on this, then any subsequent section 67 challenge by a party who participated in the arbitral proceedings should not be in the form of a full rehearing.
- 1.41 However, consultees criticised our preference for the language of appeal; an appeal, they said, could encompass a rehearing, so the distinction between the two was blurred and could give rise to ambiguity. We accept this point and, rather than using the language of “appeal or rehearing”, we now focus on particularising what we propose should be the limits of a challenge under section 67.
- 1.42 We think that, ordinarily, there should be no new arguments, no new evidence, and no rehearing of evidence (especially at the request of the arbitral claimant). We think that some measure of deference should be given to the tribunal’s award; the question should be whether the tribunal’s ruling was wrong.
- 1.43 Our updated provisional proposal is as follows:
- (1) the court should 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 should not be reheard, save exceptionally in the interests of justice; and
 - (3) the court should allow the challenge only where the decision of the tribunal on its jurisdiction was wrong.

We propose that this process should be encapsulated in rules of court, rather than in legislation.

- 1.44 We explain our thinking below. We ask consultees whether they agree with the particulars of our revised proposal.

Discussion

- 1.45 The principal argument voiced against the proposal in our first consultation paper was that, if a party did not agree to arbitration, the tribunal should never be ruling in the first place.

- 1.46 We think that the answer to this argument is competence-competence. This is the idea that the tribunal should be able to rule on its own jurisdiction, and perhaps also before a court does. Thus, even if it is decided that a party did not agree to arbitration, competence-competence says that it is proper for the tribunal to be the one making that decision in the first instance.
- 1.47 Competence-competence is a principle which is recognised internationally. It can be found in the UNCITRAL Model Law. It is enshrined in section 30 of the Arbitration Act 1996.
- 1.48 We think that our revised proposals (and, indeed our original proposal) gives body to that principle. It does not preclude the tribunal's ability to rule on its jurisdiction. Nor does our proposal preclude the tribunal's ability to rule before the court does – quite the opposite, section 67 presupposes that the tribunal has ruled before the court does and our proposal does not change that. Rather, our proposal says that where a tribunal rules on its own jurisdiction before a court does, there is reason for some deference to be shown to that ruling and to the process which led to it.
- 1.49 Additionally, we now propose that these particularised limits to a challenge under section 67 should be adopted in rules of court, rather than enshrined in the Act, for the following reasons.
- 1.50 We think that the language of the Act is already consistent with our approach, without the need for amendment. However, we are aware of the strong views of consultees on both sides of this topic: we have heard how reform could negatively impact the market, and also how no reform could negatively impact the market. Factually, it has not been possible for us to verify which prediction is more likely. As a matter of principle, we think that our proposals are merited. Meanwhile, their implementation through court rules is, in our view, a compromise as a “softer” type of reform. It might allow these proposals to be piloted and amended (whether tightened or relaxed) should that prove necessary. Also, the restrictions we are proposing are largely procedural and fit naturally as the sort of prescriptions contained within court rules.

DISCRIMINATION

- 1.51 In Chapter 4 of our first consultation paper, we discussed discrimination in the appointment of arbitrators. Despite some laudable initiatives within the arbitration community, we noted that there is still a lack of diversity in arbitrator appointments. We said that there are moral and economic reasons why discrimination is unacceptable.
- 1.52 However, in the leading case on discriminatory terms in arbitration agreements, *Hashwani v Jivraj* (2011), the Supreme 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.
- 1.53 We provisionally proposed that a term be unenforceable which requires an arbitrator to be appointed by reference to a protected characteristic, unless that requirement can be justified as a proportionate means of achieving a legitimate aim.

- 1.54 We retain that provisional proposal, but we are re-consulting on discrimination because, in light of consultee responses, we have identified new topics of potential reform.
- 1.55 In response to that original proposal, some consultees suggested that it should always be justified to require the arbitrator to have a nationality different from the parties.
- 1.56 We think that the nationality of an arbitrator should not matter if they are impartial, but we acknowledge that the appearance of impartiality also matters. We accept that having an arbitrator with a neutral nationality would preclude many objections.
- 1.57 We note that there is precedent for the desirability of an arbitrator having a neutral nationality, both in the UNCITRAL Model Law, and in several institutional arbitration rules.
- 1.58 On reflection, we see the sense in the suggestion, and we now provisionally propose that it should be deemed justified to require an arbitrator to have a nationality different from that of the arbitral parties. We ask consultees whether they agree.
- 1.59 Further, again in response to our original proposal, some consultees said that the problem was not so much discriminatory terms in arbitration agreements, but appointments which were discriminatory (even when there were no terms restricting appointments). Some said that discrimination could also continue beyond the appointment of arbitrators, for example in the conduct of the arbitral proceedings.
- 1.60 The simplest approach here might be to prohibit discrimination generally in an arbitration context. If so, then the key issue, in our view, is what the remedies should be.
- 1.61 For example, if an arbitrator acts in a way which is discriminatory, we think that they might already be liable to removal under section 24 of the Arbitration Act 1996. Further, a failure to be fair could constitute a serious irregularity, meaning that any resulting award could be challenged under section 68.
- 1.62 For other remedies, we might take our cue from the Equality Act 2010. That provides that where discrimination happens in a work context, it is the employment tribunal which has jurisdiction to hear any complaint. The remedies include a declaration of the complainant's rights, compensation, and a recommendation of how the respondent should act.
- 1.63 In this second consultation we ask consultees whether they think that discrimination should be generally prohibited in the context of arbitration, and what they think the remedies should be where discrimination occurs.