



**Law
Commission**
Reforming the law

Review of the Arbitration Act 1996

Responses to First Consultation Paper

Contents

Edward Album	1
Allen & Overy LLP	4
Clare Ambrose	27
Anonymous Response 1	41
Anonymous Response 2	49
ARIAS (UK)	55
Association of Consumer Support Organisations (ACSO)	63
Bargate Murray Ltd	68
Imran Benson	74
Beth Din of the Federation of Synagogues	80
Daniel Bovensiepen	86
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	94
British Coffee Association	119
British Insurance Law Association	125
Bryan Cave Leighton Paisner LLP	132
Andrew Burr	140
Mark Campbell	146
Guido Carducci	152
Central Association of Agricultural Valuers	158
Centre of Construction Law & Dispute Resolution, King's College London	163

City of London Law Society, Arbitration Committee	192
YK Chan	212
Chartered Institute of Arbitrators	218
Graham Chase	233
Cyril Chern	240
Claimspace Limited	245
James Clanchy	252
Chancery Bar Association	258
Cleary Gottlieb Steen & Hamilton LLP	292
Clifford Chance LLP	297
Commercial Bar Association	303
Rhodri Davies KC	362
Lisa Dubot, Raid Abu-Manneh, and Rachael O'Grady	371
Stuart Dutson	375
Falcon Chambers	385
Federation of Commodity Associations	392
Fieldfisher LLP	397
Louis Flannery KC	404
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	408
FOSFA International	424
Dr Robert Gay	427
General Council of the Bar of England and Wales	434
Ben Giaretta	447
Gowling WLG (UK) LLP	453
Grain and Feed Trade Association (GAFTA)	455

Greenberg Traurig LLP	458
Jan Grimshaw	465
Dr Uglješa Grušić	470
John Habergham	481
Lord Hamblen and Lord Leggatt	486
Geoffrey Beresford Hartwell	488
Haynes and Boone CDG, LLP	499
Hilary Heilbron KC	504
Herbert Smith Freehills LLP	516
Holman Fenwick Willan LLP	524
Dr Sara Hourani	536
Michael Howard KC	542
ICC International Court of Arbitration	546
ICC UK Arbitration & ADR Committee	552
Institute of Family Law Arbitrators	563
Emmanuel Thomas Mathai Kandamchira	568
Anthony Kennedy	569
Paul Key KC	574
Michael Kotrly	581
Martin Y C Kwan	587
Toby Landau KC	601
Louise Lanzkron and Nick Peacock	608
Law Society of England and Wales	614
Michael Lever, on behalf of The Rent Review Specialist	622
Linklaters LLP	628
Lloyd's Market Association	642

London Beth Din	649
London Court of International Arbitration	651
London Maritime Arbitrators Association	662
Dr Paul MacMahon	680
Dr Aygun Mammadzada	681
Joseph Michael Matthews	690
Alex McIntosh and Chris Ward	696
Professor Alex Mills	698
Ethan Naish	706
Charles Oliver	712
Orrick, Herrington & Sutcliffe (UK) LLP	717
Dr Manuel Penades	723
Pinsent Masons LLP	726
Rowan Planterose	814
Property Bar Association	820
Nigel Puddicombe	827
John Pugh-Smith	833
Thomas Raphael KC	844
Reed Smith LLP	853
Klaus Reichert SC	860
Dr Michael Reynolds	862
Royal Institution of Chartered Surveyors	868
Ian Salisbury	875
Adam Samuel	881
Audley Sheppard KC	888
Aditya Singh	891

Skadden, Arps, Slate, Meagher & Flom (UK) LLP	896
Matthew Skinner and Garreth Wong of Shearman & Sterling LLP	940
Spotlight on Corruption	960
Sugar Association of London, and the Refined Sugar Association	966
John Tackaberry KC, and on behalf of 39 Essex Chambers, and the Society of Construction Law, and the Society of Construction Arbitrators	979
Technology and Construction Bar Association	1005
Simon Tolson	1015
Travers Smith LLP	1021
University of Aberdeen School of Law	1029
University of Southampton Law School	1058
Gilberto José Vaz	1065
Glenda Vencatachellum	1070
Rebecca Warder	1075
Allan W Wood	1080
Timothy Young KC	1085

Memorandum to Law Commission following Consultation on the Arbitration Act
by Edward Album, FCI Arb

The following submissions are made in relation to the Consultation Document. It is right to commence by congratulating the Commission and those who were responsible for the detailed examination that has taken place. This submission strongly supports the view that major changes of the Act are not necessary. The following specific points are submitted following consultation with the Arbitration Committee of the London Metal Exchange (LME) and after receiving views on the first subject below from the London Maritime Arbitrators' Association (LMAA).

1. Independence of Arbitrators and Disclosure

It is submitted that specific provisions relating to the above issues are not required. There is existing general law and the arbitration bodies such as the LMAA and LME have provisions relating to these issues in their general rules. We are concerned that, if specific rules are laid down in the Act, this could lead to unnecessary litigation. The fact is that in relation to shipping and commodities, the arbitrators are taken from those familiar with the trade concerned, many of whom are likely to have had contacts with the parties. They would not act where there is a conflict of interest and this is a matter specifically dealt with by the LME arbitration supervising body before arbitrators are appointed, as will be the case with other commodity organisations.

2. Summary Disposal of Issues

This has been the subject of a previous message to Mr. Tamblyn on 15th November, following a very valuable seminar organised by Members of Parliament. The view put forward by more than one delegate and supported by Sir Bernard Eder, who was on the panel, is that it is not appropriate for the right of summary judgment to be granted by statute to arbitrators. Court powers are different in this respect as the Courts are instruments of State and are authorised to give statutory directions. Another problem is enforcement. Several countries do not accept the enforcement of an Award if both parties have not had the opportunity to participate. In fact, parties always do have the opportunity to participate but an argument could be made on this issue if a summary judgment is given. I would mention particularly that Section 41 of the Arbitration Act gives specific reserve powers to arbitrators and these are mirrored in Regulation 10.1 of the LME. A copy of these Regulations is enclosed. The default powers are, in practice, sufficient to enable arbitrators to act if a party does not participate or does not obey a binding direction. In the circumstances, it is believed to be unnecessary to add this additional power.

3. Jurisdiction Challenge against Arbitration Awards

The current view supports the recommendation of the Law Commission that a complete rehearing is not required and issues can be dealt with by the appeal process. This was a strong view expressed at the House of Commons seminar, although opposed by Lord Mance. The extra point I would make is that, in the hearing of an appeal, the Court itself should be entitled to ask

for documents in addition to those which are specifically referred to in the arbitrator's Award or ruling.

4. Law Governing Arbitrators and Arbitration Agreement

It is suggested that provision on this subject is necessary. The Law Commission has referred to the two recent Supreme Court cases which, to some extent, clarify English Law. However it should be pointed out that the Enka case, which is the leading case on the subject, occupies no less than 114 pages in the Law Report and was decided by a majority of three to two. The other leading Supreme Court case, Kabab-Ji, occupies 33 pages and, again, is controversial in UK circles. It would be preferable to have some short provision to cover this point in a revised Arbitration Act. Detailed suggestions for this are set out in the Annexe to this memorandum. It should be emphasised that the parties are always able to deal with these issues in the Contract itself and would be well advised to do so.

I hope the above comments are helpful but I should be happy to give further information on them, if requested.

Edward Album
8th December 2022

ANNEXE

Annexe to Memorandum to the Law Commission re Governing Law and Separation of Arbitration Agreement

What Law Governs the Contract and the Arbitration Clause in the Contract (“the Arbitration Agreement”)

The following provisions shall apply, subject to the actual contract terms and the applicable rules of any specified arbitration body such as the ICC, LCIA or LMAA.

1. If a governing law is specified in writing in general terms in the Contract itself, whether or not with a specific reference to the Arbitration Agreement, the law so specified shall govern both the Contract and the Arbitration Agreement.
2. If the overall Contract does not specify a governing law for the Contract or for the Arbitration Agreement, then the Arbitrators appointed shall consider whether, on the evidence and documents available, a governing law can be clearly implied. If so, the rule in paragraph 1 above shall apply.
3. If a governing law for the Contract is not specified and cannot be implied, the following default rules will apply. These are:
 - (a) The law for the Contract itself will be based on that with which the Contract has the closest connection, as determined by the arbitral tribunal initially appointed or by any permitted appeal.
 - (b) As regards the Arbitration Agreement, if the Seat for the Contract is specified or can be implied by reference to the appointment of a supervising arbitration body in a stated country, then the laws of the country concerned shall govern juridical and procedural matters, including appeals to the Courts and other matters covered by the Arbitration Agreement, following also, as lawfully permissible, the rules of the appointed arbitration body.
 - (c) If no Seat is specified or can be implied as above, the law governing the Arbitration Agreement shall be that with which the issues covered by the Agreement have the closest connection, as determined by the arbitral tribunal initially appointed or by any permitted appeal.
4. Enforcement of any Award shall continue to be in accordance with the existing rules laid down by the New York Convention and current applicable laws.

It is to be emphasised again that parties to a Contract remain free to specify the law and provisions applicable to the Contract and the Arbitration Agreement.

Edward Album

BY EMAIL

Law Commission
Conquest House
37-38 John Street
Theobalds Road
London
WC1N 2BQ

Allen & Overy LLP

One Bishops Square
London E1 6AD United Kingdom

Tel +44 (0)20 3088 0000
Fax +44 (0)20 3088 0088

15 December 2022

Dear Law Commissioners,

Allen & Overy LLP response to the Law Commission's consultation paper entitled "Review of the Arbitration Act 1996"

1. Allen & Overy LLP is an international law firm with approximately 5,500 staff and 40 offices worldwide. Our international arbitration practice advises a diverse range of clients in complex cross-border commercial and investment treaty arbitrations in many different arbitral seats around the world, typically those administered by institutions such as the LCIA, ICC and the International Centre for Settlement of Investment Disputes. Our London-based litigators represent commercial clients in proceedings in the Business and Property Courts in England and Wales, the Court of Appeal and the Supreme Court. Many of our clients are multi-nationals, from a wide range of sectors, with only a minority being exclusively UK based. Our response is accordingly focused on our assessment of the needs, expectations and perspectives of commercial users of arbitration and on the factors that commercial parties take into consideration when making decisions as to their preferred forum globally for dispute resolution and when negotiating and drafting the detailed provisions of disputes clauses in their international commercial contracts.
2. We are grateful for this opportunity to respond to the various issues raised in the consultation paper on the Law Commission's review of the Arbitration Act 1996 (the **Act**). In producing this response, we have sought the view of our UK-based arbitration lawyers and certain of our key clients. This letter sets out the views of the majority of those who expressed an opinion.

Consultation Question 1. 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?

3. Our view is that it would be preferable to include provisions in the Act dealing, at a high-level, with the duty of and exceptions to confidentiality in relation to international arbitrations seated in the UK (as Hong Kong has done in its Arbitration Ordinance, section 18). This is because putting confidentiality on a statutory basis, at least in high level terms, would: (i) provide greater certainty as to the default position under English law (consistent with a core purpose of the Act, as noted at paragraph 3.46 of the consultation paper); and (ii) potentially increase the desirability of London as a seat for arbitration in light of the importance of confidentiality to most parties. The clients that we

Allen & Overy LLP is a limited liability partnership registered in England and Wales with registered number OC306763. It is authorised and regulated by the Solicitors Regulation Authority of England and Wales (SRA number 401323). The term partner is used to refer to a member of Allen & Overy LLP or an employee or consultant with equivalent standing and qualifications. A list of the members of Allen & Overy LLP and of the non-members who are designated as partners is open to inspection at its registered office, One Bishops Square, London E1 6AD.

Allen & Overy LLP or an affiliated undertaking has an office in each of: Abu Dhabi, Amsterdam, Antwerp, Bangkok, Beijing, Belfast, Boston, Bratislava, Brussels, Budapest, Casablanca, Dubai, Dublin, Düsseldorf, Frankfurt, Hamburg, Hanoi, Ho Chi Minh City, Hong Kong, Istanbul, Jakarta (associated office), Johannesburg, London, Los Angeles, Luxembourg, Madrid, Milan, Munich, New York, Paris, Perth, Prague, Rome, San Francisco, São Paulo, Seoul, Shanghai, Silicon Valley, Singapore, Sydney, Tokyo, Warsaw, Washington, D.C.

have engaged with on this subject have emphasised the importance of confidentiality to their choice of arbitration and were surprised that it is not provided for in the Act.

4. In our view, the arguments highlighted by the Law Commission in its paper, at paragraphs 240-246, in favour of retaining the current position can (for the most part) be overcome, for the following reasons.

- **Confidentiality should not be the default in all types of arbitration (para. 2.40):** Some arbitrations identified by the Commission, such as investor-state arbitrations, lean towards transparency. However, parties can contract out of confidentiality where they would prefer transparency. Indeed, this would be necessary on the Law Commission’s recommended approach of retaining the status quo. Should the Act be amended to codify confidentiality, it would be clearer to parties that they can contract out of the duty of confidentiality, and what they would need to contract out of.
- **The list of exceptions is not exhaustive, and the caveats are not trivial (para. 2.41):** In our view, the non-exhaustive list of exceptions set out by the Law Commission (at para. 2.32) are well settled and should be capable of definition. Setting out the settled exceptions in the Act, in broad terms, would not constrain the courts from developing the scope and application of those exceptions. Further, if necessary, an additional catch-all, sixth category could be added to catch cases where there is “some other compelling reason” which justifies overriding the default rule of confidentiality. We believe that including such a provision in the Act would strike the right balance between defining (and thus clarifying) the settled exceptions and permitting new exceptions to develop if necessary.
- **The exceptions are so general it would provide little guidance to the courts (para. 2.42):** We respectfully disagree. The codification of the exceptions, even if drafted broadly, would be useful in providing guidance to parties. Moreover, we do not think that the concepts would be any broader than plenty of others found in the Act already, e.g. in ss.33 and 68.
- **Foreign statutes and arbitral rules adopt differing approaches, which suggests that there is a lack of consensus on the precise limits of confidentiality (para 2.43):** We accept that this may be true, although there is a question over how different the leading rules and laws actually are. However, the slightly differing approaches adopted internationally have not held back the courts in this jurisdiction from developing the case law on confidentiality in the arbitration context.
- **It is not possible to provide a detailed statutory codification of the law in a way which would be future proof (para. 2.44):** This concern presupposes that a detailed statutory code is necessary. As noted above, defining the duty of confidentiality and the settled exceptions in the Act, provided it is done in high-level terms, should give the court scope to allow the law to develop.
- **Confidentiality is broader than arbitration, so it would be misplaced to codify the law in an arbitration statute (para. 2.44):** We accept this point, but consider that confidentiality plays a *particularly* important role in arbitration. We do not think that defining confidentiality in arbitration in the Act would set arbitration law at odds with the more general law because a definition using the *Tournier* exceptions would make the two consistent with each other. It might be worth considering whether there are other areas of law where confidentiality is similarly put on a statutory basis (such as sections 3 and 10 of the Trade Secrets (Enforcement, etc) Regulations 2018).
- **Due to confidentiality’s complexity, there is significant practical advantage in relying on the courts’ ability to develop the law on a case-by-case basis (para. 2.45):** We agree. However, defining the well-settled duty and primary exceptions would not curtail the court’s ability to

develop the law incrementally on a case-by-case basis, just as the law under (e.g.) s.68 has similarly developed.

- **Parties who seek greater specificity can choose arbitral rules that provide a scheme of confidentiality (para. 2.46):** This is true of many aspects of the Act, given the centrality of party autonomy as an underlying principle. In our respectful view, this misses the point, which is to set out a default framework within which more detailed arbitral rules will operate.

5. **However**, we recognise that there are a number of issues which may require further thought if the Law Commission were minded to consider again whether a duty of confidentiality should be included in the Act. Specifically, we have identified the following issues:

- (a) Confidentiality is a separate concept to privacy, but both may be relevant in the arbitration context. Would the Act only deal with confidentiality and not privacy?
- (b) If a duty of confidentiality were to be included in the Act, it would be helpful in principle for the Act to be clear on its scope, e.g. (1) as to its subject matter; i.e. whether it extends to the existence of the arbitration, the materials produced or disclosed in the arbitration etc, and (2) as to those who are subject to it (or conversely may benefit from it), such as witnesses and the tribunal.
- (c) What impact would including the duty of confidentiality in the Act have on the nature of the cause of action for a breach of confidence or misuse of private information? It is not clear whether this would entail the creation of a statutory duty such that breach would give rise to a breach of statutory duty, or for a cause of action to continue to arise as a breach of an implied term (of contract or law), in equity or in tort.
- (d) What impact would putting the duty of confidentiality on a statutory basis have on the remedies available for a breach (or potential breach) of confidence or misuse of private information?

6. In summary, we do not believe that the reasons for not including provisions on confidentiality in the Act which were set out in the Consultation Paper are insurmountable. However, we recognise that, if they were to be included, careful thought would be required. As such, we suggest that, if the Law Commission were minded to revisit this issue, a further examination of the potential consequences of including the duty in the Act would be sensible.

Consultation Question 2. We provisionally conclude that the Arbitration Act 1996 should not impose a duty of independence on arbitrators. Do you agree?

7. We agree that the Act should not impose a duty of independence on arbitrators. The Act already requires arbitrators to be impartial and we do not believe a parallel duty of independence is required. As the Law Commission notes, what matters is that an arbitrator is impartial and seen to be impartial, not whether they have a connection with a party.

Consultation Question 3. 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. Do you agree?

8. We agree that the Act should provide that arbitrators have a continuing duty to disclose any circumstances which might reasonably give rise to justifiable doubts as to their impartiality. We are in support of codifying this general duty of disclosure, as articulated in *Halliburton Co v Chubb Bermuda Insurance Ltd* [2020] UKSC 48. As was said in that case, “[t]he existence of a legal duty promotes transparency in arbitration and is consistent with best practice as seen in the IBA Guidelines

and in the requirements of institutional arbitrations such as those of ICC and LCIA” (para. 80). It therefore makes sense to include this duty in the Act.

9. In our view, the Act could potentially also stipulate the potential consequences if an arbitrator fails to make the requisite disclosure, to provide clarity to arbitrators and parties. In *Halliburton v Chubb* it was said that “[a] failure of an arbitrator to make disclosure in the circumstances described in para 153 above is a factor for the fair-minded and informed observer to take into account in assessing whether there is a real possibility of bias” (para. 155). Thus, a failure to disclose could give rise to justifiable doubts as to the arbitrator’s impartiality. It seems to us that a failure to disclose could also give rise to a right to challenge an award (under section 68(2)(a) of the Act) and potentially also to personal liability for an arbitrator in the event that the section 29 hurdle of bad faith is met (see paras. 106 and 169 of *Halliburton v Chubb*). The Act could state that a failure to disclose may be treated as relevant to these matters. Alternatively, the consequences of a non-disclosure could be referred to in the final report that is prepared by the Law Commission.
10. However, we agree that it would not be desirable for the Act to go further by defining the circumstances when a non-disclosure will lead to a successful challenge to an arbitrator under section 24 of the Act. *Halliburton v Chubb* makes it clear that removal will only occur where the non-disclosure is “*relevant and material*” to an assessment of the arbitrator’s impartiality and could reasonably lead to such an adverse conclusion (para. 116). This can be left to the courts to develop.

Consultation Question 4. Should the Arbitration Act 1996 specify the state of knowledge required of an arbitrator’s duty of disclosure, and why?

11. The Act should specify the state of knowledge required of an arbitrator’s duty of disclosure. The existing case law is silent as to this and it is important to resolve the outstanding question. In the absence of a clear test as to the state of knowledge required, it would be difficult to assess non-compliance with the duty, as well as the prospect of a successful section 24 challenge to remove an arbitrator.

Consultation Question 5. 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?

12. In our view, the state of knowledge required of an arbitrator’s duty of disclosure should be based upon what an arbitrator knew or ought to have known after making reasonable inquiries. It is not enough to base a duty of disclosure on an arbitrator’s actual knowledge, as this may give rise to wilful blindness or encourage oversight on the part of arbitrators. The broader standard of knowledge that is proposed would be consistent with the IBA Guidelines on Conflicts of Interest in International Arbitration (Part I, General Standard 7(d)).
13. Full and frank disclosure by arbitrators is important. This is because of the impact that disclosure may have on the perceived impartiality of an arbitrator and because public information about an arbitrator’s conflict may be limited. The result is that an arbitrator should be required to meet a relatively high duty of disclosure and should not be able to hide behind his or her own failures to inquire.
14. Our view is that this standard should be stated in the Act, rather than leaving the standard to the courts to develop (as suggested by Lady Arden in *Halliburton v Chubb*, para. 162). This is because it is important that arbitrators and parties have certainty over what is expected of arbitrator disclosures. It is in the interests of parties for there to be a standard that goes beyond actual knowledge, as this will encourage arbitrators to be rigorous with their disclosures. The common law can then of course take account of developing standards and expectations by giving meaning to what amounts to reasonable inquiries and the consequences of failing to make disclosures that were not known.

Consultation Question 6. 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 by the House of Lords)?

15. In our view, if provisions along the lines proposed are to be included in the Act, the requirement of a protected characteristic in an arbitrator (or indeed the requirement of the absence of such a characteristic) should be enforceable in circumstances where it can be more broadly justified, rather than only if it is strictly necessary.
16. In the commercial transactions and disputes on which we advise, the only requirements we generally see which might relate indirectly to an arbitrator's protected characteristics are those relating to nationality (e.g. a requirement for an Israeli or Saudi arbitrator could be considered to refer indirectly to a protected characteristic). Indeed, as the consultation paper acknowledges, in the commercial context it is commonplace for arbitration agreements and institutional rules to seek to ensure the neutrality of arbitral tribunals by making nationality a relevant consideration in the appointment of arbitrators. Whilst we recognise that the inclusion of such a requirement speaks more to the *perception* of neutrality than to whether any particular arbitrator will in fact be neutral, perceptions are important in this context. For some of the commercial parties we advise, in particular states and state-owned entities and their commercial counterparties, arbitration is chosen precisely because it is seen as a more jurisdictionally neutral mechanism for resolving disputes and because it is possible to appoint arbitrators who are of a neutral nationality. In our view, it is entirely legitimate to include appropriately drafted requirements as to nationality in an arbitration clause for this reason.
17. We would not therefore be supportive of any amendment to the Act that might result in reasonable requirements as to the nationality of arbitrators being found to be unenforceable. We would be concerned that a provision that would make nationality requirements enforceable only when they are strictly necessary would set too high a bar and would risk reasonable requirements regarding nationality being challenged. In our view, that would be inconsistent with the expectations of commercial parties and would make London less attractive as a seat of arbitration.
18. An amendment to the Act that might increase the risk of such provisions being rendered unenforceable would potentially also expose a significant number of awards to the risk of challenge at the enforcement stage. This would also be unattractive to commercial parties when considering whether to choose London as a seat of arbitration in their international transactions.
19. If provisions along the lines proposed are included in the Act, we agree that it would be hasty to conclude that other requirements relating to protected characteristics beyond nationality provisions could never be relevant, such that a strict necessity test may also risk setting the bar too high in relation to these requirements.

Consultation Question 7. We provisionally propose that:

(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. Do you agree?

20. As indicated above, in the commercial context it is both commonplace and (in our view) legitimate to include appropriately drafted requirements in arbitration clauses as to the nationality of arbitrators (which might, as noted above, be regarded in certain circumstances as a proxy for protected

characteristics). Conversely, it is extremely rare in commercial relationships to see clauses imposing requirements as to other protected characteristics. Nor do we see challenges to arbitrators based on their protected characteristics other than nationality.

21. We recognise, however, that our experience in the commercial context is not necessarily representative of the position more widely. We agree that improper discriminatory practices in this area should not be tolerated. We would not therefore object to the inclusion of an anti-discrimination provision in the Act, provided that it is drafted in a way that mitigates the risk of uncertainty being created among users of arbitration as to whether nationality requirements in the form commonly seen in commercial contracts might be found not to be a proportionate means to achieve a legitimate aim. Such uncertainty would in our view be problematic for the following reasons:
- As discussed above, perceived neutrality is important to commercial parties, particularly states and state-owned entities and their commercial counterparties. A statutory provision that might appear to undermine the ability of users to ensure jurisdictional neutrality would be inconsistent with the expectations of commercial parties and may make London less attractive as a seat of arbitration.
 - We can see that if such provisions were rendered unenforceable, in a small minority of cases it may be difficult to sever the unenforceable nationality provisions from an arbitration clause, leading to the risk that the entire arbitration clause would be unenforceable.
 - As the consultation paper acknowledges, where the composition of an arbitral tribunal was not as agreed by the parties, there is a risk that this will give rise to issues on any application to enforce the award in certain foreign jurisdictions. In our view there may well be jurisdictions where this is a real risk. Given the number of commercial contracts that include requirements as to the nationality of arbitrators, this is problematic and would in our view make London less attractive as a seat of arbitration for parties who anticipate having to enforce awards in jurisdictions where this could be an issue, even if the risk in any individual case is low.
22. If anti-discrimination provisions are included in the Act, one way to ensure that appropriately drafted nationality requirements are protected could be to include a specific provision in the Act permitting the inclusion of such requirements. We recognise, however, that this would be difficult to draft in a way that captures only those requirements that have been drafted in an appropriate way. An alternative option may be to ensure that any guidance published in relation to the Act makes it clear that the intention is that legitimate requirements as to nationality should not be unenforceable and to provide examples of permissible language, although this would also be an imperfect solution.
23. We would also make the following points on the detail:
- A statutory provision that renders an agreement in relation to an arbitrator's protected characteristic(s) unenforceable should be drafted in a way that makes it absolutely clear that only the requirement as to the protected characteristic(s) of the arbitrator are rendered unenforceable by the Act, such that the arbitration agreement as a whole will continue to be enforceable in circumstances where the offending provision can be severed.
 - It will be important that there is clarity as to whether these requirements apply retrospectively to clauses drafted before any amendment to the Act.

Consultation Question 8. Should arbitrators incur liability for resignation at all, and why?

24. Arbitrator immunity is critical for the integrity of the arbitral process. It ensures that arbitral decision-making is independent and that arbitrators can act without fear of personal liability. We are therefore

supportive of limiting the liability of arbitrators. The immunity in section 29 of the Act should have broad application.

25. In the context of arbitrator resignations, there are competing objectives. On the one hand, it is critical that, in appropriate circumstances, an arbitrator is able to resign from his or her position without liability. On the other hand, it is equally critical that arbitrators should not resign unless it is strictly necessary.
26. In our experience, the latter point is as important as the former. Arbitrator resignations, sometimes on doubtful grounds, can lead to substantial expense, inconvenience and delay for the parties. For example, these consequences may result from: appointing the new arbitrator; deciding on the procedure to bring the new arbitrator up-to-speed; reading-in time for the new arbitrator; re-hearing of evidence/arguments that have already been heard; and new pleadings in relation to such a re-hearing.
27. Our view is that, in certain circumstances, arbitrators should incur liability for resignations. This is based on the following considerations.
28. Arbitrators are different to judges, because they are appointed and paid by the parties, and they may have a broad range of objectives for accepting and continuing or discontinuing their appointment. While judges are unlikely to resign from cases, the risk of resignation by an arbitrator is realistically higher because (s)he is not answerable to the state or to public scrutiny, and may have been appointed with a degree of alignment with one party in mind. Resignation is a tool that can be misused by an arbitrator to disrupt an arbitration, or an arbitrator that has lost interest in or availability for an arbitration, to avoid his or her duties. Potential liability for resignation is one tool to deter inappropriate arbitrator resignations.
29. If blanket immunity is given to arbitrators for resignations, we may see the number of inappropriate resignations increase, which is not in the interests of parties. It would also send the wrong message to users of UK-based arbitration that, despite their non-judicial standing, arbitrators are entirely immune for their decisions to resign unless they have acted in bad faith (a threshold which is so high as to be almost insurmountable).

Consultation Question 9. Should arbitrators incur liability for resignation only if the resignation is proved to be unreasonable?

30. On the basis that we believe that liability should be incurred for certain resignations, the question then is whether reasonableness is the correct standard.
31. We note the comments of the Law Commission that there is no case law on when a resignation is positively reasonable, but that there has been some limited judicial guidance on when a resignation is unreasonable (paras. 5.16-17 of the Law Commission's paper). It would appear that while there is some broad guidance on when an arbitrator resignation may be reasonable in the DAC Report and in the arbitration commentaries, an arbitrator has limited judicial guidance on whether a resignation will be determined to be reasonable. We would expect that, absent a change in the statute, the courts will provide further guidance when an appropriate case comes up for determination.
32. We are not aware that the current threshold for liability for arbitrator resignations is not fit for purpose. Our experience is not that arbitrators are regularly being held liable for the consequences of their resignations, nor that well-reasoned resignations are being deterred. If the standard were to increase or reduce, the position may change, with either more resignations occurring or more arbitrators being deterred from resigning. Our view, therefore, is that the reasonableness standard is appropriate, and that the courts should be left to determine which resignations are unreasonable based on the facts of a given case.

33. Currently, an arbitrator is prima facie liable for resignation, subject to relief being available from the court if it is satisfied that resignation was reasonable. We would support reversing the burden of proof (as contemplated in paragraph 5.20 of the consultation paper) so that the onus would be on the party asserting that the arbitrator should be liable to show that the resignation was unreasonable. This would seem more consistent with ordinary expectations of natural justice.

Consultation Question 10. 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. Do you agree?

34. As far as we are aware, the role of arbitrators in arbitration-related court proceedings is limited. While arbitrators sometimes play a discrete role in applications to remove an arbitrator under section 24 of the Act (when they have to be named as parties), court applications are otherwise ordinarily between the parties to the arbitration only.
35. In respect of liability for applications to remove an arbitrator under section 24, we have the following observations:
- We would expect that ordinarily, the involvement of an arbitrator in a removal application should attract immunity under section 29 of the Act. The question that the court will need to consider is whether the arbitrator is acting before the court “*in the discharge or purported discharge of his functions as arbitrator*”. This question should normally be in the affirmative (as the Law Commission note). This is important because, if there is no immunity for the costs of removal application or more arbitrators are held liable for such costs, the result may be that arbitrators are more ready to resign than to stand-up to a/the parties. However, it seems to us to be consistent with section 29 that an arbitrator may be liable for costs in a section 24 application on the basis that their conduct in those proceedings is such as to be regarded as falling outside the discharge of the functions of an arbitrator.
 - The removal of an arbitrator will often be the flip-side of a resignation. One or more parties may ask the arbitrator to resign and, if he/she refuses, they may then consider that they have no choice but to make a removal application. An anomaly is created in our view if arbitrator liability may arise for the former, but the arbitrator has complete immunity (even for the costs of the court application, let alone the knock-on cost impact of the removal) for the latter. This anomaly may encourage arbitrators to hold on for a removal application, rather than to resign. In our view, an unreasonable and contested refusal to resign should be regarded in the same way as an unreasonable resignation.
 - The general view of the clients that we have discussed this issue with is that they are shocked to hear that, on the Law Commission’s proposal, they would be liable in all circumstances for the costs of a court application to remove an arbitrator notwithstanding that they have acted appropriately and the arbitrator has acted inappropriately. In our view, the interests of the parties have arguably been underplayed in the discussion of this issue. It is one thing for the arbitrator to have a different view to a party on whether he ought to resign. It is quite another for an arbitrator to refuse to resign and then rack-up court costs by engaging inappropriately (or outside the scope of his/her functions as arbitrator) in a removal application. Why should the arbitrator not be made to pay the costs of the application in such circumstances?
 - Against this background, we consider that the status quo is more attractive. This is because the general position will be that cost liability is not incurred by arbitrators, but that in rare and exceptional cases the arbitrator will have to pay/contribute to the costs. On the other hand, it is clearly unsatisfactory that the rationale for directing an arbitrator to pay has not been properly explained.

36. It would create more certainty if the current position could be articulated in the Act, by building a carve-out into section 29 of the Act and making clear the threshold for cost liability in section 24 of the Act (as for section 25). Such a carve-out might refer (for example) to the loss of immunity for removal applications in exceptional circumstances, such as unreasonable intervention in the court process.
37. One main concern with maintaining the status quo appears to be that professional indemnity insurance is not available to cover such costs. It is not clear from paragraph 5.38 of the Law Commission's paper what the source of this position is. We question whether it is correct, as it would seem surprising if an arbitrator was not able to obtain insurance against this type of liability.
38. In respect of liability for other types of court application that are based on something done by the arbitrator, we have the following observations:
- We are not aware that there is an existing problem of arbitrators being held liable for the costs of court applications outside of applications under section 24. We are also not aware that arbitrators are changing their conduct based on this liability, which appears currently to be hypothetical.
 - An application to the court that derives from an act of the arbitrator during the arbitration should attract arbitrator immunity given it will relate to "*anything done or omitted in the discharge or purported discharge of his functions as arbitrator*". The courts have not indicated that they wish to extend arbitrator liability to a broader range of arbitration-related court applications.
 - If an arbitrator is not a party to a court application (as is usually the case), it is not clear how a court could award costs against an arbitrator absent a separate claim being brought against the arbitrator (to which immunity would presumably apply). Thus, it is not clear how liability could be attached to an arbitrator in the Law Commission's example at paragraph 5.41 of the Law Commission's paper of an application under s.67 or s.69 of the Act.
39. Consequently, as above, our view is that the status quo ought to remain, subject potentially to an attendant clarification of the scope of arbitrator immunity under s. 29 of the Act.

Consultation Question 11. 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. Do you agree?

40. We agree that the Act should expressly permit an arbitral tribunal to adopt, on the application of a party, a summary procedure to decide a claim or an issue. More specifically, we agree that:
- It has the potential to save time and money.
 - It can be compatible with a tribunal's duty to give each party a reasonable opportunity to put its case.
 - It would helpfully put beyond doubt any concern among arbitrators as to whether adopting such an approach is appropriate or permissible and as to whether it might leave awards open to challenge on the basis of a lack of due process (we agree that currently tribunals can be reluctant to grant summary relief because of this uncertainty, such that there is a need to clarify the position).
 - Adopting a summary procedure should be considered only on the application of a party and not at the tribunal's own initiative.
 - Any amendment to the Act to permit summary disposal should not be a mandatory provision of the Act; instead, parties should be able to opt out of the ability to apply for a summary procedure,

consistent with the general principle of party autonomy under the Act in relation to procedural matters.

41. A key concern among many users of commercial arbitration is that it is a time consuming and costly process. In our view, introducing an express power to grant summary awards would be welcomed by commercial users because it has the potential to save time and costs and to limit the scope for counterparties to act tactically by bringing unmeritorious claims with a view to forcing a settlement. Having discussed this proposal with a number of our clients, it is clear that this would be a very welcome reform from their perspective. The fact that it would be a world leading development means that it would in our view be a factor that would enhance the attractiveness of London as a seat of arbitration when compared with jurisdictions that do not have this mechanism.
42. We recognise that difficulties may potentially arise on enforcement if a party's case has been dealt with summarily (although concrete examples of such difficulties are thin on the ground). We also recognise that including an express provision in the Act permitting summary disposal may not resolve those difficulties. However, this is not in our view a reason not to clarify the position in the Act. If a party has concerns about potential enforcement risks if it obtains a summary award, it can avoid that risk by not applying for summary disposal and instead arguing the claim in the usual way.

Consultation Question 12. 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. Do you agree?

43. We agree that the summary procedure to be adopted in any given case should be a matter for the arbitral tribunal in the circumstances of the case and in consultation with the parties. The arbitral tribunal is best placed to decide on the appropriate procedure in any given case, having heard any views expressed by the parties on this question. We recognise that this is not necessarily efficient because in every arbitration the tribunal will have to design its own procedure. However, unlike in English litigation (where there are detailed written procedural rules, including in relation to applications for summary judgment), the ethos of arbitration is that procedure should be almost entirely for the agreement of the parties or, failing that, the discretion of the tribunal. Permitting the tribunal to determine the procedure would be much more consistent with that ethos.

Consultation Question 13. We provisionally propose that the Arbitration Act 1996 should stipulate the threshold for success in any summary procedure. Do you agree?

44. We agree that the Act should stipulate the threshold for success in any summary procedure. In the absence of a clear test, potential applicants would be unable to predict whether they are likely to succeed in any application for summary disposal and would therefore be unable to assess whether such an application is worth pursuing. Moreover, such a test could not develop through the cases since each arbitration would be a confidential process, and there is no stare decisis. Similarly, potential respondents would be unable to predict whether they might face such a challenge or whether it might succeed. As the consultation paper notes, determining what test to apply in every application for summary judgment would make summary disposal more time consuming and costly. Worse, it would run the risk that in some cases arbitrators may reach the wrong view as to what is an appropriate test, potentially leading to unfairness.

Consultation Question 14. 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. Do you agree?

45. We agree that this is an appropriate threshold for the following reasons:
 - It would appear to us to be a fair test on its face, which strikes an appropriate balance:

- The threshold is drafted in a way that prevents injustice by ensuring that cases which have realistic prospects can be heard in full, whilst at the same time ensuring that cases that are fanciful are not permitted to proceed, thereby avoiding a waste of time and costs.
 - The “manifestly without merit” threshold appears to us to be higher. Given the desire among commercial users to introduce a mechanism along these lines with a view to reducing the time and cost involved in resolving a dispute by arbitration and limiting the scope for parties to act tactically by bringing unmeritorious claims, this would in our view be too high a threshold to apply.
- As the consultation paper notes, the test has a largely clear and settled meaning in the English courts, unlike the alternative test proposed, namely whether a case is “manifestly without merit”. This should help to inform tribunals (and parties) as to how to construe and apply the test in practice.
 - We have not been able to identify any significant academic criticism of the test as applied by the English courts. Nor have we identified any indication in the case law that the test is particularly problematic when applied in practice.
 - Whilst the case law indicates that there are a number of scenarios where summary judgment will commonly be inappropriate or at least more difficult to obtain (for example where a mini-trial would be necessary, where the law is a state of flux, or where there are allegations of fraud), it would be contrary to the ethos of arbitration to seek to set these out in the Act. Instead this should be left to the tribunal’s discretion.
 - We recognise that arbitration and litigation are different and that this does not necessarily mean it is appropriate to apply the same test in arbitration as is applied by the English courts. For example:
 - Litigation involves the use of public resources, such that one factor in the balance when setting the test in relation to litigation may be whether allowing certain claims to proceed would be an appropriate and proportionate use of those resources – this is not a consideration in the arbitration context.
 - International parties and arbitrators may be becoming familiar with the threshold for summary dismissal stipulated in the arbitration rules of key arbitral institutions, many of which require a party to establish that a claim is “manifestly without legal merit” (or similar) but may not be familiar with the test applied by the English courts.
46. However, in our view, the factors that point towards it being appropriate to apply the same test in the arbitration context discussed above outweigh those that might suggest a different approach is more appropriate.
47. This is our view notwithstanding the common use of the “manifestly without legal merit” threshold in international arbitration. Indeed, the adoption of this threshold in a number of sets of arbitration rules may mean that it is more often applied in practice in arbitrations seated in London, at least initially. We recognise that there is some risk in defining the threshold differently from the overall consensus approach in international arbitration. However, we think that a different threshold could be viewed as a positive point of difference rather than a source of criticism, for the reasons above.

Consultation Question 15. 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. Do you agree?

48. Yes.

Consultation Question 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?

49. Yes, we see the logic of the Law Commission's comments on this subject and that this amendment will provide some clarity to the position.

Consultation Question 17. 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. Do you agree?

50. We do not have a strong view on this proposed amendment, but can see the logic of the Law Commission's rationale.

Consultation Question 18. We provisionally conclude that the provisions of the Arbitration Act 1996 should not apply generally to emergency arbitrators. Do you agree?

51. Parts of the Act are not appropriate to emergency arbitrators, as demonstrated in the Law Commission's comments on this subject. However, the Act must adapt to reflect the reality that emergency arbitrator procedures are now commonplace, like Singapore's International Arbitration Act has done.
52. Our view is that it should be possible to identify which parts of the Act are applicable to emergency arbitrator procedures and which are not. This is the exercise that has been undertaken in Article 9.14 of the LCIA Arbitration Rules, which confirms which provisions of the Rules will apply to emergency proceedings. This exercise will obviously need to be undertaken very carefully, to avoid any unintended consequences.
53. Making this clarification will provide certainty as to the provisions that apply to emergency arbitrator procedures, and this will fill any gaps created by institutional rules or party agreement. For example, it seems to us to be essential to provide that sections 29 (immunity) and 33 (general duties) apply to emergency arbitrators as they do to the fully constituted tribunal.

Consultation Question 19. 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?

54. Yes, this is a matter for arbitral rules.

Consultation Question 20. Do you think that section 44(5) of the Arbitration Act 1996 should be repealed, and why?

55. Yes. It is unhelpful if there is an (incorrect) perception following *Gerald Metals v Timis* that the availability of emergency arbitrator provisions precludes recourse to the court under section 44(3) and (4) of the Act. In our view, where the parties have agreed emergency arbitrator provisions, they should nevertheless be able to seek the assistance of the court under section 44(3) or (4), provided the requirements of those provisions are met in the usual way. When advising clients, the concern often arises that they wish to retain the right to apply to the court for interim measures, and the lack of clarity following *Gerald Metals* is unhelpful. We therefore consider that, even if section 44(5) is repealed, it would be helpful to stipulate in the Act that the availability of emergency arbitration does not per se preclude the availability of interim relief from the court.
56. When section 44(5) was developed, emergency arbitrator procedures did not exist and thus there was a clear gap in time between the commencement of a dispute and the constitution of an arbitral tribunal that the court could fill. Now, with emergency arbitrator provisions widely available, the question is

whether (before the constitution of the full tribunal) it would be appropriate to seek interim relief from the court.

57. In this regard, we query whether a test of “urgency” would define too narrowly the circumstances in which it would be appropriate to seek interim relief from the court. As section 44(5) recognises, the issue is not merely one of timing but also of the effectiveness of the relief that might be available from a tribunal or emergency arbitrator. We now have the guidance of Mr Justice Leggatt, pointed out at paragraph 7.60 of the Law Commission’s paper, that urgency must be assessed by reference to, amongst other things, what can be achieved under emergency arbitrator provisions (as well, more generally, as whether the tribunal has the power and practical ability to grant effective relief). In our view, this seems to give the test of “urgency” a somewhat unnatural meaning (since it also imports the concept of effectiveness) and query whether the articulation of the test in sections 44(3) and (4) should be re-examined. In particular, we wonder whether section 44 should define more broadly the circumstances in which relief from the court might be available. It seems to us that this would be consistent with the international standards set out in paragraphs 7.67 to 7.72 of the consultation paper. Moreover, the feedback that we have received from clients is that they generally prefer access to the court for interim relief to be more, rather than less, available.
58. Relatedly, there is a question as to whether the removal of section 44(5) will send a signal to the courts or to parties that the test under section 44(3) has become easier to satisfy. For example, might a court decide to act in an “urgent” situation even though the same relief sought from the court is also available and being sought from an emergency arbitrator or the tribunal (which may not have been possible when section 44(5) existed)?

Consultation Question 21. 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.

59. Our view is that it may be preferable to allow the affected party to choose between these two options.
60. In cases of urgency, faced with the non-compliance of the other party to an order of the emergency arbitrator, the affected party should be able to go to the court, either under section 44(3) by establishing urgency or under section 44(4) with the permission of the emergency arbitrator, if it thinks that doing so will produce a quicker outcome than pursuing a peremptory order (first before the emergency arbitrator and then before the court). This is because the peremptory order scheme may take too much time, such that the benefit of the emergency arbitrator’s order is lost. (We note that, consistent with our response to question 18, section 44(4) is an example of a provision in the Act which should apply to emergency arbitrators.)
61. In cases where there is less or no urgency, or it is thought that the peremptory order scheme can be used to avoid the intervention of the court and thus to produce a quicker outcome, the affected party should be able to seek a peremptory order from the emergency arbitrator. We would add that it should also be possible to seek a peremptory order from the full tribunal once it has been constituted. Failing compliance with a peremptory order, it should be possible to apply for an order from the court under section 42. In such circumstances, it may be unnecessary to go to the court under section 44, because the issue of a peremptory order by an emergency arbitrator may be sufficient.
62. In the event there is a preference for only one scheme, we would support the introduction of a peremptory order scheme. This will ensure that the arbitral process retains its primacy and will not encourage parties to go directly to the courts rather than utilise emergency arbitrator procedures (for

fear that they will end up before the courts in any event when their counterparty ignores the emergency arbitrator's order).

Consultation Question 22. We provisionally propose that: (1) where a party has participated in arbitral proceedings, and has objected to the jurisdiction of the arbitral tribunal; and (2) 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. Do you agree?

63. There are mixed views amongst our team on the proposal to change the s.67 procedure from a rehearing to a review/appeal, as we know there are amongst the international arbitration community more generally.
64. The arguments in support of a change to a review are clear: (i) there is a concern about the costs and time involved in a s.67 rehearing; (ii) there is a lack of parity between the procedures under s.67, on the one hand, and ss.68 and 69, on the other, which can be difficult for parties to understand; and (iii) if defining features of arbitration are finality and that tribunals should be able to rule on their own jurisdiction, it is contrary to those intentions to provide for a wide role for the courts in challenges to jurisdiction.
65. Equally, it is not clear to us that reform would necessarily have a significant practical impact. Our recent experience on a small number of s.67 challenges has been that the procedure has effectively been the same as under related s.68/69 challenges. In those cases, we (as counsel) have not sought to raise new evidence or pursued materially different arguments to those raised in the arbitration, and the court has not undertaken a full re-examination of the facts.
66. Notwithstanding these points, our view (by majority) is that the proposed reform should not be made, for the following reasons.
- The most important feature of international arbitral systems, as opposed to national court systems, is party consent. It is universally accepted that the power and legitimacy of a tribunal derives from party consent. Thus, challenges based on jurisdiction (s.67) are necessarily different from challenges based on procedural irregularities (s.68) and appeals on points of law (s.69). If a party finds itself in an arbitration that it never agreed to and before individuals that it did not appoint, it would rightly want the decision of the tribunal to hear the dispute reviewed in full by the courts. The clients that we have surveyed have remarked on the need to ensure that they are not improperly engaged in processes that they have not consented to.¹
 - There is a risk of inconsistencies of approach. Under the Act, jurisdictional issues may be put to the court in various ways. Those other ways (such as under s.32) will involve a comprehensive hearing of the relevant issue by the court while, in contrast, the proposal is that the process under s.67 will not involve such a process. It is difficult to understand why the approach of the courts to jurisdictional questions should be different depending on what part of the Act a party relies on. Moreover, at the enforcement stage, a party that raises a jurisdictional objection in England & Wales or abroad may be subject to a full re-hearing, rather than a review.
 - The Law Commission has expressed a concern over the fairness of the current system and that it detracts from the finality of arbitration awards. However, we are not convinced that there is a clear fairness or finality issue that needs to be addressed:

¹ We do not agree with the Law Commission's description at paragraphs 8.41-8.42 of the Law Commission paper that "*we are considering a situation where both arbitral parties ask the arbitral tribunal to rule on its jurisdiction...It cannot be a case of "heads I win, tails it does not count"*". Where a party faces a claim against it in arbitration that it has not consented to, it often has no choice but to participate and challenge the jurisdiction of the tribunal. Non-participation in the arbitration will often not be a realistic option for parties that wish to defend their interests. Further, an application to the court to determine a jurisdictional issue under s.32 will not be available without agreement of the other party or the tribunal (contrary to the comment at paragraph 8.44 of the Law Commission paper). The consent such a party therefore gives to the process before the tribunal is consequently heavily caveated.

- In our experience, jurisdictional issues are often argued and debated over various stages of an arbitration (initial pleading, reply pleading, oral submissions, tribunal questions etc). Parties will therefore know the deficiencies in their case and seek to plug them long before an award is issued by the tribunal. It is unrealistic to think that parties (unfairly) hold back arguments or evidence from a tribunal for use before the court, or that they take the risk of treating the arbitration as a test run.
- To the extent that parties use a tribunal’s award to sharpen their jurisdictional arguments before the court, this does not give rise to a concern. Jurisdiction either is or is not conferred by an arbitration agreement. If a party wishes to present its arguments in a slightly different manner to assist the court in reaching the correct decision on jurisdiction (subject to the point about s.73 below), this is not unfair.
- There may be cases where justice is best served by allowing new evidence to be adduced, which would be difficult in the context of a review. For example, it may be that evidence was shut out by the tribunal but that the court thinks it is appropriate that it is heard (*Kalmneft v Glencore International* [2001] 2 All E.R. (Comm) 577, para. 91: “*even if evidence has been shut out before the arbitrator, any prejudice to the losing party is ameliorated by his opportunity to adduce that evidence under section 67 in the course of challenging the arbitrator's ruling*”) and it may be that documents were not available at the time of the arbitration but are available at the time of the court process (*Jiangsu Shagang Group v Loki Owning Company* [2018] EWHC 330 (Comm), paras. 13-14).
- The current system does not necessarily lead to wasted time and costs:
 - First, it would appear that in the majority of s.67 applications, parties rely on the evidence that was adduced in the arbitration (*Americas Bulk Transport v Cosco Bulk Carrier* [2020] EWHC 147 (Comm), para. 5: “*The evidence will usually be and in this case is that which was given before the Tribunal as recorded in the transcripts of the proceedings before the Tribunal leading to the Award.*”). Thus, limiting the process under s.67 application may, in fact, impact (for better or worse) only a limited number of s.67 challenges (noting that s.67 challenges are raised in a tiny proportion of arbitration cases). However, even in those cases where new evidence is involved, as Langley J observed, the fact of a rehearing (which in this case involved the service of new expert evidence) does not necessarily lead to a “*great extra burden*” (*Peterson Farms v C&M Farming* [2004] EWHC 121 (Comm), para. 20).
 - Second, the courts have expressed the desire to control the procedure in s.67 applications (e.g. *A v B* [2015] EWHC 137 (Comm), para. 5). The courts will not allow evidence to be adduced where it would be unfair to do so or where it would prejudice the other party (*Central Trading v Fioralba* [2014] EWHC 2397 (Comm), para. 32), and the courts will address the late admission of evidence by giving it less weight and potentially awarding costs (*Electrosteel Castings*, para. 23). This suggests the courts will be careful not to allow the rehearing process to be used in an unfair manner.
 - Third, there are restrictions on the s.67 process notwithstanding that a re-hearing is allowed and a party will not necessarily be able to use the s.67 process to rack up costs:
 - A party cannot advance new grounds of objection that it has not raised before the tribunal (s.73). This is an important restriction that is also relevant to whether parties are likely, as a matter of tactics, to hold back arguments from the tribunal.
 - The court may deal with a s.67 application on a summary basis, without a hearing, where the challenge has no real prospect of success (O8.6 of the Commercial

Court Guide; recent case of *National Iranian Oil Company v Crescent Petroleum* [2022] EWHC 2641 (Comm)).

- The court can dispose of a s.67 application by the determination of a preliminary issue (*X v Y* [2015] EWHC 395 (Comm), para. 66; recent case of *NDK v HUO Holding* [2022] EWHC 2580 (Comm)).

67. Our view, therefore, is that it is best left to the courts to decide how and when to restrict evidence in the context of a s.67 application, rather than to tie the courts' hands by changing the process to a review. Our view may change if we were to become aware of a large number of cases in which the losing parties were using the s.67 process to subject the winning parties to a long and drawn out process of jurisdictional re-consideration, but we do not understand that to be the case.

Consultation Question 23. 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?

68. If s.67 becomes an appeal process, we do not see why that should have a bearing on the process under s.32. The former arises where a process has taken place before the tribunal that has led to an award (legal arguments, evidence etc). The latter normally arises before this process has taken place or reached a conclusion.

69. However, to the extent the process under s.67 is changed to a review, it may be helpful to make clear that, under s.32, a re-hearing should take place if a jurisdictional award has not been issued, but that a review should take place if a jurisdictional award has been issued (to ensure parity with s.67).

Consultation Question 24. We provisionally conclude that our proposed change to section 67 of the Arbitration Act 1996 would not require any similar change to section 103. Do you agree?

70. If s.67 becomes an appeal process, that creates a disconnect with the process under s.103, which should rightly involve a rehearing. This is a reason not to change the process under s.67. However, if the process under s.67 is changed to a review, it is not clear why the same logic should not apply to applications under s.103.

Consultation Question 25. 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. Do you agree?

71. We read s.67 as follows.

72. Under s.67(1), a party to arbitral proceedings can apply to the court either to (a) challenge an award as to the tribunal's substantive jurisdiction, or (b) seek an order declaring an award made by the tribunal on the merits to be of no effect because the tribunal did not have substantive jurisdiction. However, it is not clear to us why it is not possible for a party to make an application under both (a) and (b), i.e. to challenge an award that finds that the tribunal does have jurisdiction and to seek an order that a separate merits award be declared to be of no effect. It is clearly implicit in s.67(1)(b) that the court has the power to declare an award on the merits to be of no effect, in whole or part.

73. Under s.67(3), there are three remedies that a court may grant: to confirm, to vary or to set aside. These remedies appear to arise only in respect of an application under s.67(1)(a) ("*challenging an award of the arbitral tribunal as to its substantive jurisdiction*"). The language of s.67(3) does not suggest that this provision is also seeking to provide remedies in respect of an application under s.67(1)(b). Otherwise, s.67(3) would open by saying only "*On an application under this section, the court may...*".

74. At paragraph 8.60 of the Law Commission paper, it is said that if the court decides that the tribunal has no jurisdiction, it is best that it be able to declare the award to be of no effect. This is because an award that is of no effect continues to exist, such that the tribunal has completed its duty, unlike where an award is set aside (para. 8.59 of the LC Report). We agree with this distinction, notwithstanding that it is contrary to the comments in *Husmann (Europe) Ltd v Pharaon* [2003] EWCA Civ 266 (para. 81).
75. In our view, if the court decides that the tribunal's finding that it does have jurisdiction is wrong, the best course of action would be that it declares the jurisdictional part of the award to be of no effect (as the Law Commission recommends). However, if the tribunal has also gone on to make determinations beyond matters of jurisdiction, our view is that: (i) it is cleanest to set aside the determinations if they are made in the same award as the jurisdictional determinations (under s.67(3)(c)) – this will not lead to any resumption of proceedings as the part of the award finding that the tribunal does have jurisdiction will have been found to be of no effect; and (ii) if the determinations are made in a separate merits award, to declare that award to be of no effect as the court is implicitly able to do under s.67(1)(b).
76. If the reverse exists, i.e. the court decides that the tribunal's finding that it does not have jurisdiction is wrong, the natural remedy (contrary to the view at paragraph 8.62 of the Law Commission paper) is to vary the part of the award dealing with jurisdiction (or vary one part and set aside another), so that in its place stands a determination that the tribunal does have jurisdiction (s.67(3)(b)). If the award is simply set aside or declared to be of no effect, there is then no foundation within the award for the tribunal to go on to make a determination on the merits.
77. We believe that the following changes are therefore required to s.67, in addition to that suggested by the Law Commission's Question 25:
- First, that “or” in s.67(1) is changed to “and/or”. This is to reflect the fact that, where a party believes that the tribunal does not have jurisdiction, there may be two applications to the court: one for a remedy in respect of the tribunal's jurisdictional award, and another for a separate award on the merits to be declared to be of no effect.
 - Second, that “or” in s.67(3) is changed to “and/or”. This is to provide the court with flexibility to give different remedies for different parts of the award. For example, it may wish to confirm certain paragraphs, vary others and set aside / declare to be of no effect some others.
 - Third, that s.67(3)(a) and (b) is revised to read “confirm/vary the award in whole or in part”. This is also to provide more flexibility.
78. This may require similar changes to the language under s.69(7).

Consultation Question 26. 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?

79. We agree. A tribunal has competence to rule on its own jurisdiction. The follow-on from the principle of competence-competence is that the tribunal should have the power to rule on the parties' costs involved in deciding with its jurisdiction. Its decision will ultimately be subject to the overview of the courts, such that there can be a challenge if the apportionment of costs gives rise to a serious irregularity (s.68) or a wrong decision on a point of law (s.69).

Consultation Question 27. 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?

80. We agree that section 69 currently strikes the right balance between competing interests in respect of the ability to appeal an arbitral award on a point of law.
81. We disagree with those commentators who suggest that section 69 should be repealed. Indeed, we see real value in the fact that there is the possibility of an appeal to the court on a point of law for London seated arbitrations. In our view, the fact that this mechanism is available in London but not in many other jurisdictions enhances the attractiveness of London as a seat. Given that section 69 is rarely invoked and, where it is invoked, permission is often not given, we are also not concerned that the current mechanism creates significant delays in the resolution of disputes. Nor do we consider that it fundamentally undermines the finality of arbitration as a process.
82. Although many commercial parties opt out of section 69 via the incorporation of institutional rules such as those of the ICC or LCIA (which may in part explain why the number of appeals is low), it is in our view appropriate that this is an opt out rather than an opt in mechanism. The possibility of bringing an appeal in the circumstances provided for in section 69 (ie where a tribunal's decision is obviously wrong or where the question is of general importance and the tribunal's decision is open to serious doubt) should not be available only to those who are sufficiently sophisticated or well advised to have chosen to opt in because it is ultimately a right for parties to be protected against the potential for significant injustice. It is far preferable that the default position is that such appeals are possible and that parties who wish to ensure a greater degree of finality and who are therefore happy to switch off this right can do so by opting out.
83. We also disagree with the commentators who suggest that section 69 should be expanded. One of the reasons why parties commonly choose arbitration in their commercial contracts is to limit the scope for appeals. The current test achieves that, whilst ensuring (as noted above) that significant injustices are avoided by permitting appeals when things go badly wrong. Introducing a more permissive regime for appeals would significantly increase the number of awards that are potential susceptible to appeal and would mean that there is no real distinction between English court litigation and London seated arbitration in terms of finality, thereby limiting the ability of commercial parties to choose a different approach. If parties specifically wish a right of appeal to be available, they should agree this under section 69(2)(a). We acknowledge the concern about the risks to the development of commercial law if too few cases are heard by the courts, but we are not convinced that encouraging more appeals is the way to avoid this.

Consultation Question 28. Do you think that section 7 of the Arbitration Act 1996 (separability of arbitration agreement) should be mandatory, and why?

84. Given the importance of the principle of separability and the effect of the Supreme Court's decision in *Enka v Chubb*, in our view section 7 of the Act should be mandatory, at least while the default position under English law remains that the law chosen to govern the contract within which an arbitration clause is contained is considered to be an implied choice of law to govern the arbitration agreement itself.
85. If the Act were to be amended to include a default rule that the law governing the arbitration agreement is the law of the seat (as to which, see our answer to question 38 below), the need to make section 7 of the Act mandatory would arguably be less pressing, because there would be fewer occasions in which a London seated arbitration would be found to be governed by a law other than English law and therefore at risk of the separability principle not being applied.

Consultation Question 29. 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?

86. Yes.

Consultation Question 30. 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?

87. As a matter of principle, our view is that, the parties having agreed to submit their dispute to arbitration, the tribunal should generally decide any jurisdictional or legal issue that arises. The parties can of course change their minds and decide to submit an issue to the court instead (as they can under s.32(2)(a) and s.45(2)(a)). But we do not think the tribunal should, absent the agreement of both parties, be able to avoid determining an issue that they are otherwise obliged to determine by reference of that issue to the court.
88. That said, we note the comments of the Law Commission that the court rarely seems to labour over the requirements in s.32(2)(b)(i)-(iii) and s.45(2)(b)(i)-(ii). Accordingly, it may be possible to simplify those subsections. We agree with the Law Commission that the references to cost savings and delay are out of place, but we see the value of a broader requirement – in both ss.32 and 45 – of there being a “*good reason why the matter should be decided by the court*” (currently in s.32(2)(b)(iii)), as that requires a party to justify its application to the court. The court can then provide direction as to what such “good reasons” may be. It is not enough that the court simply has discretion, as the Act should set-out the test that a party must satisfy to get the court to determine the application.

Consultation Question 31. 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?

89. In our view, it is unnecessary for the Act to make express reference to remote hearings and electronic documentation. The Act is already compatible with the use of modern technology and nothing in section 34 precludes giving procedural directions for remote hearings and electronic documentation, or the use of other modern technology. The institutional rules are also being constantly updated to keep up-to-date with the manner in which parties arbitrate their disputes. The risk of referring explicitly to remote hearings and electronic documentation is that technology is constantly changing, which means they could become superseded by new technologies. This would require constant updates to the Act in order to keep up. We would therefore be inclined to leave the Act as is in this regard.

Consultation Question 32. Do you think that section 39 of the Arbitration Act 1996 should be amended to refer to “orders” (rather than “awards”), and why?

90. We do not agree. Rather, we think that the heading of section 39, and also section 39(2)(a) and (b), should be amended to refer to both “orders” and “awards”. That is because it is possible for a tribunal to grant relief under section 39 in the form of either an award (final on what it decides, but subject to tribunal’s final adjudication per section 39(3)) or an order. This reflects the current interpretation by the courts of section 39; see e.g. *EGF v HVF & Ors* [2022] EWHC 2470 (Comm) at paras. 118-120. This interpretation reflects in turn the international understanding that interim relief can be rendered in the form of an award. However, the current interpretation is not obvious from the face of section 39, which could in our view be ‘tidied up’ as we propose.

Consultation Question 33. Do you think that section 39(1) of the Arbitration Act 1996 should be amended to refer to “remedies” (rather than “relief”), and why?

91. No strong view, but we can see the benefit of making s.39(1) and s.48 consistent.

Consultation Question 34. 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?

92. The problem identified in respect of section 70(3) is one that we have direct experience of. When a tribunal issues an award, the parties will ordinarily consider whether to raise an application to challenge and/or clarify/correct the award. These processes often have similar time frames and while the former will take place before the court (for an English seated arbitration), the latter may take place before the court, the tribunal or to some other body (depending on what the institutional rules or the parties' agreement provides for). Our experience has been that where a clarification, correction or similar application has a bearing on a potential sections 67-69 challenge, there is a lack of clarity over whether to (i) file the challenge while reserving the right to amend it following a determination on the clarification/correction application, (ii) apply to the court on a precautionary basis to extend time to file the challenge on the basis of the connection between the two applications, or (iii) hold back the challenge on the basis of a material connection between the two applications albeit with the very large risk that the challenge will subsequently be found to be out of time.
93. We agree with the Law Commission's proposal to amend section 70(3) of the Act 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. This will provide a degree of certainty to the timing applicable where a section 57 application is being made.
94. However, our view is that this amendment alone does not go far enough. There are other changes to this provision that may assist users and that reflect the current state of the case law.
95. First, *K v S* and *Daewoo Shipbuilding & Marine Engineering Co Ltd v Songa Offshore Equinox Ltd* (which are cited by the Law Commission) provide some support for the proposition that time will also run from the date of a correction where the application is *not* brought under section 57, but under an agreed process to the same effect such as Article 27 of the LCIA rules. However, the authorities cited are incomplete. The Law Commission did not cite *Xstrata Coal Queensland Pty Ltd v Benxi Iron and Steel (Group) International Economic and Trading Co Ltd* [2020] EWHC 324 (Comm), which is the most recent authority, and refers clearly to an application under section 57 "or an agreed process to the same effect" being relevant to the time restrictions under section 70(3). The judgment of *Xstrata Coal* shows that the court will count time from the date an applicant or appellant is notified of the result of their application under institutional rules "equivalent" to section 57 (see paras. 27-42). This is an important clarification as the choice of institutional rules will often amount to the agreement out of section 57 referred to in section 57(1). As such, it is important that section 70(3) is amended to refer not only to a request under section 57, but also to an agreed equivalent to section 57, to the extent the application is material to the (section 67-69) application or appeal.
96. Second, it would be helpful to amend section 70(2) in a similar manner, such that it is clear to parties that they must first exhaust an application under rules equivalent to section 57 before bringing a section 67-69 application. In *K v S* it was said that "*the reference in section 70(2) to "recourse under section 57" can reasonably be construed as wide enough to include recourse under an agreed power to correct an award*" (para. 16). While this is a sensible decision, it requires a strained interpretation of section 70(2) which could be avoided by amending the section.

Consultation Question 35. 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?

97. Yes.

Consultation Question 36. We provisionally propose that sections 85 to 87 of the Arbitration Act 1996 (on domestic arbitration agreements) should be repealed. Do you agree?

98. Yes.

Consultation Question 37. Do you think that any of the suggestions discussed in Chapter 11 needs revisiting in full, and if so, why?

99. In our view, the suggestion concerning section 60 of the Act (para. 11.111 of the Law Commission's paper), which has been dismissed by the Law Commission, does not go far enough.

100. Section 60 provides that “[a]n agreement which has the effect that a party is to pay the whole or part of the costs of the arbitration in any event is only valid if made after the dispute in question has arisen.” The suggestion in Chapter 11 that the Act should stipulate that the parties are free to re-confirm an agreement to pay costs in any event after the dispute has arisen is a good starting point, although this does not go far enough from a commercial standpoint. As the Law Commission note, the ability to re-confirm is already compatible with the Act and the suggestion does not therefore change anything in law, or in practice.

101. Our proposal is that section 60 should be revised to reflect the fact that, in some circumstances, parties should be able to agree, prior to a dispute arising, on the apportionment of costs in an arbitration. The policy considerations underlying section 60 reflect a potential disparity in bargaining power between the parties and a need to protect consumers, for example, from bearing the costs of arbitration. However, it is regrettable, from a freedom of contract perspective, that we are seeing section 60 stand in the way of contractual provisions agreed between commercial parties of equal bargaining power. For example, price review clauses in wholesale contracts specifying that the parties will bear their own costs of any arbitration are rendered unenforceable by virtue of section 60 of the Act. While parties may be able to reconfirm their agreement on costs following a dispute arising, the reality is that this may not be possible. International parties are surprised by section 60, which has no equivalent in other jurisdictions of which we are aware.

102. To resolve this discrepancy, we would propose that the current position in section 60 be considered the default rule, but that section 60 be revised to provide the tribunal with the discretion to uphold an existing agreement as to costs between the parties. This would enable the tribunal to assess whether to depart from the default rule in the event, for example, that the apportionment of costs has been a negotiated provision between parties of equal standing and that it does not give rise to an uncommercial outcome. This would be a middle ground, where the tribunal can have regard to an existing contract, without taking away from the protection envisioned by section 60.

Consultation Question 38. 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?

103. In our view, there would be merit in considering in more detail whether there should be a default rule that the law governing the arbitration agreement is the law of the seat. Our reasoning is as follows:

- At present, the law governing an arbitration agreement is determined by reference to common law conflicts of laws rules. Under those rules, the law governing an arbitration agreement will be the law expressly or impliedly chosen by the parties or, in the absence of such a choice, the law with which the arbitration agreement is most closely connected.
- As the Consultation Paper notes, in *Enka v Chubb*, the Supreme Court held that, in circumstances where there has been no express choice of law to govern the agreement to arbitrate:

- Where there has been an express choice of law to govern the contract within which the arbitration agreement is contained, that law is likely to be found to be an implied choice of governing law for the agreement to arbitrate (absent indications to the contrary and subject, among other things, to the validation principle). This was the unanimous view of the Supreme Court.
- Where there has been no express choice of law to govern the contract within which the arbitration agreement is contained, there is no implied choice of law for the agreement to arbitrate. In such cases, the agreement to arbitrate is governed by the law of the jurisdiction with which it is most closely connected, which is likely to be the law of the seat of arbitration. This was the view of the majority of the Supreme Court.
- We can see the logic and benefits of the conclusion reached by the Supreme Court in *Enka v Chubb* in cases where there has been no express choice of law to govern an arbitration agreement:
 - The idea that the law chosen to govern a contract applies also to the arbitration agreement is likely to reflect the expectations of most users of arbitration, the majority of which are unlikely to be familiar with the principle of separability or, as a result, the idea that an arbitration clause may be governed by a law other than the law chosen to govern the agreement as a whole. As such, parties may well be of the view that, in choosing a law to govern their contract, they have indeed made a choice of law to govern their arbitration agreement, even if as a matter of law the choice has to be regarded as an implied rather than an express choice.
 - The decision has the advantage of simplicity. In cases where there has been an express choice of law to govern the contract (which is the case in relation to the vast majority of commercial contracts) the effect of the decision is that:
 - The same overarching rules of interpretation will apply to the entirety of the agreement.
 - There is no need to determine whether related provisions (for example agreements to negotiate or mediate prior to the commencement of arbitration) are governed by the law governing the contract or the law governing the arbitration clause, because there will only be one law in play. This is consistent with English law more generally in relation to depeçage. As the Supreme Court put it “Depeçage is the exception not the rule.”
 - It is consistent with the approach taken to the determination of the governing law of jurisdiction agreements.
- From a policy perspective, however, we are not convinced that the default rule should be that the law governing the arbitration agreement is the law chosen to govern the contract. In our view there are good policy and practical arguments that the default rule should be that the law of the seat applies:
 - When negotiating an arbitration agreement, commercial parties generally wish to ensure that they agree on a seat of arbitration that is arbitration-friendly. Among other things, they choose seats in jurisdictions whose courts have a track record of respecting the autonomy and finality of the arbitration process and of upholding the parties’ choice of arbitration as the mechanism for resolving their dispute. The courts in arbitration-friendly jurisdictions also tend to have sensible substantive rules on how arbitration agreements governed by local law should be interpreted and construed. If the default rule is that the law chosen to govern the contract also governs the arbitration clause, these sensible substantive rules would not apply. This would suggest that the better starting point in the absence of an express choice is that an arbitration

agreement is governed by the law of the seat, because this would be more likely to result in the application of sensible rules of construction and interpretation.

- One of the reasons why parties commonly choose to include arbitration clauses in their commercial contracts is because they are able to choose a neutral forum. This is particularly the case in contracts involving states or state-owned entities. Commercial parties commonly want to ensure (as far as possible) that their agreement with a state counterparty is insulated from the risk of interference by the state. In particular, they seek to limit the risk that the state could change the law in a way that negatively impacts their rights under the agreement. To achieve this they commonly seek to agree with the state party that the substantive obligations under the contract should be governed by a law other than the law of the state in question. They also seek to ensure that disputes are resolved by arbitration in a neutral seat. In practice, it can be more difficult to persuade a state party to agree that the contract is governed by a neutral law than to persuade the state party that disputes should be resolved in a neutral seat. Nor is it always possible to agree to the inclusion of an express choice of law to govern the arbitration clause itself. If the default rule is that the law of the contract applies to the arbitration clause, this would potentially reduce the insulation achieved by the parties having agreed a neutral seat of arbitration. This again suggests that the better starting point in the absence of an express choice is that an arbitration agreement should be governed by the law of the seat.
- Including a default rule that an arbitration clause is governed by the law of the seat would also have the practical benefit of making it easier to seek urgent relief from the English court in support of a London seated arbitration because the court would not need to hear foreign law evidence as to the interpretation or scope of the arbitration agreement.
- Such a rule would also be consistent with the position the Supreme Court reached in *Enka v Chubb* in cases where there has been no express choice of law to govern the substantive obligations in the contract.

104. On balance, our view is that it would be worth giving further consideration to enacting a default rule that, in the absence of express choice, the law of the seat should apply. Given the complexity of the issues, there should be further consideration and consultation on this point if it is taken forward, and in particular on the drafting of any amendment to the Act that is ultimately proposed. It seems to us that any such amendment would need to be drafted in a way that allows for exceptions to apply (including where there has been an express choice of law for the arbitration agreement itself and where the validation principle applies).

Allen & Overy LLP

RESPONSE ON CONSULTATION

CLARE AMBROSE

Consultation Question 1. 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? Paragraph 2.47

No. The basic position on confidentiality is now well established (more so than in 1995). A simple statement similar to the rules forming part of the Scottish statute would be a user-friendly way to explain the starting point for both domestic and international users. This would not preclude common law development of the scope of the principle and its exceptions. The statute need not aim for a comprehensive code and can allow for the fact that some matters are not confidential as a matter of consent (effectively an opt-out) or by way of specific treaty, e.g. investor state arbitration, and provide a non-exhaustive list of recognised exceptions, including public interest. This type of provision would be useful even if not wholly mandatory, indeed many very important provisions of the Act are non-mandatory and this classification would not enable parties to contract out of public policy exceptions in any event – see just as examples e.g. ss1, 5, 7, 81,).

The fact that parties can agree on confidentiality is not a good reason for laying down no statutory principle. Parties will often fail to agree on confidentiality and they need to know the starting point in the absence of an agreement.

English law undoubtedly recognises confidentiality as a starting principle in the absence of express agreement. It would be a fudge to omit any reference to this and it should be reflected in the statute rather than expecting users to have to explore case law or obtain legal advice to find that answer, or allowing mischievous parties (or competitors) to suggest that UK law does not protect confidentiality in those circumstances. The Act does already refer to complex areas which are developed by case law or consent (e.g. conflicts of laws, public policy safeguards and efficiency). To have no recognition of the existing principle of confidentiality would be an unfortunate omission in an updating statute, and likely to generate continuing uncertainty.

Consultation Question 2. 12.2 We provisionally conclude that the Arbitration Act 1996 should not impose a duty of independence on arbitrators. Do you agree? Paragraph 3.44

Yes

Consultation Question 3. 12.3 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. Do you agree? Paragraph 3.51

Yes

Consultation Question 4. 12.4 Should the Arbitration Act 1996 specify the state of knowledge required of an arbitrator’s duty of disclosure, and why? Paragraph 3.55

Yes

Consultation Question 5. 12.5 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? Paragraph 3.56

Upon what they ought to be aware of, but without a positive duty to make disclosure based on reasonable enquiries. A duty of reasonable enquiries would be impractical since:

- In most sectors, the names of parties are not transparent, must the arbitrator you start asking the parties which group of companies they belong to? Who is your beneficial owner? This could take weeks.
- It will place burdens on the parties too. Substantial information may have to be given– have experts been instructed, what are the events and issues involved?
- Who pays for these reasonable enquiries? Sometimes parties or institutions round up a number of potential arbitrators, the work required could be substantial. In a huge case this might be easy to justify but not otherwise.
- The duty may generate uncertainty, it would be measured against a reasonable arbitrator who has not yet been appointed, and who has limited information, that is going to be a difficult test to apply.

Consultation Question 6. 12.6 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 by the House of Lords)? Paragraph 4.10

&

Consultation Question 7. 12.7 We provisionally propose that: (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. Do you agree? Paragraph 4.36

1. The Paper rightly acknowledges that diversity is important. Unjustified discrimination is no longer acceptable in a modern arbitration system within the UK. It is important that English law provides legal safeguards since arbitration takes place behind closed doors so transparency provides no accountability. Participants may (sometimes justifiably) consider that confidentiality precludes or inhibits objections being pursued by way of other remedies.

2. Discrimination is not a major problem area in arbitration but it is present.
 - a) The Paper refers to current statistics¹ which show that complacency in the arbitration sector is unwarranted regarding gender discrimination. The figures would be significantly worse on inclusion for ethnicity and disability.
 - b) Shipping was fairly cited as an area for potential discrimination noting that some shipping contracts specify that arbitrators must be “commercial men”. Thus is not very common and many users ignore the gender requirement. However, I have seen it applied by clients and their experienced lawyers so as “to play safe”.
 - c) Parts of the UK’s services industry (including commodity associations, shipping, surveying, insurance and construction professionals) still remain notably “male, pale and stale”. Within these areas there are many associations and panels that are the gateway to work as arbitrators, counsel and experts. Parties select from these panels. The fact that equality legislation may not be directly applicable means that they may not consider it necessary to test whether their practices are discriminatory. The make-up of these panels suggests that indirect (and probably direct) discrimination continues.
 - d) Procedures and remedies within religious arbitration are often discriminatory. Some aspects are justified but many are not. This is a complex area but the continuing absence of clear legal safeguards against unjustified discrimination is unsatisfactory.
 - e) If the Government is encouraging the increasing use of arbitration in family law then it is important to have basic safeguards to ensure that the pool is diverse and that conduct within arbitration meets the standards that are expected in court proceedings.
 - f) Practical problem areas within the process include the harassment of counsel and failure to make adjustments for witnesses (on grounds for example of religion or disability). Serious incidents appear to be very rare but low level unequal treatment is often tolerated and very rarely reported, partly because of confidentiality.
3. A measure against discrimination would be a world-leading initiative. The fact that the leading international institutions are embracing measures for improving diversity is a firm indication that it is an attractive, market friendly stance - improving the pool and adding legitimacy to the arbitral process. Principles of equality and non-discrimination are more international than domestic – again pressure for change to date has come from international institutions. There is no business case for the UK being a discrimination friendly seat, nor is there evidence that London is attractive as a seat because it tolerates unjustified discrimination. If anything having integrity is its attraction.
4. There is no realistic prospect of a floodgate of challenges that would disrupt London as a seat. The threshold for invalidating an appointment or a contractual

¹ Para 4.4.

provision has already been addressed in the case law. The threshold for establishing a serious irregularity in the proceedings or the award is a high one and the courts can promptly set the same robust standard where discrimination is alleged. The standard for civil claims and for professional misconduct relating to discrimination is also now well established. Statutory safeguards should, however, ensure that serious cases can be properly addressed. More importantly, they will also make institutions and practitioners consider more carefully whether their practices are justifiable. They can no longer take the view that arbitration is exempt.

5. The Law Commission rightly acknowledges that existing safeguards are insufficient. If reform is needed to protect against discrimination then the Paper's proposals are inadequate. The grounds given for intervention make clear that English law currently permits unacceptable discrimination and this is not limited to the appointment stage. There is evidence of discrimination on appointment and participants are equally likely to discriminate within the arbitral process, for example on procedural measures, participation within the tribunal or the representation of parties. To send an important signal about diversity and equality, any reform should not be limited to the criteria for appointment but should apply more generally to the conduct of arbitration.

Consultation Question 8. 12.8 Should arbitrators incur liability for resignation at all, and why? Paragraph 5.23

Yes

Consultation Question 9. 12.9 Should arbitrators incur liability for resignation only if the resignation is proved to be unreasonable? Paragraph 5.24

Yes

6. Any measure that excuses a professional from responsibility must be very strongly justified. Arbitrators have a quasi-judicial role which justifies their existing immunity in the exercise of that role in the interests of finality and avoiding issues being re-litigated. However, their mandate is a consensual one that comes solely from the parties and there is no constitutional justification for the wider immunity granted to judges. In addition, arbitrators, unlike judges, claim fees from the parties for their services. Many of the Paper's proposals on immunity do not give adequate weight to the importance of giving parties a safeguards against arbitrators charging fees in an unjustifiable manner or amount.
7. The Paper talks of arbitrators being "*in a very exposed position*",² and having the "*fear of litigation hanging over them*".³ There is little evidence that this perception is shared, or to support the Paper's suggestion that arbitrators are declining to make robust decisions for fear that resignation or removal will lead to liability.⁴

² Para 5.10.

³ Para 5.20.

⁴ Para 5.10.

There is no evidence that the existing immunity is preventing arbitrators taking up appointments and properly performing their role. In addition, most arbitrators can secure liability insurance which will cover against liabilities, including costs liabilities (this includes LMAA full members and all practising lawyers).

8. Actual complaints are rare but there is a much more widespread perception, most often expressed by users off the record so as to avoid prejudicing their position, that arbitrators are perhaps too well insulated against liability and that (rightly or wrongly) users are “over a barrel” in terms of having no recourse against an arbitrator lacking in competence or integrity, or who inflates fees or is too slow or unwell to conduct the arbitration yet remains unwilling to resign. While English law is not singled out from other systems for this type of complaint, any reform that might strengthen this perception requires very significant justification.
9. The effect of the current wording of section 29 on resignation has not been thoroughly tested but the Paper is correct in suggesting that it could be read as imposing a default liability and a disincentive against resignation. The appropriate burden of proof is debateable since the starting point is probably that a resignation is a breach of the arbitrator’s mandate unless justified. However, while arbitrators should be discouraged from resigning without reason there is a greater policy need to encourage arbitrators to resign when appropriate. Accordingly, I would support the proposal that arbitrators should only incur liability for resignation where a party can show that the resignation is unreasonable.⁵
10. However, resignation may be extremely disruptive and can cause a loss of confidence in the process. Arbitrators should not be given immunity for resignation in all circumstances. The rationale for arbitral immunity does not justify *carte blanche* for an arbitrator to exit the process and keep their fees. The Paper provides insufficient reason for extending an arbitrator’s immunity to resignation regardless of whether it is reasonable.

**Consultation Question 10. 12.10 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. Do you agree?
Paragraph 5.45**

No

11. The proposal to extend immunity to the costs of court proceedings arising out of the arbitration mainly arises out of two first instance decisions⁶ on costs relating to two domestic arbitrations. In both instances the arbitrator had plainly been in the wrong (even if not shown to have acted in bad faith) but unusually made a positive choice to take part and defend the court proceedings. While the Paper finds fault

⁵ Para 5.20.

⁶ *Wicketts v Brine Builders* (8 June 2001) (HHJ Seymour QC) [2002] CILL 1805 (TCC) and *Cofely Ltd v Bingham* [2016] EWHC 240 (Comm).

with the judgments and places sympathy with one of the arbitrators,⁷ few practitioners would regard it as unsatisfactory that the arbitrators were held responsible for some of the costs they caused by unsuccessfully defending their position in the proceedings.

12. Arbitrators are well protected from liability under English law and the two known cases⁸ where a costs order was made against arbitrators were very unusual. There is no precedent for arbitrators being held responsible for costs when they take no positive part in the proceedings.⁹ The current position is preferable because arbitrators are protected by their immunity for what they have done in the arbitration, but it provides no incentive (or safeguard) to encourage arbitrators to enter the arena of court proceedings and generate satellite disputes.
13. The two court decisions relied upon provide little rationale for expanding the immunity to protect arbitrators who defend such proceedings. To the contrary, they show the unattractive prospect of satellite litigation which runs counter to the very purpose of the immunity. Taken as a whole, the case law suggests that costs orders against arbitrators or liability for resignation are wholly exceptional but wider statutory immunity against costs orders would send the wrong signal and give arbitrators undue licence in court proceedings. In addition, costs is a fact sensitive area that is better addressed by development of the case law.
14. The existing immunity under section 29 protects an arbitrator against “*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*”. On its ordinary meaning this wording would not appear to cover the conduct of separate court proceedings even if they relate to what was done in the arbitration. It is significant that unlike the discharge of their functions, arbitrators have a choice as to whether to take part in such court proceedings. The Paper’s proposal that immunity should extend to taking part in proceedings arising out of the arbitration is likely to have unintended consequences. For example, it would apply where an arbitrator pursues proceedings claiming fees without justification.

Consultation Question 11. 12.11 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. Do you agree?

⁷ Para 5.27-5.28.

⁸ *Wicketts v Brine Builders* (8 June 2001) (HHJ Seymour QC) [2002] CILL 1805 (TCC) and *Cofely Ltd v Bingham* [2016] EWHC 240 (Comm).

⁹ N Tamblyn, “Arbitrator Immunity and Liability for Court Costs” (2022) 88(2) *Arbitration* 225, 234 takes issue with some of the analysis in CI Arb guidance. However, that guidance fairly distinguishes the case where an arbitrator plays no part in resisting relief sought in the court proceedings, and one where the arbitrator does not take an active part but continues to make a positive claim for fees or to exercise a lien over fees that are in issue in the proceedings (for example under s24(4) and 25(3)(b)).

Paragraph 6.25

Yes

Consultation Question 12. 12.12 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. Do you agree?

Paragraph 6.29

Yes

Consultation Question 13. 12.13 We provisionally propose that the Arbitration Act 1996 should stipulate the threshold for success in any summary procedure. Do you agree? Paragraph 6.31

Yes

Consultation Question 14. 12.14 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. Do you agree? Paragraph 6.35

Yes

Consultation Question 15. 12.15 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. Do you agree?

Paragraph 7.22

Yes

Consultation Question 16. 12.16 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? Paragraph 7.36

Yes

Consultation Question 17. 12.17 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. Do you agree? Paragraph 7.39

Yes

Consultation Question 18. 12.18 We provisionally conclude that the provisions of the Arbitration Act 1996 should not apply generally to emergency arbitrators. Do you agree? Paragraph 7.48

Yes

Consultation Question 19. 12.19 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? Paragraph 7.51

Yes

Consultation Question 22. 12.22 We provisionally propose that: (1) where a party has participated in arbitral proceedings, and has objected to the jurisdiction of the arbitral tribunal; and (2) 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. Do you agree? Paragraph 8.46

No.

15. The Paper overestimates the problem said to justify the reform, and fails to give proper weight to the potential difficulties and downsides to reform, both as a matter of practice and principle.

Is there a practical problem that must be fixed?

16. At the outset, the Paper overestimates the practical problems and the risk of unfairness said to justify reform. The Law Commission correctly acknowledge that section 67 is only invoked in a tiny percentage of cases (around 15 per year).¹⁰ Only around 4 section 67 cases are heard and reported per year and the vast majority of those are decided without hearing witnesses and instead using documentary evidence largely drawn from the arbitral process.¹¹ The paper refers to a “double hearing problem”¹² but only identified one case¹³ where there was a re-run of oral evidence. That decision was not appealed and while the ultimate loser may have felt aggrieved that it suffered an unfair error in court the winner probably took the same view about the arbitral process. It cannot be suggested that the outcome was wrong or unfair, or in itself reflects a defect in section 67. The cost of calling witnesses was atypical and attributable primarily to the parties’ unsurprising choice to have oral evidence in a high stakes case.

17. Any process of challenge to an award will entail delay and what might be treated as “wasted” costs at some stage because either the tribunal’s decision was wrong or it was incorrectly challenged. This is unavoidable. Parties pursuing and defending challenges to awards are generally well represented and know the stakes. In addition, any challenge will give rise to the prospect of a diametrically different outcome on the same issues. This is the very point of a right of challenge. There will always be some parties who may attempt to use the challenge process, wholly or partially, as a means to delay the process or achieve tactical advantage. The legislation and the courts cannot eradicate this risk but should provide a balance between allowing an award to be challenged while ensuring that challenges are pursued fairly. The objective of reducing relatively rare cases of

¹⁰ Para 8.33.

¹¹ “Arbitration in Court: Observations on over a decade of arbitration-related cases in the English courts”, 11 November 2021 published by Osborne Clarke.

¹² Para 8.44.

¹³ *Jiangsu Shagang Group Co Ltd v Loki Owning Co Ltd, “The Pounda”*, [2018] EWHC 330 (Comm), [2018] 2 Lloyd’s Rep 359.

abuse should not be placed ahead of certainty or upholding basic principles underlying a jurisdictional challenge.

The proposal is contrary to principle

18. The proposed reform would create unjustifiable inconsistency in the manner in which jurisdictional objections are addressed by the English court. Where such objections are raised on enforcement (typically by application of the New York Convention under section 101¹⁴ or under a common law action on the award allowed under section 104) a party will be entitled to a full rehearing of its objection regardless of its participation in the arbitration, whereas under section 67 it will be limited to a review by way of appeal. Further, applications under sections 9 and 72 would be another standard of investigation for the same type of issue.
19. The Paper suggests that there are merely theoretical objections to its proposal.¹⁵ This fails to give proper weight to the well-established principles underlying the existing English law on jurisdictional objections which broadly reflect international consensus.¹⁶ Jurisdictional objections matter because the arbitral process is by definition a consensual process. The very point of a jurisdictional challenge is that the objecting party maintains that it has not consented to the process.
20. The Paper suggests that under its proposal a court will have a final say on jurisdiction but does not need to hear the evidence afresh or new evidence.¹⁷ However, imposing a statutory standard of review somewhat throws the baby out with the bathwater since it may bind the parties to a process they never agreed to. Both parties will be bound by the tribunal's determinations on evidence, procedure and the scope of the investigation. This may give rise to hardship and undermine basic principles of natural justice, for example if the tribunal refuses an oral hearing or legal representation (as is permissible in some commodity arbitration rules, e.g., GAFTA).
21. The Paper attempts to justify the measure as a matter of principle by suggesting that its reform applies "*where both arbitral parties ask the arbitral tribunal to rule on its jurisdiction*" and "*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 merits, subject to review by the court*".¹⁸ Following from this the Paper suggests that it would be unfair for a party objecting

¹⁴ The Paper correctly proposed at para 8.57 that it should not adjust the New York Convention defence under s103.

¹⁵ Para 8.37.

¹⁶ Article 16 of the UNCITRAL Model Law on International Commercial Arbitration (1985 as amended in 2006), *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46.

¹⁷ Paras 8.39-8.40.

¹⁸ Para 8.41.

to jurisdiction to ask a tribunal to issue an award and then assert that the award can be ignored.¹⁹

22. This analysis is inconsistent with English law. First, the courts have discretion to give evidential weight to an award on jurisdiction, they are simply not bound to give it such weight. Secondly, and more importantly, it runs contrary to the English law approach to *kompetenz-kompetenz* which has never recognised some hybrid sort of jurisdiction whereby the tribunal's process or ruling on its own powers is binding even where properly challenged. It is also contrary to well established Court of Appeal authority and Supreme Court discussion²⁰ under which a party taking part under objection is not treated as conferring jurisdiction on the tribunal. These cases show that, in rare situations, parties may enter into a specific agreement conferring jurisdiction on the Tribunal to decide jurisdiction, and although this would technically be subject to review (because section 67 is mandatory) any challenge would be bound to fail by reason of the parties' specific agreement.

Practical problems with the proposal

23. At a practical level, the English law on section 67 is now well-settled and parties using a London seat currently have a significant degree of certainty as to the way in which the court will decide the challenge. The Paper's survey of other jurisdictions²¹ suggests that they are similar to the English system of a rehearing with safeguards and flexibility. Unsurprisingly, these are tailored differently by other systems. The English approach of a re-hearing under section 67 is not a source of strong criticism from international users, or cited as a reason why parties would avoid London. The Paper only identifies one vocal domestic commentator²² and although there was some initial judicial criticism when the law was bedding down that has subsided.

24. Introducing an "appeal test" is likely to generate substantial uncertainty and will generate different means of obtaining tactical advantage in the relatively unusual cases where parties could take unfair advantage. The current system may, in the very rare cases that get to a court hearing, generate potentially unnecessary costs and unfairness at that stage. However, the proposed reform may much more commonly cause unnecessary delay, extra costs and potential unfairness before the tribunal. For example where parties could insist that they must be entitled to unduly full disclosure or an unnecessary oral hearing as this is their opportunity to run the evidence, in circumstances where currently a tribunal would have stronger grounds for containing the investigations.

¹⁹ Para 8.42.

²⁰ *LG Caltex Gas Co Ltd v China National Petroleum Corp* [2001] EWCA Civ 788, [2001] 1 WLR 1892, *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46 [25]-[27].

²¹ Paras 8.5-8.28.

²² *Merkin and Flannery on the Arbitration Act 1996* (6th ed, 2020) pp 684 to 685.

Is section 72 a good safeguard for a party that wants a full hearing?

25. The Paper attempts to answer objections of principle by suggesting that a party who wants to have a full hearing will still have this option under section 72 which preserves the rights of a party who does not participate in the arbitration but later objects to the tribunal's jurisdiction.²³ This overstates the availability and effectiveness of section 72 as a safeguard. Section 72 is not a practical remedy in itself; it is essentially an exception to waiver and the rule that statutory remedies are exhaustive.
26. Non-participation in reliance on section 72 may also not be a practical or attractive option, for example where a party reasonably considers that the arbitral process could be effective to resolve the dispute but wants to reserve its position on this, or where the tribunal has jurisdiction over some parts of the parties' dispute but there are objections over others. Preserving rights under section 72 can be a practical tightrope since a party may reasonably want to explain its position. In addition, applications seeking an injunction or declaratory relief under section 72 remain somewhat unmapped (for example it is not wholly clear whether statutory time limits apply after an award²⁴) and these are discretionary, equitable remedies so may be lost by delay.²⁵ Currently section 72 is rarely invoked, mainly because it is not an identifiable remedy and non-participation is a somewhat perilous approach since awards are readily enforceable.
27. Under the Paper's proposals there would remain uncertainty as to the scope and effectiveness of section 72. In addition, English law should not incentivise non-participation. This would give rise to wasteful default arbitral proceedings and enforcement proceedings which would be more likely to give rise to inefficiency and unfairness in English arbitration than the mischief identified as justifying the reform.

Are there other means to address the problem?

28. The problems of delay, inefficiency and unfairness identified by the Paper are already addressed by other means that do not jeopardize the integrity of English law on jurisdictional objections. The Commercial Court has recently introduced a useful filter on section 67 cases that have no real prospect of success.²⁶ It has always employed wide case management powers which stop a party from unnecessarily duplicating the production of evidence or generating new evidence of limited relevance. The court will also penalise parties in costs for this. English law also has sophisticated and robust rules on waiver (section 73) that enable the courts to stop parties attempting to run new points or introduce new evidence for this purpose.

²³ Para 8.44.

²⁴ E.g. *Bernuth Lines Ltd v High Seas Shipping Ltd* [2005] EWHC 3020 Comm [58].

²⁵ E.g. *Zaporozhye Production Aluminium Plant v Ashly Limited* [2002] EWHC 1410.

²⁶ Commercial Court Guide 2022, O8.6.

29. Less invasive measures could be introduced that would further remedy the potential mischief of repetition of evidence. This would include making it easier for parties to go directly to court. Most commentators agree that section 32 is under-used and it could be made more accessible, for example by enabling a party to seek permission from the court even where the tribunal has not given permission. Where section 32 is an available option, a party's insistence on using the arbitral process would justify more robust case management (and costs sanctions) when the matter comes to court. Other measures would be to give the court wider powers under section 70 to require a losing party to bring in security as a condition of pursuing a challenge.

Consultation Question 23. 12.23 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? Paragraph 8.51

Do not agree with change but same test should probably apply.

Consultation Question 24. 12.24 We provisionally conclude that our proposed change to section 67 of the Arbitration Act 1996 would not require any similar change to section 103. Do you agree? Paragraph 8.57

Do not agree with change but same test should probably apply.

Consultation Question 25. 12.25 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. Do you agree? Paragraph 8.64

Yes

Consultation Question 26. 12.26 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? Paragraph 8.71

Yes

Consultation Question 27. 12.27 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? Paragraph 9.53

Yes

Consultation Question 28. 12.28 Do you think that section 7 of the Arbitration Act 1996 (separability of arbitration agreement) should be mandatory, and why? Paragraph 10.11

No. Party autonomy does not need to be overridden here.

Consultation Question 29. 12.29 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? Paragraph 10.17

Yes

Consultation Question 30. 12.30 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? Paragraph 10.34 142

Yes – these are useful remedies and should be more easily available.

Consultation Question 31. 12.31 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? Paragraph 10.42

Yes

Consultation Question 32. 12.32 Do you think that section 39 of the Arbitration Act 1996 should be amended to refer to “orders” (rather than “awards”), and why? Paragraph 10.47

Yes

Consultation Question 33. 12.33 Do you think that section 39(1) of the Arbitration Act 1996 should be amended to refer to “remedies” (rather than “relief”), and why? Paragraph 10.49

No. Section 48 is about final remedies so they do not cover the same ground. Relief could be just a procedural remedy such as a stay.

Consultation Question 34. 12.34 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? Paragraph 10.59

Yes

Consultation Question 35. 12.35 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? Paragraph 10.64

Yes

Consultation Question 36. 12.36 We provisionally propose that sections 85 to 87 of the Arbitration Act 1996 (on domestic arbitration agreements) should be repealed. Do you agree? Paragraph 10.69

Yes

Consultation Question 37. 12.37 Do you think that any of the suggestions discussed in Chapter 11 needs revisiting in full, and if so, why? Paragraph 11.5

No

Consultation Question 38. 12.38 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? Paragraph 11.

Section 18: Appointments

It is still necessary to go to court to obtain an appointment if the arbitration agreement requires a sole arbitrator. This is regarded as cumbersome and unnecessarily expensive when party appointment is achieved under s17. S18 is applied more frequently than its equivalent under Article 11(3)(b) of the Model Law because a sole arbitrator is the default choice under English law. If maintained, the appointment procedure under s18 could be made more efficient, for example providing for the application to be decided on papers.

Section 41

The existing powers to dismiss a claim for inordinate and inexcusable delay under s41(3) are based on a court procedure no longer in force. The survival of this procedure in the context of arbitration proceedings is an historical anomaly. These powers are difficult to apply effectively and the provisions are not seen as a useful tool by practitioners. Practitioners regard them as redundant as the requirements are difficult and expensive to establish. Given delay is one of the main problems of arbitration it is unsatisfactory that the main statutory remedy is redundant.

Peremptory orders under s41(5) are now the main means of imposing progress but

- a) this provision is not designed to address delay;
- b) peremptory orders are not well understood (or defined) and the requirements for making one are technical and not user-friendly (for example, there is wide uncertainty among practitioners as to the meaning of a final order and a peremptory order)
- c) the tribunal's powers only arise where there has been a failure to comply with orders.

Stronger provision giving broader powers to deal with inaction and delay would empower parties and arbitrators to act proactively and stop delay.

CLARE AMBROSE,

Twenty Essex, [REDACTED]

15 November 2022

ANONYMOUS

We consider that the Law Commission's discussion of the Supreme Court's decision in *Enka v Chubb*¹ should be revisited in full and that the law of the arbitration agreement should be specified, in default of party choice, as following the law of the seat of the arbitration.

The Supreme Court's decision is at odds with a long line of former caselaw more generally indicating a preference for the seat, beginning with the Court of Appeal's own judgment in *Enka*, and spanning back to the House of Lords in *Hamlyn Co v Talisker Distillery* [1894] A.C. 202. See also for example the comments of Moore-Bick, L.J in *Sulamerica Cia Nacional de Seguros SA v Enesa Engenharia SA* [2012] EWCA Civ 638.

The overarching reason for proposing this change is to avoid the negative practical implications of *Enka*, detailed below, and to give certainty to parties.

The parties' choice of seat is intentional

The choice of the arbitral seat is an intentional one that carries with it the expectation that the law of the seat will guarantee the protection of the arbitration procedure and uphold the parties' intention that disputes arising from the underlying contract will be arbitrable and resolved in a neutral and robust forum. It is usually the result of a careful consideration of the features of the law of the seat (robustness of the local courts, availability of experienced counsel, alignment with New York Convention / UNCITRAL Model law, etc) and often is the result of a negotiated compromise between the parties. In our significant experience advising parties in the negotiation

¹ [2020] UKSC 38.

of contracts and arbitration agreements in them (often at the eleventh hour), parties will often concede the law of the main contract to their counterparty in order to retain their first choice of seat, which they consider to be more important in terms of determining the robustness and outcome of any arbitration. Given the eleventh hour nature of these negotiations, it is often the case that the parties do not actively choose a separate governing law for their arbitration agreement (and pre *Enka*, they did not have to).

The impact of *Enka* on contracts drafted with this in mind is significant. In fact, all agreements in which the arbitration agreement, providing for a London seat but which is silent on its governing law, will now be subject to exactly the kind of foreign law meddling and intervention that they sought to evade through the choice of an English seat, as discussed below.

By way of example of the unintended consequences of *Enka*, users of London-seated arbitration who entered into contracts with Russian counterparties and who, by way of ordinary commercial negotiation, acquiesced to Russian law as the governing law of the contract, will be disconcerted to discover that it is now Russian law which governs the validity and scope of the arbitration agreement and not that of the seat. This is particularly acute because Russia introduced an amendment to its Russian Arbitrazh (Commercial) Procedure Code granting its own courts exclusive jurisdiction over disputes in which a party has been 'affected' by foreign sanctions, even if the underlying contract provides for arbitration. Where the arbitration agreement in question is governed by English law, it is open to a tribunal (and a party) to 'ignore' the effect of Russian law and proceed with the arbitration (albeit, this might be in parallel with Russian court proceedings). However, post *Enka*, this arbitration agreement is governed by Russian law and the supplanting of arbitral jurisdiction by the Russian courts where sanctions apply would be valid, leaving the non-Russian entity with no recourse against having its dispute heard by the Russian courts. This illustrates the kind of mischief that parties who choose arbitration in London seek to avoid, yet

Enka has the (albeit unintended) effect of pitching them directly into the conflict they sought to avoid.

One might argue that this can be avoided by parties expressing their choice of law. For contracts entered into after *Enka*, that may be so. But it does not address the many hundreds if not thousands of contracts already in existence which are now exposed to this kind of mischief, despite having chosen a London seat to guard against it.

The Supreme Court's presumption and the exceptions to that presumption are not arbitration friendly

The Supreme Court attempted to address the problems with its presumption that the governing law of the contract applies to the arbitration agreement by setting out exceptions to this presumption. These are that parties are assumed not to have intended to have chosen the law of the contract to apply to the arbitration agreement where there was at least a serious risk that it would invalidate² or “*significantly undermine*”³ the arbitration agreement with reference to what is intended by reasonable commercial parties.

As a preliminary point, the fact that there are already exceptions to the presumption suggests that the presumption is not fit for purpose, and will likely embroil parties in litigation to decide whether the exception applies in any given case. This prospect is not a positive one for a number of reasons.

² *ibid* [106].

³ *ibid* [109].

First, it introduces unwelcome uncertainty to disputes arising out of agreements which name London as a seat but for which the main contract is governed by a different law. The Supreme Court's exceptions raise more questions than they answer, not least what might reasonable commercial parties in a pre-*Enka* world have intended by choosing a different seat to the governing law. This will incentivise parties to make arguments based on the exceptions to decide on the law of the arbitration agreement in what should be a straightforward process in an arbitration friendly jurisdiction. As put by Lord Hoffmann, “[i]t may be that the majority in *Enka* could sometimes deal with such a plea by their exception for foreign law, which would make the agreement to operate inoperable, but there is plenty of scope for litigation.”⁴

Secondly, the uncertainty created by the exceptions set out in *Enka* will incentivise parties to litigate whether their particular circumstances fall within the presumption or the exceptions to *Enka*, which will make London a less attractive seat to parties. For example, as commentators have pointed out “*there is considerable indeterminacy in the majority’s suggestion that their general rule might not apply where a law might “significantly undermine” the commercial purpose of an arbitration agreement*”. For example, if the particular invalidating rule is relatively obscure, can the court assume the parties would have known about the rule?⁵

Thirdly, what the Supreme Court’s approach in *Enka* does do is incentivise parties to adduce evidence of foreign law in order to exploit the exceptions to the presumption, adding cost and delay to what should be a straightforward question to be determined. Disingenuous parties will seek to avail themselves of this capacity to disrupt proceedings and maximise procedural

⁴ Lord Hoffmann, ‘The Efficacy of Justice’, speech at the Gaillard Lecture on 17 November 2022.

⁵ Myron Phua and Matthew Chan, ‘Persistent questions after *Enka v Chubb*’ (2021) 137 LQR 216, <<https://www.twentyessex.com/persistent-questions-after-enka-v-chubb-2021-137-lqr-216/>>.

inefficiency. Further, although “[q]uestions of foreign law are dealt with in the English Commercial Court on a daily basis”⁶ and indeed by tribunals, this does not detract from the fact that English-seated tribunals (and courts) are likely to be more well-versed in English law, which they can readily apply to these questions without the need for costly and timely references to experts of foreign law, which disrupt the principle of a one stop forum for arbitration.

Fourthly, *Enka* displays an inconsistent logic on separability of the arbitration agreement from the main contract (a key principle). It both denies separability (in the main presumption that the arbitration agreement is governed by the law of the contract) and on occasion brings it back to life (if the presumption results in the clause being seriously undermined or invalidated, where the main contract is terminated, or when there is no express or implied choice of law of the main contract). This selective revival of the principle is inconsistent and has been criticised by Lord Hoffmann as being like “a rabbit-out-of-a-hat”.⁷

Part of the Supreme Court’s reasoning for denying separability in this way was that commercial parties are unaware of this principle. But this cannot be assumed of the parties’ legal advisers and is also inconsistent with the common law origins of the doctrine and its place in the system of English law, having been described as being “part of the very alphabet of arbitration law” by the House of Lords in *Lesotho Highlands Development Authority v Impregilo SpA*.⁸

⁶ *Enka* (n 48), [117].

⁷ Lord Hoffmann (n 51), ‘The Efficacy of Justice’.

⁸ [2005] UKHL 43, per Lord Steyn at [21] referring to *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd* [1993] QB 701, pp. 724 – 725.

***Enka* makes London and English law’s appear less arbitration friendly**

London has always been perceived as a robustly arbitration-friendly jurisdiction – both as a result of the Act and of past English court decisions. It has rightly held the status of one of the world’s leading arbitration venues for that reason. The decision in *Enka* seriously risks undermining that perception, for the reasons stated above.

In addition, the related finding of the Supreme Court regarding the effect of section 4(5) of the Act (namely, that the choice of a foreign law to govern the arbitration agreement will automatically displace the non-mandatory provisions of the Act where the provision is ‘substantive’ and not ‘procedural’),⁹ is deeply problematic. We refer to the Russian law example above as just one illustration of this. The decision in *Enka* now means that in every English-seated arbitration, every non-mandatory provision of the Act could be automatically ousted by a routine choice of foreign law.¹⁰ This also introduces a need to characterise every single non-mandatory provision of the act as either procedural or substantive, which would involve an “*extremely difficult and complex*” exercise (in the words of the Departmental Advisory Committee on Arbitration, quoted in the judgment).¹¹

For all these reasons, the decision in *Enka* poses serious risks for London as a preferred choice for arbitration.

⁹ *Enka* (n 48), [74].

¹⁰ Salim Moollan KC, speech at Brick Court Chambers Annual Commercial Conference 2022 on 13 October 2022, on *Enka v Chubb*, available at <https://www.youtube.com/watch?v=kY_e9khmLKA>.

¹¹ *Enka* (n 48), [78].

The Law Commission's solution

We disagree that the implications resulting from *Enka* can be resolved by reference to the choice of arbitral rules as the Law Commission suggest at para. 11.9 of its Paper. The parties' choice of law governing the underlying contract was understood to be an implied choice in *Enka* as to the law governing the arbitration agreement (emphasis added). This means that even where the institutional rules as a default refer to the law of the seat such as in the LMAA or LCIA rules, these are ousted by any implied choice of law.

This takes us back to the need for parties to now draft agreements so as to include an express provision as to the governing law of the arbitration agreement when this could be dealt with more simply and effectively by a change in the law to favour the law of the seat.

Conclusion

The Supreme Court's analysis in *Enka* was focused on creating immediate certainty as to the law governing the arbitration agreement where no choice has been made. This it achieved to an extent, but it has failed to consider the policy and practical implications such a rule would have on England and Wales as a leading arbitral forum.

As a result, a wide range of determinations relevant to arbitration are now potentially left to the law governing the main contract and not the law of the seat; these include jurisdictional challenges, arbitrability, interpretation of the clause, its scope, and who is bound by it. *Enka* arguably invites tactical recourse on these issues to disrupt and illegitimately prevent the other party from relying on the agreement to arbitrate.

The question is thus, not whether "*Enka was wrong*" which appears to be the focus of the Law Commission Paper but rather,¹² what is the right rule for England and Wales to adopt as a leading arbitral seat as a matter of policy? The answer is clearly to adopt the simpler and more efficient presumption in favour of the law of the seat.

¹² Salim Moollan KC (n 58), Brick Court Chambers Annual Commercial Conference 2022 on 13 October 2022.

Response ID ANON-PT57-RUK4-P

Submitted to Law Commission Consultation: Review of the Arbitration Act 1996
Submitted on 2022-12-13 14:57:25

About you

What is your name?

Name:

[REDACTED]

What is the name of your organisation?

Enter the name of your organisation:

[REDACTED]

Are you responding to this consultation in a personal capacity or on behalf of your organisation?

Personal response

If other, please state::

What is your email address?

Email:

[REDACTED]

What is your telephone number?

Telephone number:

[REDACTED]

If you want the information that you provide in response to this consultation to be treated as confidential, please explain to us why you regard the information as confidential. As explained in our privacy notice, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

Please explain to us why you regard the information as confidential:

I would like my response to be treated as anonymous (although the information provided is not confidential). I do not wish to be named in your list of responses.

Consultation questions

Consultation Question 1: 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?

Not Answered

Please share your views below.:

Consultation Question 2: We provisionally conclude that the Arbitration Act 1996 should not impose a duty of independence on arbitrators. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 3: 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. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 4: Should the Arbitration Act 1996 specify the state of knowledge required of an arbitrator's duty of disclosure, and why?

Not Answered

Please share your views below.:

Consultation Question 5: 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?

Not Answered

Please share your views below.:

Consultation Question 6:

Not Answered

Please share your views below.:

Consultation Question 7:

Not Answered

Please share your views below.:

Consultation Question 8: Should arbitrators incur liability for resignation at all, and why?

Not Answered

Please share your views below.:

Consultation Question 9: Should arbitrators incur liability for resignation only if the resignation is proved to be unreasonable?

Not Answered

Please share your views below.:

Consultation Question 10: 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. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 11: 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. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 12: 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. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 13: We provisionally propose that the Arbitration Act 1996 should stipulate the threshold for success in any summary procedure. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 14: 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. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 15: 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. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 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?

Not Answered

Please share your views below.:

Consultation Question 17: 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. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 18: We provisionally conclude that the provisions of the Arbitration Act 1996 should not apply generally to emergency arbitrators. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 19: 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?

Not Answered

Please share your views below.:

Consultation Question 20: Do you think that section 44(5) of the Arbitration Act 1996 should be repealed, and why?

Not Answered

Please share your views below.:

Consultation Question 21:

Not Answered

Please share your views below.:

Consultation Question 22:

Not Answered

Please share your views below.:

Consultation Question 23: 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?

Not Answered

Please share your views below.:

Consultation Question 24: We provisionally conclude that our proposed change to section 67 of the Arbitration Act 1996 would not require any similar change to section 103. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 25: 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. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 26: 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?

Not Answered

Please share your views below.:

Consultation Question 27: 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?

Not Answered

Please share your views below.:

Consultation Question 28: Do you think that section 7 of the Arbitration Act 1996 (separability of arbitration agreement) should be mandatory, and why?

Not Answered

Please share your views below.:

Consultation Question 29: 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?

Not Answered

Please share your views below.:

Consultation Question 30: 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?

Not Answered

Please share your views below.:

Consultation Question 31: 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?

Not Answered

Please share your views below.:

Consultation Question 32: Do you think that section 39 of the Arbitration Act 1996 should be amended to refer to "orders" (rather than "awards"), and why?

Not Answered

Please share your views below.:

Consultation Question 33: Do you think that section 39(1) of the Arbitration Act 1996 should be amended to refer to "remedies" (rather than "relief"), and why?

Not Answered

Please share your views below.:

Consultation Question 34: 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?

Not Answered

Please share your views below.:

Consultation Question 35: 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?

Not Answered

Please share your views below.:

Consultation Question 36: We provisionally propose that sections 85 to 87 of the Arbitration Act 1996 (on domestic arbitration agreements) should be repealed. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 37: Do you think that any of the suggestions discussed in Chapter 11 needs revisiting in full, and if so, why?

Please share your views below.:

Third Party Funding.

Disclosure of Third Party Funding

The reasons given in Chapter 11 of the Consultation Paper for not including this topic as part of the review are inadequate. It is stated that:

“We have heard how the principal purpose for such disclosure is to reveal whether there might be a relationship between the funder and an arbitrator which goes to the question of impartiality. Impartiality and disclosure are topics which we address already, in Chapter 3.”

However, unless the identity of the third party funder is disclosed by the Claimant, an arbitrator may be unaware of the involvement in an arbitration of a third party funder with which she/he, her/his colleagues of their firm has a link and is therefore not in a position to make an appropriate disclosure. In other words, the ability of an arbitrator to make the necessary disclosure presupposes that the existence of third party funding is disclosed to the tribunal by the funded party. Accordingly, references in Chapter 3 of the Consultation Paper to an arbitrator’s duty of disclosure are beside the point.

It is well recognised that the involvement of third party funders in international arbitration can give rise to potential arbitrator conflicts of interest, and that knowledge of both the existence and the identity of any third party funders or insurers is essential for arbitrators to assess and make appropriate disclosures of potential conflicts of interest in order to protect and preserve the integrity of the proceedings. Such a conflict might arise, for example, if one of the arbitrators is a member of a firm which has provided the funder with an opinion on the case, or regularly provides the funder with second opinions, or whose cases are regularly funded by the funder.

As the Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration (the “ICCA-QMUL Report”) [International Council for Commercial Arbitration, Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration, ICCA Reports No. 4, April 2018, pp. 82 and 83] recently observed:

(1) The existence of third-party funding or insurance in an international arbitral dispute can create the potential for an arbitrator conflict of interest with the funder or insurer;

(2) Knowledge of the existence and identity of a third-party funder or insurer in international arbitral disputes is essential for arbitrators to assess and make necessary disclosures of potential conflicts of interest;

(3) Disclosure of potential conflicts is important to avoid potential challenges to an arbitral award and to preserve the overall integrity of international arbitration;

(4) Third-party funding may be provided through a variety of structures such that it is difficult to isolate a single definition of third-party funding;

(5) Avoiding conflicts of interest is in the best interest of all parties and arbitrators, and is important for the legitimacy of international arbitration and the assured enforceability of arbitral awards; and

(6) Disclosure should strike an appropriate balance between providing adequate information for arbitrators, parties, institutions, and appointing authorities to assess potential conflicts of interest, and reducing the potential for unnecessary delay, frivolous challenges to arbitrators, or unfounded applications for disclosure of financial information and funding agreements.

The ICCA-QMUL Report concluded that “[a] party and/or its representative should, on their own initiative, disclose the existence of a third-party funding arrangement and the identity of the funder to the arbitrators and the arbitral institution or appointing authority (if any), either as part of a first appearance or submission, or as soon as practicable after funding is provided or an arrangement to provide funding for the arbitration is entered into.” [ICCA-QMUL Report, Chapter 4 Principle A.1, p. 81].

The policy reasons behind such disclosures are clear. As the IBA Guidelines on Conflict of Interest in International Arbitration explain, “[t]hird-party funders and insurers in relation to the dispute may have a direct economic interest in the award, and as such may be considered to be the equivalent of the party.” [International Bar Association, IBA Guidelines on Conflicts of Interest in International Arbitration, 23 October 2014, “Explanation to General Standard 6” subparagraph (b).] ICSID tribunals have noted “the importance of ensuring the integrity of the proceedings and to determine whether any of the arbitrators are affected by the existence of a third-party funder.” [Muhammet Çap and Sehil İnşaat Endüstri ve Ticaret Ltd. Sti. v. Turkmenistan, ICSID Case No. ARB/12/6, Procedural Order No. 3, 12 June 2015, paragraph 9. See also Bacilio Amorrortu v. The Republic of Peru, PCA Case No. 2020-11, Procedural Order No.2, 19 October 2020, in which the Tribunal ordered the claimant to disclose the identity of its third party funder in order “to deal with potential conflicts of interest”: *ibid.*, paragraph 8].

As the ICCA-QMUL Report notes, “broad agreement existed on the [ICCA-QMUL] Task Force that disclosure by the funded party of the existence and

identity of funders is necessary so that arbitrators could make appropriate disclosures and decisions regarding potential conflicts of interest.” [ICCA-QMUL Report, p. 83].

The introduction of clearly drafted, statutory provisions requiring a funded party to disclose the existence of third party funding and the identity of a funder would reflect what is generally accepted as best practice in international arbitration:

- The Singapore International Arbitration Centre (SIAC) has given the Tribunal the power to order the disclosure of the existence of and, where appropriate, details of the third party funder’s interest in its Investment Arbitration Rules and whether it has agreed to be liable for adverse costs (Rule 24(l)). It also issued a Practice Note on arbitrator conduct that clarified that arbitrators should ask for disclosure of the involvement of external funders [Practice Note PN – 01/17 On Arbitrator Conduct In Cases Involving External Funding (31 March 2017) (<https://siac.org.sg/wp-content/uploads/2022/08/Practice-Note-for-Administered-Cases-%E2%80%93-On-Arbitrator-Conduct-in-Cases-Involving-External-Funding.pdf>)].
- The Hong Kong International Arbitration Centre (HKIAC) has adopted a similar approach. Its arbitration rules now require funded parties to disclose the existence of a funding agreement, the identity of the funder and any subsequent changes to such information (Articles 4.3(i), 5.1(g), 27.6(i) and 27.7(f) and 44).
- The SCC has addressed the issue by adopting a policy encouraging disclosure of the identity of any third parties with an interest in the outcome of the dispute [SCC policy: Disclosure of third parties with an interest in the outcome of the dispute, adopted 11 September 2019 (<https://sccinstitute.com/media/1035074/scc-policy-re-third-party-interests-adopted.pdf>)].
- The ICC Rules also now cater for disclosure of funding arrangements as a result of revisions made in 2021 (Article 11(7)).
- The Australian Centre for International Commercial Arbitration (ACICA) Rules, introduced on 1 April 2021 provide for disclosure of the existence of third-party funding and the identity of the funder as early as possible in the arbitral procedure (Rule 54).
- As from 1 July 2022, the ICSID Rules now include a mandatory requirement for parties to disclose any third party funder that has provided funds for the purposes of pursuing or defending a claim (Arbitration Rule 14(1)).
- Recently negotiated free trade agreements have also addressed the issue, requiring disclosure of the existence, but not the terms, of any funding arrangement [Examples include the EU–Singapore Investment Protection Agreement, 21 November 2019, Chapter 3, Articles 3.1(2)(f), 3.8 and 3.19(6) and the EU–Canada Comprehensive Economic and Trade Agreement, 14 January 2017, Chapter 8, Articles 8.1 and 8.26].

Disclosure would also provide clarity for funders, funded parties and arbitrators and be a positive step towards preserving the integrity of the arbitral process, avoiding potential conflicts of interest between funders and arbitrators and preventing belated challenges to arbitrators or arbitral awards.

Liability of Third Party Funders for costs

A commercial funder’s investment might turn out to be very profitable in the event of a successful claim. Fairness therefore dictates that funders should be directly liable for costs in the event that the funded party is unsuccessful (as is the case in domestic litigation pursuant to s. 51(3) Senior Courts Act). Indeed, the Court of Appeal has emphasised that third-party funders seek to gain financially from claims as much as the funded parties and that “the derivative nature of a commercial funder’s involvement SHOULD ordinarily lead to his being required to contribute to the costs” [emphasis in original] on the same basis as the funded claimant [Excalibur Ventures LLC v. Texas Keystone Inc & Ors [2016] EWCA Civ 1144 at para 27]. Likewise, funders in arbitration should not be permitted to take the benefit of arbitration without being subject to the risk of the costs.

However, the ICCA-QMUL Report considered that, absent an express power in applicable national legislation or procedural rules, an arbitral tribunal lacks jurisdiction to issue a costs order against a third party funder [ICCA-QMUL Report, Chapter 6 Principle C.4, p. 145]. This is because arbitral tribunals have no authority over third-party funders who, even when their existence is disclosed, remain typically third parties vis-à-vis the arbitration agreement and the arbitration process. Thus, unlike national courts, arbitral tribunals lack jurisdiction to issue a costs order against a third-party funder.

Because of its clear and compelling fairness implications, the view that adverse costs orders should be binding on third party funders has found support by a number of governmental and non-governmental reports on third party funding, including, for example, the Hong Kong Law Reform Commission Report on Third-Party Funding for Arbitration (2016) [Hong Kong Law Reform Commission Report on Third-Party Funding for Arbitration (2016), Chapter 7, Final Recommendation, p. 106].

There is no principled reason why those who choose to participate in arbitration should be at a disadvantage, compared to court litigants, in their ability to recover costs from non-parties. Otherwise, a successful respondent in arbitration is exposed to the risk that it would be unable to recover its costs either from an unsuccessful impecunious claimant or from the funder. The ability of a tribunal to make binding costs orders against a third-party funder would provide counterparties in arbitration with certainty that any adverse costs orders will eventually be paid, if not by the funded party then by the third-party funder itself.

Consultation Question 38: 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?

Please share your views below.:

[REDACTED]

From: [REDACTED]
Sent: 20 December 2022 12:19
To: arbitration
Subject: Arbitration Consultation: Response from ARIAS (UK)

Dear Sir or Madam,

I write in respect of the consultation on the Arbitration Act 1996.

I am chairman of ARIAS (UK).

I am acutely conscious of the deadline of 15 December 2022. I had thought that I had uploaded the views of ARIAS (UK) to assist the Commission. Unfortunately, I fear that this may not have happened.

I would be grateful if you would accept this email instead which contains ARIAS (UK)'s limited comments and views.

Thank you in advance, for your assistance – and apologies for my technological difficulties.

Yours faithfully,

[REDACTED]

++++++

Q.1 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?

AGREED

1. The London Insurance market, made up of syndicates and companies controlled from across the world, is one of the world's largest providers of insurance and reinsurance as well as being home to numerous syndicates and companies which purchase reinsurance.
2. Arbitration is the favoured dispute resolution mechanism in the London and international markets, both for some classes of direct insurance (such as excess liability) and most classes of reinsurance. It is not uncommon for various (re)insurers to be involved in disputes with a policyholder in

respect of the same underlying loss, i.e., where there are 'layers' of excess insurance (often on a quota share basis) or where multiple reinsurers provide excess of loss reinsurance. The most obvious example is the 'September 11th' tragedy which gave rise to many disputes in the market. The amounts at stake frequently run into seven figures.

3. Nevertheless, the market – i.e., both buyers (policyholders) and sellers (insurers and reinsurers) – favour arbitration. For decades, participants in the London market have favoured three-person arbitration as the appropriate dispute resolution mechanism. That continues to be the case today – together with the attendant confidentiality provided by the common law.
4. The older forms of arbitration agreement contemplated tribunals solely consisting of industry professionals; the modern practice is often to select a lawyer with expertise in this area of law, usually a King's Counsel or a retired judge, as the third appointee. This provides legal insight, forensic and case management expertise and, since reasoned Awards are the norm in London arbitration dissenting Awards are rare so it usually not possible to determine which of the panel contributed most or least to an eventual ruling.
5. The Awards produced are of a high quality and procedure is conducted efficiently by experienced practitioners and arbitrators. As a result, applications for permission to appeal in insurance cases seldom arise and successful appeals are very rare.
6. In summary, it would be fair to regard insurance and reinsurance treaty arbitration as a modified form of trade arbitration where the parties will always be members of the world's re/insurance market, with arbitrators drawn from that industry and from amongst its expert advisers.
7. Historically, the parties' choice of arbitration has resulted in a *confidential* dispute resolution mechanism. That gives rise to two issues: first, the ability of the parties thereto to disclose the arbitration award to third parties in the normal course of business; and, secondly, the market's desire to know of issues determined by arbitral panels which are relevant to the sector more generally.
8. In respect of the first issue, the common law has developed exceptions to confidentiality so that the result of an arbitration can be disclosed to those who 'need' to know, i.e., those most obviously affected by it, such as reinsurers, retrocessionaires, auditors, etc.: see *Associated Electric & Gas Insurance Services Ltd v. European Reinsurance Company of Zurich (Bermuda)* [2003] UKPC 11; *Department of Economics Policy Development of the City of Moscow –v- Bankers Trust Company* [2003]

EWHC 1377 (Comm); and *Emmott v Michael Wilson & Partners Ltd* [2008] EWCA Civ 184.

9. As far as ARIAS (UK) is aware, the current approach, whereby the contents and the limits of the duty of confidentiality are determined by the common law, does not give rise to practical difficulties and are well-understood by those in the market. Further, there is no consensus that the common law test of confidentiality should be altered on a statutory basis, either by way of dilution or fortification.
10. As to the second issue, certain participants in the insurance and reinsurance market favour reduced confidentiality in awards to enable important decisions to be circulated within the market. However, that has hitherto been a consensual process rather than one imposed upon the parties. For example, some awards emerge by consent, such as Mr Michael Kerr's award in the *Dawson's Field* Arbitration in 1972. A more recent example is the award by Lord Mance regarding COVID issues in the *China Tai-Ping* award.
11. ARIAS (UK) has sought to facilitate such publication for important market decisions, whilst at the same time protecting the identities and therefore the confidentiality (at least in part) of the parties. To that end, the ARIAS (UK) Confidentiality Clause seeks to facilitate consensual agreement to make anonymised awards public where the issue is significant legally to the wider reinsurance market.
12. The reinsurance market has supported that initiative and the Joint Excess Loss Committee will be including that clause in its next iteration of the approved Additional J.E.L.C. Clauses.
13. The ARIAS (UK) Confidentiality Clause provides as follows:

'1. In the event of arbitration between the reinsured and a reinsurer subscribing to this contract, the parties agree that any hearing and all documents created for the arbitration - including but not limited to pleadings, correspondence, orders, witness statements, expert reports and written submissions - and all documents disclosed by one party to the other in the arbitration process (hereafter "arbitration materials") shall remain confidential.

2. The parties further agree that any Award and Reasons (hereafter "the decision") shall be confidential to the parties save that either party may disclose the decision including any arbitration materials reproduced therein (a) to such of its own reinsurers or retrocessionaires as may be financially affected by the decision (b) to any other reinsurer subscribing to this contract or to any other contract forming part of the same reinsurance programme (c) in furtherance of a claim against any third party or (d) where legally obliged to do so, to its auditors, regulators or

capital providers. Any Award disclosed hereunder will be first anonymised as to the other party(ies) and the names of its or their witnesses and legal advisers.

3. The parties further agree that either party may not later than 56 days after the publication of the decision apply to the Tribunal for permission to publish the decision anonymised as to the parties, the names of witnesses and of legal advisers. The party applying will provide the Tribunal and the other party with the proposed anonymised decision. If the other party objects to publication, or proposes only a summary be published, that party will within 28 days state its objections and provide a copy of its proposed summary, if any.

4. In the event that the parties cannot agree on publication or on the form thereof, the Tribunal will fix a hearing following which it will only grant permission to publish an anonymised decision (or a summary in such terms as it, in its sole discretion, deems appropriate) if it concludes that there is a market interest in the issues, wordings or clauses resolved by or considered in the decision in light either of a lack of binding judicial authority thereon, or of the existence of previous, current, or likely future disputes thereon.

5. The Tribunal may in its sole discretion decide to include or exclude the names of the Tribunal from publication. The decisions of the Tribunal under this clause will be final and nothing herein will detract from the power of the High Court to allow publication of the decision on other grounds.'

14. The clause seeks first to promote consensual dissemination of awards of importance to the market as a whole. Failing that, the issue is devolved to the tribunal. The motivation is not to pull back the curtain of confidentiality and make arbitrations public. Rather, the clause addresses the concerns raised by, *inter alios*, Lord Thomas and others that private dispute resolution in commercial matters had led to the ossification of the common law in certain areas. The clause was also prompted by a desire on the part of insurers and reinsurers to reduce the costs being incurred by the industry 'reinventing the wheel' i.e. repeatedly arbitrating the same issues.
15. However, this is based upon the *agreement* of the parties to include this clause, an agreement which is informed by the parties' roles and experience within this sector, and their familiarity with arbitration and the attendant confidentiality. It is not intended to undermine the *status quo*, i.e., that arbitrations are confidential.
16. More recently, ARIAS (UK) has promulgated a new clause for direct insurance disputes. This also seeks to address issues of confidentiality in the insurance market as follows:

13. Any hearing and all documents created for the arbitration - including but not limited to pleadings, statements of case, correspondence, orders, witness statements, expert reports and written submissions - and all documents disclosed

by one party to the other in the arbitration process (hereafter “arbitration materials”) shall remain confidential.

14. Any Award with or incorporating Reasons (hereafter “the decision”) shall be confidential to the parties save that either party may disclose the decision: (a) to such of its own reinsurers or retrocessionaires as may be financially affected by the decision; (b) to any other insurer subscribing to this policy or contract and to any other insurer participating in the same insurance or reinsurance programme; (c) where reasonably required in furtherance of a claim against any third party; or (d) where obliged to do so, to its auditors, regulators or capital providers. Any decision disclosed under this provision will be first anonymised as to the other party(ies) and the names of its or their witnesses and legal advisers.

15. In addition to the limited disclosure provided for by paragraph 14 above, either party may not later than 56 days after the publication of the decision apply to the Tribunal for permission to publish the decision anonymised as to the parties, the names of witnesses and of legal advisers. The party applying will provide the Tribunal and the other party with the proposed anonymised decision. If the other party objects to publication, or proposes only a summary be published, that party will within 28 days state its objections and provide a copy of its proposed summary, if any. In the event that the parties cannot agree on publication or on the form thereof, the Tribunal will fix a hearing following which it will only grant permission to publish an anonymised decision (or a summary in such terms as it, in its sole discretion, deems appropriate) if it concludes that there is an interest on the part of the market or its customers in the issues, wordings or clauses resolved by or considered in the decision in light either of a lack of binding judicial authority thereon, or of the existence of previous, current, or likely future disputes thereon.

16. The decisions of the Tribunal under clause 15 will be final save that nothing herein will detract from the power of the High Court or any higher Court to allow publication of the decision on other grounds.’

17. Paragraph 14 of the Clause merely seeks to reflect the market’s understanding of the current exceptions to the law of confidentiality of arbitration proceedings. Paragraph 15 of the Clause again promotes publication, but only in limited circumstances.

Consultation Question 2: We provisionally conclude that the Arbitration Act 1996 should not impose a duty of independence on arbitrators. Do you agree?

AGREED

18. Issues of independence vs impartiality were addressed in detail in the DAC report prior to the 1996 Act. The good reasons for distinguishing between

the two – and rejecting the need for the former but insisting upon the latter – still hold good.

19. The industry's use of market people who may have connections with participants – and therefore not technically independent – but who are and remain impartial is critical to the nature of insurance and reinsurance dispute resolution in London, which requires arbitrators to possess industry expertise.
20. ARIAS (UK) has not been consulted by the International Bar Association Arbitration Sub-Committee in relation to its Guidelines nor in relation to its revised Guidelines, nor by any other arbitral body interested in that topic.
21. So far as the current Committee of ARIAS (UK) is aware, the question of impartiality has only been considered once by the Management Committee in recent years. With effect from January 2014 the Committee introduced revised procedural rules and in the context of their preparation, the question was raised as to whether those should address this topic. The original Rules had not done so and the view was taken that the common law and the Arbitration Act 1996 were clear; a powerful House of Lords had held unanimously that arbitrators are required to meet the judicial standard: *R v Gough* [1993] AC 646. The Third Edition of the ARIAS (UK) Rules therefore opens with a prominent quotation of s.1 of the 1996 Act, reiterating the objective of “fair resolution of disputes by an impartial tribunal without unnecessary delay or expense”.
22. ARIAS (UK) appreciates that since the Gough test for apparent bias was articulated by the House of Lords in 1993 that test has undergone reconsideration. However the uniformity of its application to arbitrators and the judiciary remains, as the Committee understands it, unaffected.

Consultation Question 3: 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. Do you agree?

DISAGREE

23. A universal and codified obligation to make disclosures on a continuing basis is inappropriate.
24. *First*, this proposes a *statutory* duty to continue that which is required by and determined by the common law, *viz.*, the obligation to disclose that which might reasonably give rise to justifiable doubts as to their impartiality. That would risk setting a rigid continuing obligation in

circumstances where the disclosure obligation at common law is more nuanced, fact and market-specific, and subject to exceptions.

25. *Secondly*, such a continuing obligation under statute would only make sense if there were a clear and workable definition of that which might reasonably give rise to justifiable doubts as to an arbitrator's impartiality – but that will vary from case to case, and from sector to sector.
26. *Thirdly*, as recognised by the Supreme Court in *Halliburton*, what is appropriate to disclose as a matter of concern in one market is not an issue in a different market. One cannot legislate with a sledge hammer. Specialised trade sectors have their own practical needs and historical working methods. The Supreme Court in *Halliburton* recognised the need to respect such nuances and market practices which are known to participants and have served their sectors well. As noted by the Supreme Court at [91]:

[91] As GAFTA and LMAA have shown, it is an accepted feature of their arbitrations that arbitrators will act in multiple arbitrations, often arising out of the same events. Parties which refer their disputes to their arbitrations are taken to accede to this practice and to accept that such involvement by their arbitrators does not call into question their fairness or impartiality. In the absence of a requirement of disclosure of such multiple arbitrations, the question of the relationship between such disclosure and the duty of privacy and confidentiality does not arise. As I have said, there is evidence of similar practice in re-insurance arbitrations: para 43 above.'

In that regard, paragraph 43 stated:

[43] GAFTA also provides with its submission a report from the Management Committee of ARIAS (UK), the Insurance and Reinsurance Arbitration Society, describing practice in treaty reinsurance arbitrations, which are conducted by a limited pool of specialist arbitrators and often involve multiple disputes about the same subject matter. ARIAS (UK) opines that practitioners in its field are well aware of the possibility of overlapping appointments and have not expected such appointments to be disclosed.'

27. Such an approach cannot easily be formulated for the purposes of a statutory obligation.
28. For example, treaty reinsurance arbitration in London is a field of commercial dispute resolution where there is an evident probability that the same issue will be considered a number of times sometimes on one programme of treaties and sometimes on wholly unrelated reinsurance treaties, often in standard or fairly standard forms, by what is in practice a limited pool of specialist arbitrators. It has not historically been the

practice of arbitrators in this field to disclose, e.g., that they have considered or been party to a ruling on an issue raised by an offered appointment nor for them to disclose if they have been asked, after accepting such an appointment, to accept a further appointment considering such an issue in a second reference.

29. Likewise, it is not common in the reinsurance sector that arbitrators disclose how many prior appointments they have received from either of the parties.
30. In particular, where the same issue affecting a reinsurance buyer gives rise to multiple references, usually one per layer of its programme, it is common practice for the reinsurance buyer to appoint the same arbitrator to each of those references, whether there are common reinsurers on those layers or not. The Committee of ARIAS (UK) - which is composed of industry professionals active in this area - is not aware of that ever being considered objectionable.
31. In short, 'trade' arbitrations in the insurance and reinsurance sector operate on the basis that arbitrators must have familiarity with the general subject-matter, may have familiarity with the particular issues and may well have been appointed many times by either party. That is not perceived by the market to be a problem, despite the views of others in the less focussed or more general areas of arbitration. To impose a blanket duty would seriously disrupt the efficient and established arbitral procedures in the insurance and reinsurance market.

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED]

CONFIDENTIALITY NOTICE: This e-mail is sent on a confidential basis to the addressee. The e-mail and any attachments may also be privileged. If you are not the named recipient, please notify the sender and/or the clerks at the above address immediately and do not disclose the contents to any other person, use it for any purpose, or store or copy the information.

Commercial and Common Law Team (Arbitration)
Law Commission
1st Floor
Tower
52 Queens Anne's Gate
London
SW1H 9AG

15 December 2022

Dear Sir/Madam,

RESPONSE TO THE LAW COMMISSION CONSULTATION ON THE ARBITRATION ACT 1996

The Association of Consumer Support Organisations (ACSO) welcomes the opportunity to respond to the Law Commission consultation on the Arbitration Act 1996 ('the Act'). This letter constitutes ACSO's response.

ACSO represents the interests of consumers in the civil justice system and the reputable, diverse range of organisations who are united in providing the highest standards of service in support of those consumers. Its role is to engage with policymakers, regulators, industry and the media to ensure there is a properly functioning, competitive and sustainable civil justice system for all. The review of the Act and the wider consideration of the accessibility of Alternative Dispute Resolution (ADR) mechanisms such as arbitration is therefore of direct relevance to our members and to our work.

It is pleasing that the Law Commission has taken the 25-year anniversary of the Act as an opportunity for a fresh practical review and to consider areas for refinement.

ACSO's members rely upon the Act when conducting ADR sessions, particularly for the benefit of the consumer protection and enforceability provisions that the Act provides. Our membership includes ADR providers and leading claimant law firms and we also have significant ongoing engagement with insurers and their representatives, all of whom will be interested in this consultation and its outcomes.

ACSO has already helped to facilitate a greater use of ADR in low-value personal injury claims, assisting with the collaboration of adversaries to agree ADR processes and then using the throughput data to analyse the benefits to all parties. We are therefore particularly close to the utility of the Act and are generally pleased with the consumer benefits it provides.

While we are pleased to see that the Law Commission has taken the opportunity to consider such matters as are listed below, we also believe that the Act should be more accessible to the lay person. The benefit of arbitration is that it can be useful in multi-million-pound commercial disputes, just as it can in small claims between Litigants in Person (LiPs) and insurers. However, the latter category of smaller value and higher-volume disputes may be

discouraged from using arbitration due to the inaccessibility of the wording and technicalities of the Act. This is unfortunate as there is great potential in the use of arbitration and other ADR mechanisms to the benefit of all parties in litigation, and to assist the courts in reducing long backlogs and focussing more on the complex litigation with a wider social benefit. However, the Act is complex and technical, and so represents a missed opportunity for the Law Commission to simplify and consolidate its language or make recommendations for supplementary consumer guidance.

That said, it is welcome to note in the consultation a comprehensive and reasonable assessment of the Act and perceived issues related to its use. Each of the recommendations made are sensible, with some small caveats which are explained below. While this response will not cover in detail every consultation question, we will touch on each review subject and provide our high-level views:

1. Confidentiality

ACSO notes the Law Commission's intention not to seek further codification of the law of confidentiality in the Act and supports its decision.

One of the main benefits of the Act as it is currently drafted is the flexibility for the parties to set their own boundaries around the form, content and required output of the arbitration hearing. This has enabled ACSO members to design sessions suitable both for low-value personal injury matters and much more complex matters in which confidentiality may be a key consideration.

The further codification of confidentiality in the Act would, in our opinion, deplete some of the flexibility and therefore potential applicability of the Act. In that way, it would not be in keeping with the intention of the Act to overarch arbitration in its various forms and legal niches.

In addition, data on ADR availability, capacity, outcomes and benefits should be promoted to allow analysis and knowledge sharing in pursuit of a greater use of ADR. Codified confidentiality risks hindering data sharing in an area where data is already in short supply.

However, ACSO could see benefit in a requirement for the arbitrator or arbitral organisation to provide a summary of the extent to which confidentiality applies to those proceedings and when it is acceptable to venture beyond those boundaries. For example, disclosure to a prospective motor insurer of the outcome of an arbitrated disputed claim for damages for personal injury or for the purpose of preventing a crime or physical harm to a child or vulnerable person. In that regard, we support paragraph 1.20 of the Consultation Summary document.

2. Independence of arbitrators and disclosure

While ACSO understands the conclusions reached in the consultation that impartiality trumps independence in any event and so makes a codified requirement for independence unnecessary, we argue that careful consideration should be given to contentious matters where there is an obvious 'imbalance of arms'. The natural example being a LiP pursuing a

claim against a large insurance organisation. For the LiP, confidence that the arbitrator has no connection with the insurer could help to promote the mechanism's use.

As stated in the consultation, impartiality assists here to help ensure that the award is fair and reasonable. However, confidence in the fairness of proceedings plays a significant part in the initial agreement to proceed, and it is arguable that a requirement to show independence could help to instil confidence in those that are unfamiliar with such processes.

We therefore support the comment in paragraph 1.30 of the Consultation Summary, but believe this should be extended further for consumer cases.

3. Discrimination

ACSO supports the Law Commission recommendations to strengthen the Act's provisions against challenges related to the arbitrator's protected characteristics, including the unenforceability of terms referring to a protected characteristic unless it achieves a legitimate aim.

4. Immunity of arbitrators

We support the promotion of the immunity of arbitrators where their conduct is reasonable and where resignation is for one of a number of prescribed and fair justifications. We do not support immunity for negligence.

The finality of the proceedings is important for the success of arbitral proceedings, as is the impartiality and legitimacy of the arbitrator. The immunity of the arbitrator in retirement is an important protection against any undue pressure caused by the threat of proceedings against the arbitrator for personal liability.

It is further noted that many arbitrators carry indemnity insurance to avoid such risks, but if there is any perceived risk that this would not cover against personal liability in a situation where many would consider the actions of the arbitrator were fair and reasonable, it is clear the protections must be altered.

Absolute immunity would not be desirable. Arbitrators sit in a position of legal and social responsibility, and it is important that there are measures in place to ensure that such a role is carried out appropriately.

5. Summary disposal of issues which lack merit

ACSO can see potential benefit in the inclusion of provision for a summary disposal of arbitral proceedings which lack merit. However, the extent to which such provisions would have utility in personal injury or clinical negligence proceedings is doubtful.

References made to "the tribunal" should also be removed or qualified, as they could be a source of confusion in consumer arbitral proceedings. There must also exist a supporting and robust mechanism for appeal to the courts.

6. Interim measures ordered by the court in support of arbitral proceedings

ACSO believes that the principle of parity with domestic court proceedings should remain so as to avoid the delivery of an inferior type of justice. We therefore agree with the recommendations where they bring arbitral proceedings in line with judicial process.

Third parties should have a full right of appeal in the circumstances described at 1.59 of the Consultation Summary, to do otherwise would be a denial of justice to a party that is not a party to the arbitration.

7. Jurisdictional challenges against arbitral awards

ACSO has not received any feedback reporting disfunction in the statutory scheme for objecting to the tribunal's decision and would not, therefore, support changes to a functioning scheme.

In relation to the recommendations that referral to the court following objection to the arbitral outcome being held by way of an appeal rather than a rehearing, we have no comments to make on this save for repeating that an arbitral process that assimilates the judicial process is one that has parity and is easier to justify in its use.

8. Appeals on a point of law

ACSO agrees with the Law Commission that Section 69 of the Act should not be repealed. It is this provision that protects relatively inexperienced parties from poor delivery of service by arbitrators in lower-value disputes.

Section 69 remains non-mandatory and is not included in Schedule 1 of the Act. Parties are experienced in opting in or out of Section 69, and this should not be compromised by unnecessary reform.

9. Modern Technology

It is the absence of prescription on the use of modern technology in arbitral proceedings that has allowed it to remain modern and applicable as the use of technology progresses. Unnecessary prescription of the types of technologies that can be used to deliver proceedings would be restrictive and are likely to require updating over time. We therefore agree that no such prescription should be added.

ACSO would not support an order in the Act for remote hearings or the use of electronic documentation for the reasons described above and the conclusions the Law Commission has reached in its consultation.

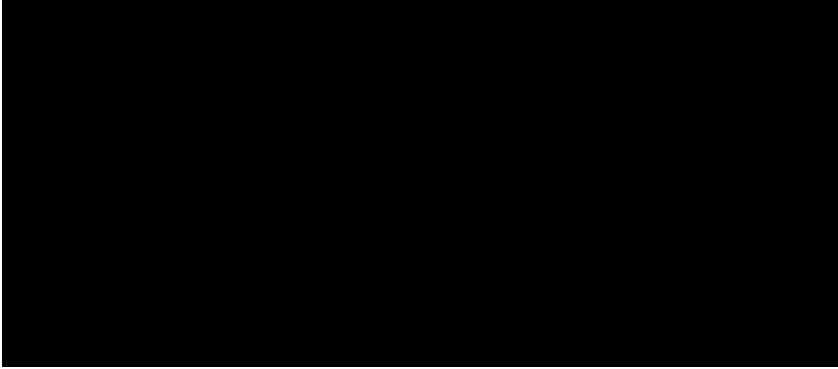
10. Section 39 (power to make provisional awards)

ACSO considers that the use of the word 'award' should replace the word 'order' in Section 39 of the Act. The powers of arbitrators and the enforceability of their awards is much better understood and requires no embellishment. We argue this approach to the simplification of language with the consumer in mind should be taken to the Act on the whole.

In summary, ACSO considers that this is a positive action in refining an Act in which our members were already finding utility, particularly in its versatility. We hope that this submission assists you to finalise the recommendations made to the legislature.

If you require further detail on any of the points raised above, or require any further information at all, please do not hesitate to get in touch.

Yours faithfully,



Response ID ANON-PT57-RURB-B

Submitted to Law Commission Consultation: Review of the Arbitration Act 1996
Submitted on 2022-12-02 15:03:51

About you

What is your name?

Name:

[REDACTED]

What is the name of your organisation?

Enter the name of your organisation:

Bargate Murray Ltd (Solicitors)

Are you responding to this consultation in a personal capacity or on behalf of your organisation?

Response on behalf of organisation

If other, please state::

What is your email address?

Email:

[REDACTED]

What is your telephone number?

Telephone number:

[REDACTED]

If you want the information that you provide in response to this consultation to be treated as confidential, please explain to us why you regard the information as confidential. As explained in our privacy notice, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

Please explain to us why you regard the information as confidential:

Consultation questions

Consultation Question 1: 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?

Agree

Please share your views below.:

Obligations of confidentiality in arbitration are already well established. A rigid new definition may prove to be unnecessarily restrictive.

Consultation Question 2: We provisionally conclude that the Arbitration Act 1996 should not impose a duty of independence on arbitrators. Do you agree?

Agree

Please share your views below.:

To impose an obligation of independence would defeat the object of arbitration. Many trade arbitral bodies are fairly small and independence would shut out experienced and knowledgeable people from acting as arbitrators.

Impartiality is a different thing, however. Arbitrators should be impartial, but not necessarily wholly independent.

Consultation Question 3: 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. Do you agree?

Agree

Please share your views below.:

This usually already happens, and it is consistent with our view that arbitrators should be impartial and share any circumstances that might impact that obligation.

Consultation Question 4: Should the Arbitration Act 1996 specify the state of knowledge required of an arbitrator's duty of disclosure, and why?

Other

Please share your views below.:

It might take the careful use of words, but if they can be found, broad guidance can be included in the Act.

Consultation Question 5: 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?

Actual knowledge

Please share your views below.:

The test cannot be set in stone, and not all arbitrators are in a position to conduct "reasonable enquiries" in any event.

Consultation Question 6:

Only if necessary

Please share your views below.:

Consultation Question 7:

Agree

Please share your views below.:

Consultation Question 8: Should arbitrators incur liability for resignation at all, and why?

Other

Please share your views below.:

S.25 of the Arbitration Act 1996 is well balanced as it stands but see our answer to Q.9 below.

Consultation Question 9: Should arbitrators incur liability for resignation only if the resignation is proved to be unreasonable?

Not Answered

Please share your views below.:

One hopes that if the reason for resignation is reasonable the parties would agree to it. It might be desirable to expressly state at the beginning of S25 of the Act that arbitrators will incur liability for resignation only if the resignation is shown to be unreasonable.

Consultation Question 10: 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. Do you agree?

Agree

Please share your views below.:

Clearly sensible.

Consultation Question 11: 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. Do you agree?

Agree

Please share your views below.:

Many arbitral body rules, such as those of the London Maritime Arbitrators Association, already include cheaper and more rapid procedures for small and medium size claims and it is sensible for the Act to include summary procedures to ensure costs are kept to a minimum.

Consultation Question 12: 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. Do you agree?

Agree

Please share your views below.:

We agree but would go further and leave the final decision to the Arbitral tribunal to prevent time wasting by one party.

Consultation Question 13: We provisionally propose that the Arbitration Act 1996 should stipulate the threshold for success in any summary procedure. Do you agree?

Agree

Please share your views below.:

Consultation Question 14: 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. Do you agree?

Agree

Please share your views below.:

This would helpfully align arbitration procedure more closely with court practice.

Consultation Question 15: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 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?

Other

Please share your views below.:

This needs careful thought. In principle, yes, if drafted carefully so as not to drag in third parties without appropriate reason to do so.

Consultation Question 17: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 18: We provisionally conclude that the provisions of the Arbitration Act 1996 should not apply generally to emergency arbitrators. Do you agree?

Other

Please share your views below.:

No views expressed.

Consultation Question 19: 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?

Other

Please share your views below.:

No views expressed

Consultation Question 20: Do you think that section 44(5) of the Arbitration Act 1996 should be repealed, and why?

No

Please share your views below.:

We disagree with the repeal of S 44(5) of the Act because if the arbitral tribunal has power to act, it should be left to that tribunal to do so.

Consultation Question 21:

Peremptory order

Please share your views below.:

Consultation Question 22:

Agree

Please share your views below.:

We strongly agree.

Consultation Question 23: 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?

Yes

Please share your views below.:

In general, the approach should be to reinforce the authority of arbitral tribunals to reach decisions. An appeal, rather than a rehearing, helps to do that and also helpssave court time and reduces costs.

Consultation Question 24: We provisionally conclude that our proposed change to section 67 of the Arbitration Act 1996 would not require any similar change to section 103. Do you agree?

Agree

Please share your views below.:

Consultation Question 25: 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. Do you agree?

Other

Please share your views below.:

We are not sure why this is needed, given that S 67(3)(c) already allows the court to set aside the Award in whole or in part. For example, if the award is of "no effect" as opposed to being set aside, does this impact costs orders or other relief? We are unclear about the purpose of a "no effect" order.

Consultation Question 26: 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?

Agree

Please share your views below.:

Sensible proposal

Consultation Question 27: 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?

Agree

Please share your views below.:

This section has worked well. The last thing we need is to revert to a world in which it was too easy to appeal and arbitral award.

Consultation Question 28: Do you think that section 7 of the Arbitration Act 1996 (separability of arbitration agreement) should be mandatory, and why?

Other

Please share your views below.:

S.7 is clear.

Consultation Question 29: 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?

Agree

Please share your views below.:

Consultation Question 30: 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?

Yes

Please share your views below.:

We have used the S.45 procedure, with the consent of the other party and the Tribunal in an arbitration. The case was Goodwood Investments Holdings Inc. v Thyssenkrupp Industrial Solutions AG [2018] EWHC 1056 (Comm) before Males J, who thought it an underused section of the Act. These procedures should be more readily available, provided there is agreement between the parties OR the Tribunal decide a referral is helpful. It should not require both the parties AND the tribunal to agree.

Consultation Question 31: 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?

Other

Please share your views below.:

In general terms perhaps, but really these are matters for the tribunal.

Consultation Question 32: Do you think that section 39 of the Arbitration Act 1996 should be amended to refer to "orders" (rather than "awards"), and why?

Other

Please share your views below.:

It might be better to delete S. 39(4).

Consultation Question 33: Do you think that section 39(1) of the Arbitration Act 1996 should be amended to refer to "remedies" (rather than "relief"), and why?

Yes

Please share your views below.:

More contemporary term that users of arbitration will understand

Consultation Question 34: 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?

Disagree

Please share your views below.:

No, not if this proposed amendment can be used for frivolous reasons, or to buy time.

Consultation Question 35: 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?

Agree

Please share your views below.:

Consultation Question 36: We provisionally propose that sections 85 to 87 of the Arbitration Act 1996 (on domestic arbitration agreements) should be repealed. Do you agree?

Agree

Please share your views below.:

Consultation Question 37: Do you think that any of the suggestions discussed in Chapter 11 needs revisiting in full, and if so, why?

Please share your views below.:

Consultation Question 38: 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?

Please share your views below.:

There is some doubt in the minds of some arbitrators whether they are entitled to order a stay of proceedings, perhaps as a means of compelling compliance by a recalcitrant party with an order. It should be made very clear that arbitral tribunals do have power to stay proceedings in such circumstances, as a useful tool to encourage compliance.

Submitted to Law Commission Consultation: Review of the Arbitration Act 1996
Submitted on 2022-12-12 10:30:52

About you

What is your name?

Name:

Imran Benson

What is the name of your organisation?

Enter the name of your organisation:

Hailsham Chambers

Are you responding to this consultation in a personal capacity or on behalf of your organisation?

Personal response

If other, please state::

[REDACTED]

What is your email address?

Email:

[REDACTED]

What is your telephone number?

Telephone number:

[REDACTED]

If you want the information that you provide in response to this consultation to be treated as confidential, please explain to us why you regard the information as confidential. As explained in our privacy notice, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

Please explain to us why you regard the information as confidential:

Consultation questions

Consultation Question 1: 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?

Disagree

Please share your views below.:

One of the virtues of the 1996 Act is it is fairly comprehensive, clear and accessible. This is a good thing. The accoutrement of case law makes accessibility harder, especially for international parties or those who are less familiar with English litigation or who do not have the ability to pay for lots of legal advice. I appreciate the drafting may be difficult and constraining, but generally speaking I think the reforms should aim to keep the Act a one-stop shop without the need to resort to case law. You rightly recognise this at para 3.46 of your consultation.

A clear set of provisions at least explaining the breadth of potential confidence and the criteria for the Court, would assist.

In particular, on the current case law the scope of the duty of confidence and privacy is unclear.

Can a party even tell an outsider that there is an arbitration? Can the results be summarised? Can the award be shared? What about where there is a third party with a formal or informal interest in the outcome: duties to the stock exchange, professional regulators, insurers, benevolent associations? The statute should make this clear rather than expose participants to the vagary of further litigation over this.

Consultation Question 2: We provisionally conclude that the Arbitration Act 1996 should not impose a duty of independence on arbitrators. Do you agree?

Agree

Please share your views below.:

Consultation Question 3: 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. Do you agree?

Agree

Please share your views below.:

At the moment those institutions or law firms who regularly arbitrate have a good deal of knowledge about the approach of different arbitrators and, sometimes, their views on issues which reoccur in different scenarios. This is unfair to those who have less frequent experience.

I have in mind cases where an insurance policyholder brings an arbitration claim against an insurer where the latter is represented by a large insurance law firm. The likelihood is that the insurer/law firm will have a material information advantage about the tribunal over the policyholder. Where the case concerns an issue of law which is not clear but which often reoccurs the insurer will often know what the arbitrator is minded to decide and the policy holder does not. One has seen this in some of the recent Business Interruption Insurance cases where lots of claims are being resolved at arbitration often before the Courts give final answers on legal issues. Insurers and insurance firms pick up a stock of knowledge about how the arbitrator approaches the issues and this means they can choose the arbitrator who fits their case or recite practically verbatim analysis from a previous award. This is totally unfair.

An arbitrator should therefore disclose where they have given awards involving similar issues and, if necessary, disclose anonymised extracts from previous awards so that the prospective parties can decide whether the arbitrator has a sufficient open mind.

The information should also include details of relationships with the party. The Professional Negligence Bar Association has an adjudication scheme to help resolve disputes between clients of professionals and those professionals. It recognises that clients will often be suspicious that the adjudicator/arbitrator may have a strong connection with the firm being challenged. The rules require the adjudicator to disclose the number of sets of instructions which he or she has received, or worked on, in the past year from either (i) any of the parties or (ii) the insurer (if known), including any after the event insurer, of any of the parties or (iii) the solicitors representing any of the parties. (See rule 20.2

<https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fpnba.co.uk%2Fwp-content%2Fuploads%2F2019%2F06%2FPNBA-Adjudication-Scheme-5-Feb-1>

This is a useful precedent.

Consultation Question 4: Should the Arbitration Act 1996 specify the state of knowledge required of an arbitrator's duty of disclosure, and why?

Yes

Please share your views below.:

Assists with clarity and certainty.

Consultation Question 5: 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?

What they ought to know

Please share your views below.:

Where an arbitrator is a paid professional they ought to take reasonable care.

Where an arbitrator is effectively a non-professional or volunteer then actual knowledge seems sufficient.

This is analogous to the difference between professional trustees and non-professional trustees. If the parties have gone to a mutually trusted person to help them resolve that is very different from paying the rates of a top KC or retired judge.

Consultation Question 6:

More broadly justified

Please share your views below.:

Party flexibility and discretion is appropriate and should be supported. The HoL was right.

Consultation Question 7:

Disagree

Please share your views below.:

There are lots of arbitration processes where people don't know they are in an arbitration.

I have experience of dealing in disputes to do with the management of religious organisations (Temples, Synagogues, Mosques, UK offshoots of foreign

evangelical style churches). There are often falling outs between the faithful and there is some sort of clause in the constitution where senior members of the faith are called on to decide. Being a member of that faith/religious body is vital to getting an outcome which is respected and binding. It also commands legitimacy and a sense of understanding. Having ancillary litigation about whether that is a sufficient "legitimate aim" balanced against the desirability of equality is unhelpful.

I have also seen commercial disputes within an ethnic minority community where the parties agree to submit it to a panel of "elders" from the community. This may well fall short of a "legitimate aim" but is quite understandable. The experience of lots of immigrants in the UK is one of occasional hostility and frequent cultural misunderstanding or misapprehension. Their desire to have the dispute resolved by those familiar with their cultural norms and codes of ethics (which can often differ a lot from mainstream English culture) is reasonable. It would be wrong to stand in the way of them doing this. A party might well weaponise this proposal to nominate someone outside of the community, which could push the respondent into conceding on the main dispute in some circumstances rather than expose the dispute to an outsider. That would be an inadvertent form of cultural imperialism.

Clearly having a more representative selection of arbitrators is desirable but I would say it is not a matter for legislation, rather pressure on nominating persons, which is emerging.

A different compromise might be to impose the duty where the arbitrator is a professional charging fees, but not where the arbitrator is effectively a volunteer. This is analogous to the different standards expected of professional trustees and non-professional trustees.

Consultation Question 8: Should arbitrators incur liability for resignation at all, and why?

No liability for resignation

Please share your views below.:

Arbitrators should be trusted to exercise their own judgment. If they feel a need to resign they should not be punished for it.

Consultation Question 9: Should arbitrators incur liability for resignation only if the resignation is proved to be unreasonable?

No

Please share your views below.:

This risks satellite litigation and defensive practices.

Consultation Question 10: 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. Do you agree?

Other

Please share your views below.:

So long as the arbitrator is neutral. If they take an active role then they should be costs liable. If you put skin in the game you should expect to get bruised. If you are a mere spectator you should be safe.

Consultation Question 11: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 12: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 13: We provisionally propose that the Arbitration Act 1996 should stipulate the threshold for success in any summary procedure. Do you agree?

Agree

Please share your views below.:

Consultation Question 14: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 15: 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. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 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?

Not Answered

Please share your views below.:

Consultation Question 17: 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. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 18: We provisionally conclude that the provisions of the Arbitration Act 1996 should not apply generally to emergency arbitrators. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 19: 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?

Not Answered

Please share your views below.:

Consultation Question 20: Do you think that section 44(5) of the Arbitration Act 1996 should be repealed, and why?

Not Answered

Please share your views below.:

Consultation Question 21:

Not Answered

Please share your views below.:

Consultation Question 22:

Disagree

Please share your views below.:

Consultation Question 23: 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?

No

Please share your views below.:

Consultation Question 24: We provisionally conclude that our proposed change to section 67 of the Arbitration Act 1996 would not require any similar change to section 103. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 25: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 26: 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?

Disagree

Please share your views below.:

Consultation Question 27: 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?

Not Answered

Please share your views below.:

Consultation Question 28: Do you think that section 7 of the Arbitration Act 1996 (separability of arbitration agreement) should be mandatory, and why?

Not Answered

Please share your views below.:

Consultation Question 29: 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?

Not Answered

Please share your views below.:

Consultation Question 30: 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?

Not Answered

Please share your views below.:

Consultation Question 31: 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?

Not Answered

Please share your views below.:

Consultation Question 32: Do you think that section 39 of the Arbitration Act 1996 should be amended to refer to "orders" (rather than "awards"), and why?

Not Answered

Please share your views below.:

Consultation Question 33: Do you think that section 39(1) of the Arbitration Act 1996 should be amended to refer to "remedies" (rather than "relief"), and why?

Not Answered

Please share your views below.:

Consultation Question 34: 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 appellants was notified of the result of that request. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 35: 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?

Not Answered

Please share your views below.:

Consultation Question 36: We provisionally propose that sections 85 to 87 of the Arbitration Act 1996 (on domestic arbitration agreements) should be repealed. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 37: Do you think that any of the suggestions discussed in Chapter 11 needs revisiting in full, and if so, why?

Please share your views below.:

Consultation Question 38: 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?

Please share your views below.:

1. Enforceability of arbitration clauses in the consumer or SME context.

Many standard form contracts have clauses sending any dispute to arbitration. This is especially common in insurance policies. Often these contracts are drafted by insurers and the customer (often an SME business) will not think about them or have any chance to negotiate on them.

An arbitration is often more expensive than litigation (not least because of fees) and the risk of public and regulatory scrutiny which often encourages good behaviour on the part of institutions, is absent because of confidentiality.

I have had cases where an SME has been pushed by an insurer into accepting much less than they are due because they cannot afford an arbitral dispute whereas they could have afforded Court (or got a fee dispensation).

I think a standard clause arbitration clause should not be enforceable against an individual or an SME business. This protects the basic right to go to Court if a party, who might otherwise be blissfully unaware of arbitrations, wants to do so.

This is particularly the case with insurers. In your report on the Third Parties (Rights Against Insurers) Act (Law Comm 272) it records at para 14.34 that most insurers do not enforce arbitration clauses against consumer claimants. That obligation has fallen away under the FCA ICOBS rules. It is appropriate to hold insurers to that long standing but now inadvertently forgotten, commitment.

Submitted to Law Commission Consultation: Review of the Arbitration Act 1996
Submitted on 2022-12-12 15:20:52

About you

What is your name?

Name:

[REDACTED]

What is the name of your organisation?

Enter the name of your organisation:

Beth Din of the Federation of Synagogues

Are you responding to this consultation in a personal capacity or on behalf of your organisation?

Response on behalf of organisation

If other, please state::

[REDACTED]

What is your email address?

Email:

[REDACTED]

What is your telephone number?

Telephone number:

[REDACTED]

If you want the information that you provide in response to this consultation to be treated as confidential, please explain to us why you regard the information as confidential. As explained in our privacy notice, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

Please explain to us why you regard the information as confidential:

Consultation questions

Consultation Question 1: 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?

Agree

Please share your views below.:

Currently, parties are free to agree to confidentiality or transparency. Codified definitions of exceptions would be necessarily broad and probably unhelpful. The courts should be left to further develop principles in this area.

Consultation Question 2: We provisionally conclude that the Arbitration Act 1996 should not impose a duty of independence on arbitrators. Do you agree?

Agree

Please share your views below.:

The Act already provides that the arbitrator must be impartial. Adding a requirement for "independence" is unnecessary, and will give rise to uncertainty and the possibility of unjustified delay and challenge to the arbitrator's authority.

Consultation Question 3: 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. Do you agree?

Agree

Please share your views below.:

This is already found in other national laws and institutional arbitration rules, and is a sensible addition that will give further confidence to the parties in arbitrations.

Consultation Question 4: Should the Arbitration Act 1996 specify the state of knowledge required of an arbitrator's duty of disclosure, and why?

No

Please share your views below.:

It will be too vague to be of help

Consultation Question 5: 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?

Other

Please share your views below.:

Consultation Question 6:

Other

Please share your views below.:

The Act should not refer to this at all.

Consultation Question 7:

Disagree

Please share your views below.:

There is no necessity for inserting any rules regarding protected characteristics into the Arbitration Act. Such rules do not appear in any other national law or institution's rules, and for good reason. Cases in which arbitrators have been challenged or discriminated against as a result of their protected characteristics are negligible if at all existent. Proposing that any agreement between the parties in relation to the arbitrator's protected characteristic(s) should be unenforceable will produce unfortunate if unintended consequence. In the context of Beth Din arbitration, parties will have chosen a Beth Din primarily because of their desire to be arbitrated under Jewish law. People who go to a Beth Din therefore do so because they know what they're going to get. That means: three religious judges called Dayanim, who are inevitably male, and who will decide their dispute according to Jewish law (note that under the doctrine of Dina deMalchuta Dina - the law of the kingdom is the law - and also under the Halachic principle that people often contract under the law of the place where they reside or do business, the Beth Din might well apply English law or another system of law). The proposals will open up the possibility of challenging Beth Din arbitration clauses or awards as unenforceable, for entirely unjustified reasons. This will lead to years of uncertainty and litigation as to whether, and if so when, a choice of a Beth Din /Dayanim to determine a dispute is or is not "proportionate". Parties will either arbitrate anyway in Beth Din but just not under the Act, or will locate the seat of the arbitration outside of England. These particular proposals appear to be unnecessary "virtue signaling." The Supreme Court has already decided for the very rare cases in which this issue is at all relevant. Further updating the statute is unnecessary and unhelpful.

Consultation Question 8: Should arbitrators incur liability for resignation at all, and why?

Other

Please share your views below.:

see next section

Consultation Question 9: Should arbitrators incur liability for resignation only if the resignation is proved to be unreasonable?

Yes

Please share your views below.:

Arbitrators need to be able to resign in some cases, e.g. if a conflict of interest may arise or be discovered, or if neither party carries out the directions and/or Interim Awards of the tribunal. However, this needs to be balanced with the expectation of the parties that the arbitrator will carry out his duties conscientiously and will not resign without good reason, particularly at a late stage when much time and expense has been invested in the arbitration.

Consultation Question 10: 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. Do you agree?

Agree

Please share your views below.:

Arbitrator's immunity is as crucial as a court judge's immunity, to ensure that the arbitrator is impartial and does not feel the need to take into account the risk of being sued and/or or having to pay court costs in the event of a challenge. Arbitrator's immunity should be extended to reflect a judge's immunity.

Consultation Question 11: 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. Do you agree?

Agree

Please share your views below.:

This will provide the parties with an option to move to an expedited procedure, and will also serve to discourage frivolous claims.

Consultation Question 12: 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. Do you agree?

Agree

Please share your views below.:

Party autonomy in choosing procedure is an important feature of the arbitral process, and this issue too comprises an important part of the procedure that the parties should be able to decide on or to delegate to the arbitrator or tribunal to decide.

Consultation Question 13: We provisionally propose that the Arbitration Act 1996 should stipulate the threshold for success in any summary procedure. Do you agree?

Disagree

Please share your views below.:

Unnecessary, and will be necessarily vague anyway

Consultation Question 14: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 15: 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. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 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?

Yes

Please share your views below.:

It can often become apparent during an arbitration that third parties have more than a passing involvement in the substantive issues of the arbitration. Further, evidence can often be found in the hands of third parties.

Consultation Question 17: 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. Do you agree?

Agree

Please share your views below.:

Third parties did not submit to the arbitration, and should not lose any rights that they may have due to two other parties arbitrating between themselves.

Consultation Question 18: We provisionally conclude that the provisions of the Arbitration Act 1996 should not apply generally to emergency arbitrators. Do you agree?

Disagree

Please share your views below.:

Arbitral Rules that allow for the appointment of an emergency arbitrator should be allowed to delineate the jurisdiction and powers of these emergency arbitrators. The Act need only allow for the enforcement of these rules as accepted by the parties.

Consultation Question 19: 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?

Agree

Please share your views below.:

Consultation Question 20: Do you think that section 44(5) of the Arbitration Act 1996 should be repealed, and why?

No

Please share your views below.:

Unnecessary

Consultation Question 21:

Peremptory order

Please share your views below.:

More efficient

Consultation Question 22:

Agree

Please share your views below.:

A sensible measure to ensure that losing parties do not take unjustified opportunities to reject or delay implementation of Awards.

Consultation Question 23: 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?

Yes

Please share your views below.:

Consultation Question 24: We provisionally conclude that our proposed change to section 67 of the Arbitration Act 1996 would not require any similar change to section 103. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 25: 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. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 26: 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?

Agree

Please share your views below.:

Consultation Question 27: 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?

Agree

Please share your views below.:

Consultation Question 28: Do you think that section 7 of the Arbitration Act 1996 (separability of arbitration agreement) should be mandatory, and why?

Yes

Please share your views below.:

Consultation Question 29: 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?

Not Answered

Please share your views below.:

Consultation Question 30: 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?

Yes

Please share your views below.:

Consultation Question 31: 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?

Yes

Please share your views below.:

To bring the Act up to date with what is happening in the real world anyway.

Consultation Question 32: Do you think that section 39 of the Arbitration Act 1996 should be amended to refer to "orders" (rather than "awards"), and why?

Yes

Please share your views below.:

For consistency in the language of the Act. Also, personal experience has shown that litigants may want to ignore an Order by saying that it is not technically an "Award."

Consultation Question 33: Do you think that section 39(1) of the Arbitration Act 1996 should be amended to refer to "remedies" (rather than "relief"), and why?

Not Answered

Please share your views below.:

Consultation Question 34: 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?

Agree

Please share your views below.:

Makes sense.

Consultation Question 35: 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?

Agree

Please share your views below.:

Consultation Question 36: We provisionally propose that sections 85 to 87 of the Arbitration Act 1996 (on domestic arbitration agreements) should be repealed. Do you agree?

Agree

Please share your views below.:

Unnecessarily different from non-domestic arbitrations

Consultation Question 37: Do you think that any of the suggestions discussed in Chapter 11 needs revisiting in full, and if so, why?

Please share your views below.:

No

Consultation Question 38: 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?

Please share your views below.:

No

Response ID ANON-PT57-RUB3-C

Submitted to Law Commission Consultation: Review of the Arbitration Act 1996
Submitted on 2022-12-15 10:59:16

About you

What is your name?

Name:
Daniel Bovensiepen

What is the name of your organisation?

Enter the name of your organisation:
Twenty Essex Chambers

Are you responding to this consultation in a personal capacity or on behalf of your organisation?

Personal response

If other, please state::

What is your email address?

Email:
[REDACTED]

What is your telephone number?

Telephone number:
[REDACTED]

If you want the information that you provide in response to this consultation to be treated as confidential, please explain to us why you regard the information as confidential. As explained in our privacy notice, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

Please explain to us why you regard the information as confidential:

Consultation questions

Consultation Question 1: 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?

Agree

Please share your views below.:

I agree with the reasoning in the Consultation Paper on this topic.

Consultation Question 2: We provisionally conclude that the Arbitration Act 1996 should not impose a duty of independence on arbitrators. Do you agree?

Agree

Please share your views below.:

I agree with the reasoning in the Consultation Paper on this topic.

Consultation Question 3: 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. Do you agree?

Agree

Please share your views below.:

I agree with the reasoning in the Consultation Paper on this topic. I have some further thoughts relevant to disclosure and sections 24(1)(a) and (d), and section 33, which I explain in response to Q38.

Consultation Question 4: Should the Arbitration Act 1996 specify the state of knowledge required of an arbitrator's duty of disclosure, and why?

Yes

Please share your views below.:

See my views re Q5 below.

Consultation Question 5: 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?

What they ought to know

Please share your views below.:

I think the act should specify the state of knowledge required of an arbitrator's duty of disclosure, and that this should be based on what arbitrators ought to know after making reasonable enquiries. This is at least a starting point in providing guidance to those acting as arbitrators now as to whether, irrespective of the procedural rules they are being appointed under or whether the arbitration is ad hoc, they are under a duty of inquiry in respect of disclosure. On a practical level, that then informs arbitrators in what reasonable practice management and data recording steps they should consider taking to comply with their duty. There is already a good degree of international acceptance, evidenced by the IBA Guidelines and common institutional rules, that arbitrators should be under a duty of reasonable care. That is not unduly onerous in this context; for other reasons legal professionals are generally already rightly well used to requirements in respect of practice management and record keeping, balanced against data protection obligations. It would help to give the duty of disclosure real teeth in practice, and preserve the international reputation of this jurisdiction as a seat for arbitration by reassuring users of arbitration that this point is explicitly addressed in the Act.

Consultation Question 6:

More broadly justified

Please share your views below.:

I think this question intended to refer to the Supreme Court. I do not have direct experience of this topic in practice, but tentatively I agree with the logic of the Supreme Court in *Hashwani v Jivraj* and the thoughts in the Consultation Paper on this subject.

Consultation Question 7:

Agree

Please share your views below.:

I broadly agree with the reasoning in the Consultation Paper on this subject, but I am a little concerned as to whether the potential implications for enforcement under the New York Convention have been thought through in enough detail, and whether further reflection may lead to a means of ensuring the drafting takes account of this/ can mitigate the enforcement risks.

Consultation Question 8: Should arbitrators incur liability for resignation at all, and why?

Liability for resignation

Please share your views below.:

See my views re Q9 below.

Consultation Question 9: Should arbitrators incur liability for resignation only if the resignation is proved to be unreasonable?

Yes

Please share your views below.:

I think arbitrators should incur liability for resignation if the resignation is proved to be unreasonable. In my view this would strike the right balance between arbitrators not unduly fearing resignation in appropriate circumstances, and not bearing any onus/ burden in applying to court to justify resignation, but also in discouraging resignation in frivolous circumstances. For example, an arbitrator who had acted up until near to trial, and was paid for work accordingly, ought to be strongly discouraged from causing delay and wasted party expenditure by resigning for purely personal convenience, for instance because the arbitrator would prefer not to travel for an in person hearing, or they have been invited on a holiday which clashes with the hearing dates. I have some disappointing personal experience in my practice as counsel of similar instances.

Consultation Question 10: 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. Do you agree?

Agree

Please share your views below.:

I agree with the reasoning in the Consultation Paper on this topic.

Consultation Question 11: 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. Do you agree?

Agree

Please share your views below.:

See my views re Q14 below.

Consultation Question 12: 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. Do you agree?

Agree

Please share your views below.:

See my views re Q14 below.

Consultation Question 13: We provisionally propose that the Arbitration Act 1996 should stipulate the threshold for success in any summary procedure. Do you agree?

Agree

Please share your views below.:

See my views re Q14 below.

Consultation Question 14: 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. Do you agree?

Agree

Please share your views below.:

I agree 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; 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; and that the threshold for success should be stipulated, being 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. That is broadly for the reasons outlined in the Consultation Paper.

However, also note that in my experience sections 34, 47 and 48 of the Arbitration Act 1996 are already frequently relied to devise a procedure akin to summary judgment in some ways, by effecting the expedited disposal of a preliminary issue (sometimes on assumed facts), leading to eg a partial award granting declaratory relief. This is often useful, and I would not want the introduction of a further available expedited procedure for summary disposal to be thought by implication to fetter the adoption of other "preliminary issue" type procedures. It may therefore be worth considering whether any formulation of a new provision in the Act relating to summary disposal should make clear this is without prejudice to the other default general powers of the tribunal in the Act, or as otherwise agreed by the parties.

Consultation Question 15: 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. Do you agree?

Other

Please share your views below.:

I broadly agree with the reasoning in the Consultation Paper supporting the view 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. However, it may be better to draft this along the lines instead that section 44(2)(a) does not apply to securing the attendance of witnesses under section 43. I suggest that because so far as taking evidence of a witness out of the jurisdiction under CPR r 34.13 is concerned, that may be done according to local procedure, and the word "deposition" may not always be apt in that context (or at least could lead to undesirable argument).

Consultation Question 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?

Other

Please share your views below.:

I am provisionally in favour of section 44 of the Act being amended to confirm that its orders can be made against third parties, but more consideration should perhaps be given to whether this should be restricted to certain aspects of section 44, and the fact that third parties under section 44 may be more easily reached under that section than in court proceedings, because applications under section 44 can take advantage of the arbitration jurisdictional gateway pursuant to CPR r 62.5(b).

Consultation Question 17: 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. Do you agree?

Agree

Please share your views below.:

I agree with the reasoning in the Consultation Paper on this topic.

Consultation Question 18: We provisionally conclude that the provisions of the Arbitration Act 1996 should not apply generally to emergency arbitrators. Do you agree?

Agree

Please share your views below.:

See my views re Q 19 below.

Consultation Question 19: 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?

Agree

Please share your views below.:

I agree that that the provisions of the Arbitration Act 1996 should not apply generally to emergency arbitrators, and that the Arbitration Act 1996 should not include provisions for the court to administer a scheme of emergency arbitrators. However, any carve outs dis-applying parts of the Act to emergency arbitrators would need to be very carefully drafted to avoid unintended consequences.

Consultation Question 20: Do you think that section 44(5) of the Arbitration Act 1996 should be repealed, and why?

No

Please share your views below.:

I don't think that section 44(5) of the Act should be repealed, because it reflects an important emphasis in the Act on minimum interference, and if it is repealed the assumptions made in the Consultation Paper as to the interpretation of "urgency" on the new wording of section 44 may prove to be unsound. It is also not clear that repeal of section 44(5) in itself will resolve the perceived problem arising from Gerald Metals. This seems better left to be worked out in case law.

Consultation Question 21:

Peremptory order

Please share your views below.:

I would prefer a provision which empowers an emergency arbitrator (as suitably defined) to issue a peremptory order, which, if still ignored, the court could order compliance with. That seems to me to give appropriate primacy to the arbitral process, and is likely to result in a speedier and more straightforward resolution, since at least arguably an application under section 44 could entail the court fully re-examining the merits in respect of the order originally made by the emergency arbitrator (or at the least I think it would leave more uncertainty as to what approach the courts should adopt).

Consultation Question 22:

Disagree

Please share your views below.:

I don't agree that where a party has participated, and the tribunal has ruled on its jurisdiction in an award, that any subsequent challenge under section 67 should be by way of an appeal and not a re-hearing. I regard it as unfair and unnecessary to fetter the Court's discretion in relation to evidence to be admitted, and the scope of the factual enquiry, in a section 67 appeal. Fundamentally, a party which acts at the right time to challenge what can only, as a matter of logic, be a provisional rather than final view on jurisdiction, ought in my view to at least have the opportunity for a full re-hearing in substance. The relevant issue between the parties would go to the heart of whether they have agreed to arbitrate the relevant dispute at all. I think the suggested analysis by which it is inferred parties asking the tribunal to rule on its own jurisdiction are conferring a collateral jurisdiction which entails determination by the tribunal subject to only a more limited court review is highly artificial and unrealistic. As long as there is a possibility that on a full re-hearing, but not merely on a review/ appeal, the court would conclude that the tribunal's decision as to its own jurisdiction was wrong, then the fiction is tantamount

to saying that because a party has chosen to participate to the extent of challenging jurisdiction, they are also deemed to accede to the jurisdiction of the tribunal in circumstances where the correct position following a full hearing would be that the tribunal has no jurisdiction. That in itself would only in effect result from application of the Arbitration Act 1996 in circumstances where ex hypothesi there may be no valid arbitration at all.

Pragmatically as well, given the small number of section 67 appeals, and the court's existing case management powers to control evidence, including under paras O8.6 and O8.7 of the latest Commercial Court Guide, which may result in wholly unmeritorious section 67 appeals being dismissed on paper, there seems no compelling reason to change the status quo. There is therefore no sufficient practical reason to my mind to seek to artificially circumvent a genuine conceptual difficulty, by not allowing a party the opportunity to make the case as to the tribunal's jurisdiction at a full hearing, on whatever evidence it can persuade the court is most appropriate. Furthermore, the undesirable by-product may be that more parties are encouraged/ advised not to participate in the arbitral process at all, and instead rely on section 72(1), or challenges in enforcement proceedings.

Consultation Question 23: 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?

Yes

Please share your views below.:

If, contrary to my view in response to Q22, challenge under section 67 is limited in some circumstances to a re-hearing, then I agree that logically the same limit should apply to section 32. If not, there would be an undesirable premium on disgruntled parties seeking to persuade tribunals to permit applications under section 32, to avoid the restrictions under section 67.

Consultation Question 24: We provisionally conclude that our proposed change to section 67 of the Arbitration Act 1996 would not require any similar change to section 103. Do you agree?

Agree

Please share your views below.:

I agree with the reasoning in the Consultation Paper.

Consultation Question 25: 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. Do you agree?

Agree

Please share your views below.:

I agree 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. In essence I think this is a harmless amendment, although perhaps unnecessary because I am not aware that the existing limit in only permitting the set aside remedy gives rise to any difficulties or arguments in practice.

Consultation Question 26: 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?

Agree

Please share your views below.:

I agree 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 my view the parties can fairly be regarded as having submitted to the jurisdiction of the tribunal at least to this limited extent.

Consultation Question 27: 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?

Other

Please share your views below.:

I largely agree that section 69 already strikes the right balance, but I tentatively suggest that modest reform of section 69 is at least worth considering in two respects.

Firstly, section 69(3)(c) might be re-worded to add a provision along the lines that a decision may still be open to serious doubt even if the tribunal has followed one or more decisions of the court, if such court decision(s) are themselves open to serious doubt. It is at least arguable that tribunals are not bound by the doctrine of precedent (see eg Andrew W Baker QC (as he then was), "Arbitrators Applying English Law: Inferior Tribunals or a Law Unto Themselves"), and at the least it is difficult to my mind to see why arbitrators should be regarded as bound by first instance decisions, when a judge of coordinate jurisdiction is able to depart from such a decision. However, in my experience the approach/ understanding of tribunals and judges on the application of the doctrine of precedent varies. This in turn can lead to inconsistency and unfairness in respect of leave to appeal. It also seems wrong in principle that if, for instance, a first instance decision followed by a tribunal is itself genuinely open to serious doubt, an arbitration appeal should still be stymied in circumstances where, had it been an appeal in court from the first instance decision (or indeed simply another first instance case), it would be

at least open to argument that such earlier decision was wrong, rather than the mere existence of the decision making it game over. For instance, the decision of Flaux J (as he then was) in *The Astra* was at least thought by many in the shipping market/ shipping layers to be open to serious doubt, and it was subsequently held to be incorrect by the CA several years later, but meanwhile I believe a number of section 69 leave applications were refused purely on the basis of the existence of the first instance decision in *The Astra*.

Second (and perhaps even more controversial), I think it is worth considering whether the Act should specify that leave to appeal should not be granted where leave to appeal in respect of substantially the same question, decided by a tribunal in substantially the same way, has previously been refused, in the absence of a material change in circumstances (I have in mind in respect of such a change eg in particular new court authority in the intervening period); and/or at least conversely, leave to appeal should be granted where leave to appeal in respect of substantially the same question, decided by a tribunal in substantially the same way, has previously been granted. This thought is prompted by the fact that it is not uncommon for the same issue to arise under standard terms and conditions in multiple different (non concurrent/ not consolidated) arbitrations, to which there may be only one common party. This can give rise to inconsistency in the application of section 69, which may have an adverse impact on the reputation of this jurisdiction as a seat. I have some experience of cases along these lines in which identical questions of law, arising under materially the same contracts, reached the courts on leave to appeal applications at different times, and different judges decided those leave to appeal applications in opposite ways. However, this point may also require some further procedural adjustment to stand a chance of making a practical difference, because under CPR 62.10 the default rule is that applications for leave to appeal are in private (although if leave is given, the appeal itself will be in public). I consider there is a strong argument for also making it the default position, in the absence of a different order, that leave to appeal applications are also public (with targeted redactions where necessary being a more proportionate response to arbitral confidentiality concerns). If anything I would accept that it is that latter point that I think has most force, and would at least enable there to be argument by reference to previous decisions on leave to appeal, even if not a hard rule that that leave to appeal should not be granted where leave to appeal in respect of substantially the same question, decided by a tribunal in substantially the same way, has previously been refused. However, I appreciate that is really beyond the Law Commission's remit (but there could be some comment in the final report which prompts others to consider this issue). In some ways I can also see my second proposal is at odds with the premise of my first proposal, that judges at first instance are not strictly bound by decisions of other judges of coordinate jurisdiction, but particularly if my first proposal were adopted, I think the specific policy considerations which drive the restrictions on section 69 appeals giving rise to the need for leave, and only granted in narrow circumstances), may also justify being more prescriptive as to leave being given where there is already effectively a prior decision on leave in substantially the same circumstances.

Consultation Question 28: Do you think that section 7 of the Arbitration Act 1996 (separability of arbitration agreement) should be mandatory, and why?

Yes

Please share your views below.:

When considering this question it seems to me the relevant starting point to bear in mind is that this issue is generally only going to matter in those cases where, if the arbitration agreement is separable, there is otherwise a valid arbitration agreement. In practice I think the status of section 7 is only likely to be an issue very rarely, but on balance I think section 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. In circumstances where the parties have actually given active consideration to this point there is bound to be at least a good argument that they did indeed enter into an arbitration agreement, and the only practical difference non-separability would appear to make would be to make a dispute as to the validity or existence of the main agreement outside the scope of the arbitration agreement, in circumstances where the main agreement was in fact invalid or non-existent. This could lead to a process by which eg a tribunal and subsequently the English court is asked to decide the validity of the main agreement on some basis for the purposes of resolving a jurisdictional issue, but then if they determine it is invalid for that purpose, the consequence of that may be that a foreign court is the appropriate forum to in fact resolve the same issue for the purposes of the merits as to whether the main agreement is invalid, and such a court cannot be guaranteed to reach the same conclusion (and may indeed apply a different law to that issue for some reason). The consequences of that seem to me to be a mess that rational commercial parties could not really intend.

Furthermore, particularly where identifying the law of the arbitration agreement, and/or the law of the contract to which the arbitration agreement is intended to form a part, is open to argument, making section 7 mandatory would also help to avoid potentially very difficult conflict of laws arguments, including which conflict of laws rules should be applied to decide what law applies to the question of whether the arbitration agreement is separable (having regard to section 46(3)).

Finally, presumably 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, whilst avoiding the messier consequences of approaching this from the angle of whether the arbitration agreement is separable/ non separable.

Consultation Question 29: 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?

Agree

Please share your views below.:

I agree with the reasoning in the Consultation Paper.

Consultation Question 30: 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?

Yes

Please share your views below.:

I agree with the reasoning in the Consultation Paper favouring such changes.

Consultation Question 31: 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?

No

Please share your views below.:

I don't think there is a need for the Arbitration Act 1996 to make express reference to remote hearings and electronic documentation as procedural matters in respect of which the arbitral tribunal might give directions, because these are matters best left to the parties and/or the discretion of the Tribunal. The Act already affords sufficient flexibility in these respects, and it does not seem to me the function of the Act, as the legislative framework facilitating arbitration, to prescribe or steer what directions could or should be given. Balancing environmental concerns should still ultimately be a matter for the parties and chosen tribunals, and arbitral institutions do not appear to consider themselves to be unduly fettered by the Act in this regard either.

Consultation Question 32: Do you think that section 39 of the Arbitration Act 1996 should be amended to refer to "orders" (rather than "awards"), and why?

Other

Please share your views below.:

I agree that section 39 should be amended to refer to "orders" rather than "awards", but subject to the further thoughts for additional consequential changes below. Although my own view is that section 39 as currently worded enables tribunals to make provisional orders in the form of awards if the parties agree the tribunal should have that power, I think the concept of a "provisional" award is problematic from a conceptual and enforcement perspective. Section 58(1) provides that awards are "final and binding", but how does that fit with the concept of a revocable provisional award under section 39 if it were possible to issue one? The New York Convention also does not address "provisional" awards explicitly, whereas in my view a tailored approach to recognition and enforcement of any such awards would probably be desirable. As things stand there is a risk of a wide variety of approaches internationally to recognition and enforcement of "provisional" awards in circumstances where the tribunal which issued the award may itself effectively reverse it on a final basis; this may also include a conceptual question as to what "binding" means in the context of the New York Convention. However, although I think it makes more sense for the parties to only be able to agree that the tribunal should have the power to make provisional orders rather than provisional awards, ironically a party obtaining a provisional order with the same effect as relief obtainable on a final basis pursuant to an award may be said in some respects to enjoy a better/ more secure position than if benefitting from a final award, since the other party will not have the rights of appeal that would exist in respect of an award. Taking account of these points, to make the relevant framework clearer and fairer, I also suggest that the words "including a provisional order under section 39" are added to section 41(5) (to avoid any argument that a "provisional order" is not a type of order being referred to in section 41), and section 42(5) is revised so that the leave of the court is not required for an appeal where a peremptory order is made in respect of a provisional order issued pursuant to section 39 (following an analogous logic to the proposal the subject of Q17 in respect of section 44) i.e. I suggest the right to appeal should not be fettered where a court at first instance is effectively enforcing a provisional order.

Consultation Question 33: Do you think that section 39(1) of the Arbitration Act 1996 should be amended to refer to "remedies" (rather than "relief"), and why?

No

Please share your views below.:

I don't think that section 39(1) should be amended to refer to "remedies". I don't think there is a clear need for this change. In any event, to my mind the connotation of the word "relief" in this context is broad enough to encompass relief on both an interim and final basis, whereas to me "remedy" connotes finality which is less apposite under section 39. If consistency was a major concern, I would therefore suggest the converse of the proposal currently made: section 48 is amended to refer to "relief" instead of "remedies" to make it consistent with section 39.

Consultation Question 34: 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?

Agree

Please share your views below.:

I agree 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. This seems the most appropriate fix for a clear problem with the current wording of the Act that I have found problematic a number of times in practice.

Consultation Question 35: 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?

Agree

Please share your views below.:

I agree with the reasoning in the Consultation Paper on this topic.

Consultation Question 36: We provisionally propose that sections 85 to 87 of the Arbitration Act 1996 (on domestic arbitration agreements) should be repealed. Do you agree?

Agree

Please share your views below.:

I agree with the reasoning in the Consultation Paper on this topic.

Consultation Question 37: Do you think that any of the suggestions discussed in Chapter 11 needs revisiting in full, and if so, why?

Please share your views below.:

In relation to paras 11.70 and 11.71 of the Consultation Paper, and the relationship between sections 33 and 34, the parties do potentially have the scope to place the tribunal in an invidious position. Section 33 is mandatory, and reflects a fundamental policy concern that procedures must provide a fair means for resolution. The implication to my mind is that it is not intended that parties are free to agree/ insist on procedures which contravene section 33 (it is not to the point, or the whole point, that it may not lie in the mouths of the parties themselves to then complain of a breach of section 33). That also seems consistent at least with the underlying intention / spirit of section 40(1), at least as far as reasonable expedition is concerned. A tribunal resigning is not much of a constructive response; and in fact section 34 could be open to abuse if parties later collectively decide that they are unhappy with the tribunal for their own reasons and wish to engineer the tribunal resigning. It is preferable that the parties are not regarded as having an absolutely unfettered right to agree on any procedural or evidential matter. I therefore think there is merit in clarifying section 34(1) along these lines: "... subject to the right of the parties to agree any matter, PROVIDING SUCH AGREEMENT DOES NOT PREVENT THE TRIBUNAL FROM COMPLYING WITH ITS DUTIES UNDER SECTION 33" (new wording in caps). Section 34 is itself not mandatory, so such an amendment would be relatively modest and in my view more consistent with the objectives of the Act; if anything, I can see an argument, given the non-mandatory status of section 34, that such a reform would not go far enough. I therefore think the points discussed in paras 11.70 and 11.71 of the Consultation Paper should be revisited in full.

Consultation Question 38: 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?

Please share your views below.:

In relation to Chapter 3 of the Consultation Paper, and impartiality and independence, I think it is worth considering that procedural fairness concerns may arise from the position of arbitrators irrespective of impartiality, which sections 24(1)(a) and (d), and section 33, of the Act are not really apt to address. To an extent I think this is one of the points that emerges from *Halliburton v Chubb*. The concern is that there could be a perception of procedural unfairness in some arbitrations, arising out of a lack of transparency and inequality of arms, without there being any lack of impartiality. For instance, this can arise where there are: (a) two arbitrations with one common party; (b) one common arbitrator appointed by an arbitral institution (or perhaps, in the second arbitration, by a different institution if different arbitral rules apply, or by the other arbitrators); and (c) there is an issue which is in substance the same or materially very similar in both arbitrations. The circumstances of the common arbitrator's appointments may greatly reduce the risk of apparent bias, unless the mere fact of accepting an appointment in a second overlapping arbitration, in no way influenced by the preference of any of the parties, is to be regarded as giving rise to a real possibility of bias in the eyes of the fair minded observer. However, in this context that arguably wrongly leaves out of account/ gives no weight to genuine concerns apart from apparent bias, and focuses only on the conduct of the arbitrator rather than also taking into account fairness as between different parties to the arbitrations. Any reassuring circumstances in respect of partiality of the common arbitrator do nothing to mitigate a concern that the common party may enjoy arguably unfair advantages which the counter-parties to each arbitration are ignorant of (due to confidentiality), in being able to eg test the common arbitrator's views on a particular issue or procedure in one arbitration, which could effectively act as a trial run so far as the other arbitration is concerned. Of course the features of arbitration mean that there may be some unavoidable inequality of arms where there is a common party to overlapping arbitrations without any commonality of arbitrators, but it seems to me this is an issue which is exacerbated where there is also a common arbitrator; both the common arbitrator and common party will have shared knowledge which is concealed from the other parties in each arbitration. It may be difficult to cater appropriately for this concern in the Act, but I think that it may be worth at least some separate consideration, including whether the mooted new express duty of disclosure in the Act might be drafted so as to also take account of this particular concern, and whether there should be any (appropriately limited) duty of disclosure on a party to multiple overlapping arbitrations in appropriate circumstances, as opposed to just the arbitrators. The nature of this issue means disclosure is not a panacea so far as equality of arms is concerned, but it may at least mitigate the problem, by promoting greater transparency, and ensuring that parties not involved in both arbitrations have sufficient awareness to take what procedural or other points they can to better protect their own interests in the circumstances.

I have co-authored a journal article with a colleague in *Chambers* on "The Restrictions on Multiple Arbitral Appointments under English Law", which is ready in draft but has not yet been published. It discusses this point, amongst others, with (as you may imagine) extensive reference to *Halliburton v Chubb*. If of interest, I would be happy to email a copy of the draft to the Law Commission.

Formal Response to the Law Commission’s

Consultation Paper on the Review of the Arbitration Act 1996

by Members of Brick Court Chambers

together with Lord Mance, Sir Bernard Rix and Ricky Diwan KC

(A) Introduction and proposed reform

1. This is a formal response to the Law Commission’s Consultation Paper on the Review of the Arbitration Act 1996 (“the Consultation Paper”) submitted on behalf of 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 and Andris Rudzitis of Brick Court Chambers, together with Lord Mance, Sir Bernard Rix and Ricky Diwan KC and with the further members of Brick Court Chambers listed in Annex 1.

2. It does not engage with each and every question raised by the Consultation Paper. It focuses instead on three related issues of jurisdiction and applicable law which are, it is submitted, of paramount importance in the contemplated reform. These issues were addressed at Brick Court Chambers’ Annual Commercial Conference held in London on 13 October 2022 (“the BCC Conference”, held with the participation of the Law Commission), and are as follows:
 - (a) Challenges to the jurisdiction under Section 67 of the Arbitration Act (“the Act”);

 - (b) The rationalisation of the multiple avenues of challenge to the jurisdiction which currently coexist under sections 9, 32, 67 and 72(1) of the Act;

 - (c) Addressing the unfortunate and serious consequences arising from the decision in *Enka v Chubb* [2020] UKSC 38 in which it was held that in every London seated arbitration with a choice of foreign substantive law, the arbitration agreement will

be governed by that foreign law (“the first rule in *Enka*”) and that the effect of section 4(5) of the Act is that that choice of foreign law will automatically displace the non-mandatory provisions of the Act where the provision is ‘substantive’ and not ‘procedural’ (“the second rule in *Enka*”).

3. The Law Commission’s Terms of reference for the review of the Act (which are set out in Appendix 1 of the Consultation Paper) record that “[t]he 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.” It is our submission that the reforms proposed in this present response on those three points (particularly on points 1 and 3, with point 2 relatedly providing a better answer to the issues raised by the Law Commission in relation to point 1) are crucial in ensuring the competitiveness of London (and thus the UK) as a global centre for international arbitration (and thus dispute resolution) and the attractiveness of English and Welsh law.

4. In that respect, we note that there is now global competition between jurisdictions which market themselves, and which are perceived, as ‘safe seats’ for international arbitration such as London, Paris, Geneva and Singapore. A very important part of that global competition consists in ensuring that the jurisdiction in question has a state-of-the-art legislative framework which will support arbitration and ensure its effectiveness, particularly in the face of attacks from parties who would renege on their agreement to arbitrate once a dispute has arisen – usually because they do not expect the substantive outcome of that dispute to be positive (hereinafter referred to as “recalcitrant parties”). Singapore, for instance, has been astute at making regular and well-publicised changes to its arbitration legislation to that end. The demands on legislative time in England and Wales mean that our jurisdiction cannot afford to make legislative changes at that pace and in that fashion, and the present law reform exercise is accordingly a very important, and probably unique opportunity to resolve the problems which exist under the Act and to ensure that the legislative framework in England and Wales is on a par with, if not better than, London’s competitors.

5. We respectfully submit that the positions put forward in the present response on each of the three above points fall fairly and squarely in that category. Specifically:
- (a) The rule laid down by the Supreme Court in *Dallah v Pakistan* [2010] UKSC 46 (providing for *de novo* review on challenges to jurisdiction) has gained universal recognition worldwide (including in competing jurisdictions) as a cardinal rule of international arbitration which gives effect to the key principle that, while it is important to protect the arbitral process from illegitimate attacks from recalcitrant parties, it is equally important to protect parties who have in truth *not* agreed to arbitrate from illegitimate arbitral proceedings; and that the courts of the seat must be the ultimate and unhindered arbiter in that respect.¹ As explained in this response, the premise for the proposed change to that rule in England and Wales is, in our submission, incorrect. Further, to change that rule would send the wrong message to the international community.
 - (b) We² do however agree that the current framework for challenges to jurisdiction is cluttered, and that there is a need to rationalise it. The solution does not, with respect, lie in changing the rule in *Dallah*, but in (i) amending sections 9(1) and 9(4) to bring them in line with international practice and get rid of the inefficiencies in time and costs which arise from the way in which they are currently applied;³ and (ii) abrogating sections 32 and 72(1) which are duplicative and unnecessary (and have no equivalent in other leading jurisdictions).
 - (c) As explained in this response, the changes to English law brought about by the decision in *Enka* have the effect of displacing the framework carefully put in place by our courts to protect the arbitral process under English law in favour of a foreign law of unknown content which may or may not protect the arbitration. This is so for all central aspects of the arbitration including (i) arbitrability; (ii) questions as to the scope of the clause (including the presumption of “one stop adjudication”

¹ That must in turn be balanced with the (also universally recognised) principle of *compétence-compétence*, which allows tribunals to determine their own jurisdiction in the first instance (subject to that court review).

² This does not include Lord Mance, who prefers not to endorse that aspect of this response (as developed in Part C, paragraphs 28 to 45), particularly the proposed reformulation of section 9(4) of the 1996 Act.

³ See in particular *Al Naimi v Islamic Press Agency* [2000] EWCA Civ. 17; *Albon v Naza Motors* [2007] EWCA 1124, *Aeroflot-Russian Airlines v Berezovsky* [2013] EWCA Civ 784; [2013] 2 Lloyd’s Rep 242 at paras 72-80.

under English law⁴); (iii) separability; and (iv) further aspects yet to be determined (and which will thus give rise to litigation), which could include *compétence-compétence* under section 30, remedies and interest under sections 48 and 49, and the finality of awards under section 58. The effect of the decision in *Enka* (even if correct as a matter of pure conflict of laws analysis) is to give a new weapon to recalcitrant parties who can thereby slow down or scupper altogether London-seated arbitrations. This problem should be remedied by adopting a statutory rule that the proper law of the arbitration agreement is the law of the seat with the only exception being where the arbitration agreement itself expressly chooses a different law (the “Law of the Seat Default Rule”).

6. We address each of those points below. We annex to this response the papers delivered at the BCC Conference on English and comparative law.

(B) Point 1 -- Challenges to the Jurisdiction of the Tribunal under Section 67

(B1) Consultation Question 22

7. The Law Commission’s provisional proposal is that section 67 should be reformed to stipulate that (1) where a party has participated in the arbitral proceedings; and (2) has objected to the jurisdiction of the arbitral tribunal; and (3) the tribunal has then ruled on its own jurisdiction in an award, then any subsequent challenge under section 67 should proceed by way of a limited appeal, rather than a *de novo review* or rehearing.⁵
8. We believe that criticisms of the existing approach have been significantly overstated,⁶ and disagree with the provisional proposal, for the following reasons.

⁴ See *Fiona Trust v Privalov* [2007] UKHL 40.

⁵ Consultation Paper, §8.3, §8.43 and §8.46.

⁶ The most prominent academic critics of the existing approach have been the authors of *Merkin and Flannery on the Arbitration Act 1996*: see 6th edition at p.681-685. We are aware of only two judicial critics of the existing approach: Morrison J (in *Tajik Aluminium Plant v Hydro Aluminium AS* [2006] EWHC 1135 (Comm) at [38] and *Fiona Trust & Holding Corp v Privalov* [2006] EWHC 2583 (Comm) at [26]) and Toulson J *Ranko Group v Antarctic Maritim SA (The Robin)* [1998] ADRLN 35. However, in each case, these criticisms predate the seminal decision of the Supreme Court in this area, *Dallah Real Estate & Tourism Holding Co v Pakistan* [2011] 1 A.C. 763, which conclusively established that the rehearing approach is correct and appropriate.

9. **First**, a *de novo* review of the tribunal’s jurisdiction is justified as a matter of principle. It is an essential procedural safeguard, which is necessary to ensure that the parties have in fact consented to arbitration (and to prevent the tribunal from ascribing jurisdiction to itself or, as it is often said, “pulling itself up by its own bootstraps”). This is particularly so given that a jurisdictional challenge may turn on questions of fact as well as questions of law.⁷ Because the arbitral tribunal cannot be the final arbiter of its own jurisdiction, it follows that both the tribunal’s findings of fact and its holdings of law in relation to jurisdiction must be open to challenge before the Court. The Court could not discharge that function if it were to be confined by statute to carrying out an “appellate review” of the decision of the tribunal, rather than undertaking a full rehearing.
10. **Second**, the main stated justification for reform is the desire to reduce costs and delay caused by the repetition of arguments and evidence that have already been canvassed before the tribunal.⁸ We do not agree with the premise that the existing approach is in fact resulting in significant additional costs or delays. As explained in Section B2 below, the Courts have in fact been astute in using their existing case management powers to avoid such repetition and the Supreme Court has confirmed this to be the position in terms.⁹ If there are truly concerns in that respect (*quod non*), they can be addressed by a minor change to the Rules of Court.
11. **Third**, the proposal is out of step with the position that has now been adopted in all leading jurisdictions (including Canada¹⁰, Australia¹¹, Singapore¹², Hong Kong¹³ and

⁷ This point was made by the DAC in its *Report on the Arbitration Bill (1996)* at §143.

⁸ See Consultation Paper, §8.30.

⁹ *Kabab-Ji v Kout Food Group* [2021] UKSC 48 at [81] “Whether or not a summary procedure is suitable in any particular case must depend on the facts and circumstances of the case. Similarly, if there is to be a trial, the appropriate interlocutory and trial procedure will be case and fact specific. It may be possible, for example, depending upon the nature of the dispute, to dispense with live witness evidence and rely on transcripts of oral evidence already given at the arbitration hearing along with other documentary evidence. It cannot be appropriate to mandate in advance a procedure for all cases, as the claimant suggested.”

¹⁰ *The Russian Federation v Luxtona Lta* [2021] OJ No. 3616; *Lululemon Athletica Canada Inc v Industrial Colour Productions Inc* [2021] BCJ No. 2429.

¹¹ *Lin Tiger Plastering Pty Lt v Platinum Construction (Vic) Pty Ltd* (2018) 57 VR 576 at [29]-[40]; *IMC Aviaiton Solution Pty Ltd v Altain Khuder LLC* (2011) 38 VR 303.

¹² *PT Tugu Pratama Indonesia v Magma Nusantara Ltd* [2003] SGHC 204; *Insigma Technology Co Ltd v Alstom Technology Ltd* [2009] SLRR 23; and *PT First Media TBK v Astro Nusantara International* [2014] 1 SLR(R) 372 at [162]-[164].

¹³ *S Co v B Co* [2014] 6 HKC 421 at [36].

France¹⁴), where the judgment in *Dallah* is widely regarded as being the gold standard. As noted in the Introduction to this response, the updating of our legislative framework should recognise the fact that there is a global competition between seats which are marketing themselves as safe arbitration seats. Any departure by England and Wales from a rule which has been universally adopted by other leading jurisdictions will require very strong justification indeed, all the more so in circumstances where that rule actually originated in England and Wales. No tenable justifications have been advanced.

12. **Fourth**, the proposed reform would be inconsistent in its application as between parties who seek to challenge the jurisdiction of the tribunal, and those who seek to uphold it. As currently formulated, the reform would require an appellate standard of review to be applied only in cases where the challenging party had previously *objected* to the jurisdiction of the tribunal. But section 67 applies equally in cases where a party seeks to challenge a *negative* ruling by the tribunal that it lacks jurisdiction.¹⁵ There is no logical reason why a different standard of review should be applied in such cases.
13. **Fifth**, the proposal would also require courts to apply different standards of review depending on the extent to which a party had participated in the underlying arbitration. In our view, this would introduce an unnecessary and unwelcome element of additional complexity and uncertainty into the application of section 67. Our concerns in this regard are heightened by the fact that the current proposal fails to define what is meant by “participation” in this context, so as to distinguish between those who would be entitled to a full judicial rehearing under section 72 because they had not participated, but only objected to jurisdiction, and those who would not. Thus:
 - (a) Is it participation for jurisdiction or jurisdiction and merits that counts?
 - (b) Is oral participation needed or do without prejudice written submissions put forward on jurisdiction by the objecting party suffice?

¹⁴ See the *Pyramids Case*, Cass. civ. 1ère, 6 January 1987, SPP v. Egypt, Rev. arb. 1987, p. 469, note Ph. Leboulanger; JDI 1987, p. 638, note B. Goldman; the *Abela Case*, Cass. civ. 1ère, 6 October 2010, Fondation Joseph Abela Family Foundation v. Fondation Albert Abela Family Foundation, Rev. arb. 2010, p. 813, note F.-X. Train.

¹⁵ See section 67(1) and the commentary in this regard in *Merkin and Flannery* at p.679. An example of a successful section 67 challenge to such a negative declaration is *GPF GP Sarl v Poland* [2018] EWHC 409 (Comm).

(c) If a party simply turns up to object, but takes no part in submissions and/or the merits – is that participation?

(d) Parties and their counsel do all sorts of things – where is the line to be drawn?

14. **Sixth**, the proposed reform would also result in an unjustifiable (and potentially confusing) inconsistency in the standard of review to be applied as between (i) challenges to (some, but not all) domestic awards under section 67; (ii) challenges to the enforcement of foreign awards under section 103; and (iii) challenges to the enforcement of English awards abroad under Article V of the New York Convention. This is because, following *Dallah* (which was itself a decision arising out of a challenge to enforcement under section 103), any challenge under section 103 would be by way of a rehearing. But no equivalent reform is currently proposed in relation to section 103.¹⁶

(B2) The real concern: procedure not powers

15. More generally, it seems to us that the real concern in relation to section 67 (to the extent that there is one) is about the *procedure* to be adopted by the Court in hearing jurisdictional challenges; not the *powers* of the Court. The former is for rules and courts to decide. It is only the latter that are properly the subject of statutes and statutory reforms.
16. In any event, the concerns that have been identified in the Consultation Paper (and elsewhere) about the procedure that is currently adopted by the courts in relation to challenges to jurisdiction under section 67 have, in our view, been greatly overstated.
17. As the Consultation Paper rightly notes at §8.33, section 67 is only invoked in a relatively small number of cases each year. There were only 15 such applications issued in 2020 to 2021, and only 19 in 2019 to 2020.¹⁷ Not all of the applications that are issued ultimately result in a full hearing before the Court.¹⁸

¹⁶ See Consultation Paper, §8.52 – 8.56.

¹⁷ The Commercial Court Report 2020-2021.

¹⁸ The Commercial Court Report for 2020-2021 notes at §3.1.5 that, of the 19 applications that were issued in 2019 to 2020, at least 5 were discontinued and 1 was settled (i.e. c. 32% of the applications issued).

18. Even where a section 67 challenge is determined on its merits, a *de novo* review does not inevitably (or even invariably) result in a full rehearing of all of the evidence and argument that was canvassed before the tribunal. We therefore respectfully suggest that the authors of *Merkin and Flannery* are inaccurate when they claim that the existing approach involves the application of an “*inflexible rule*”, and that the Court is obliged to “*consider the matter of jurisdiction afresh in all circumstances, and by way of a rehearing with oral testimony from expert and factual witnesses, even where there has been a full inter partes hearing before the tribunal ...*”.¹⁹ In our experience as practitioners and former judges of the Commercial Court, this does not reflect the way in which section 67 operates in practice, as has been confirmed by the Supreme Court.²⁰
19. The Court already has very considerable flexibility through its existing case management powers to determine the appropriate procedure for the resolution of a challenge under section 67, even where that challenge proceeds as a *de novo* review. This can involve (for example):
- (a) The summary disposal of challenges that have no real prospect of success.²¹
 - (b) The determination of section 67 challenges on the basis of written submissions, without the need for a contested oral hearing.²²
 - (c) The use (or re-use) of some of the original evidence from the arbitration (e.g. witness statements, expert reports and transcripts of cross-examination).²³
 - (d) Restrictions on the admission of new evidence or additional disclosure requests.²⁴

¹⁹ See at §67.9.2.

²⁰ See para. 10 and fn 8 above.

²¹ See e.g. *Honeywell International Middle East Ltd v Meydan Group LLC* [2014] EWHC 1344 (TCC); and *Kabab-JI SAL v Kout Food Group* [2022] 1 All E.R. (Comm) 773.

²² In this regard, the latest edition of the Commercial Court Guide emphasises at §O8.6 the fact that “*The court has the power under CPR r. 3.3(4) and/or CPR r. 23.8(c) to dismiss any claim without a hearing*”.

²³ This procedure was adopted e.g. in *Primetrade AG v Ythan Ltd* [2005] EWHC 2399 (Comm) at para 13; and in *Ecuador v Occidental Exploration and Production Co* [2006] EWHC 345 (Comm): see para 7 in particular; in *Dallah* at first instance there was no oral evidence of fact, although there was of French and Pakistani law: [2008] EWHC 1901 (Comm) at paras 4 and 5.

²⁴ See e.g. *Central Trading & Exports Ltd v Fioralba Shipping Co (The Kalisti)* [2014] 2 Lloyd’s Rep 449, Males J refused permission for the claimant to adduce evidence before the Court which it had chosen not to deploy before the tribunal. See also *Primetrade AG v Ythan Ltd* (supra) at para 62.

- (e) Even in cases where new evidence is admitted (e.g. new documents or witness statements), such evidence is likely to be met with a very significant degree of judicial scepticism (which may undermine the weight of such evidence) in the absence of a good explanation as to why it was not adduced before the tribunal.²⁵
20. The procedure to be adopted by the Court will depend on the nature of the issues raised by the particular jurisdictional challenge. A more extensive evidential inquiry may be required, for example, in cases where a party alleges that it was not a party to the arbitration agreement, than those in which the challenge is based on the scope of the arbitration agreement or reference to arbitration, or the constitution of the tribunal.
21. The Consultation Paper says at §8.40 that there are many cases where the Court should not “*hear the evidence afresh, or entertain new evidence*” and that there are cases where the Court should “*simply consider the evidence put before the arbitral tribunal, including witness statements or transcripts, and rely also on the arbitral tribunal’s findings of fact*”. We agree. But, in our view, this is what already happens in practice and the courts are already astute to ensure that there is no attempt unfairly to adduce new evidence or “grounds of objection”.
22. In our experience, cases in which the Court will require (or permit) a full rehearing (i.e. involving fresh requests for disclosure and the (re-)attendance of factual and expert witnesses for (further) cross-examination) are relatively few and far between. In *Dallah* itself, for example, no additional evidence was called from any witnesses of fact. Expert evidence on French law was heard by Aikens J at first instance, but only because no such expert evidence on French law had been adduced before the tribunal.²⁶
23. In our view, the problem that the proposed reform in relation to section 67 seeks to address is therefore more apparent than real. We are concerned, however, that by enshrining a particular type of procedure in statute, the proposed reform would (i) remove the flexibility that is inherent in the existing approach, which enables the Court to adjust its procedure to meet the demands of the particular jurisdictional challenge before it; and

²⁵ See e.g. *Electrosteel Castings Ltd v Scan-Trans Shipping & Chartering Sdn Bhd* [2002] EWHC 1993 (Comm) at [23] (per Gross J).

²⁶ See *Dallah v Pakistan* (Aikens J) [2008] EWHC 901 (Comm); [2008] 2 Lloyds’ Rep. 535 at paras 4 and 5.

(ii) send a very damaging signal that England and Wales pays nothing but lip service to the cardinal principle of *compétence-compétence* (since the practical effect of the proposed rule will be that parties will be forced not to argue jurisdiction before the arbitral tribunal so as to preserve their right to a full hearing thereof by the courts).²⁷ In that last respect, we respectfully submit that the authors of Merkin and Flannery are fundamentally mistaken when they seek to support the proposed change on the basis that “*when you buy arbitration, you buy the right to get (and the obligation to live with) the wrong answer*” (quoting Lord Justice Kerr): the point at issue on challenges to jurisdiction is *whether* the relevant party has bought into arbitration at all (or into arbitration of that particular subject matter). The principle behind section 67 is the opposite of what Merkin and Flannery suggest; the parties agree that arbitrators may determine their jurisdiction, but the court determines whether the arbitrators’ decision in that respect was correct.

24. If any reform is therefore required (which we doubt, for the reasons set out above), we would suggest – at most – a much more modest reform of the applicable procedural rules, rather than any amendment to section 67 itself. For example, if it was felt necessary to do so, an appropriate amendment could be made to the wording of CPR r. 62.10 (Hearings in Arbitration Claims) or to Practice Direction 62, to make it clear that:

“In determining the procedure to be adopted for any [re]hearing under Section 67, the Court should take account of the extent to which the party opposing jurisdiction participated and had the opportunity to adduce evidence and the nature of the jurisdictional challenge and such other matters as the Court deems appropriate”.

25. However, if there is a need to enshrine anything in statute, then it should be to affirm that a hearing under section 67 is, in principle, a *de novo* rehearing, and not an appeal.
26. London is one of the world’s leading centres for international arbitration. We are concerned that, far from enhancing London’s reputation as an arbitral centre, the

²⁷ We note in that respect that the principle of *compétence-compétence* does not confer on an arbitral tribunal the right finally to determine its own jurisdiction. It provides that the tribunal has that jurisdiction, but always subject to the final say of the courts of the seat: see Prof. W.W. Park, *The Arbitrator's Jurisdiction to Determine Jurisdiction* in ICCA Congress Series, Vol. 13 pp. 55-113 (attached). The question of which forum should have priority in making that determination is addressed as part of our second submission, in Part C below (rationalisation of avenues of challenge to jurisdiction).

proposed reform to section 67 will have a deleterious effect, by enshrining a particular type of procedure into statute and by effectively neutering the principle of *compétence-compétence* in England and Wales. While in practical terms only a very limited number of cases are likely to be affected; in perspective terms it would send the wrong message internationally and would, in our view, be a retrograde step.

27. As noted in the Introduction to this response, while we agree that the overall regime for challenging jurisdiction under the Act is cluttered and in need of reform, we respectfully submit that the solution does not lie in changing the rule in *Dallah* but in rationalising that regime. We now turn to that second point.

(C) The rationalisation of the avenues of challenge to jurisdiction under the Act

(C1) Consultation Questions 37 & 38

28. The Consultation Paper does contain a suggestion in that respect, which is summarised in paragraph 11.45, *viz.* to clarify whether the standard of proof for section 9(4) is a good arguable case or the balance of probabilities.

29. Paragraph 11.46 of the Consultation Paper sets out the Law Commission's preliminary view in this regard:

At present, the cases indicate that the court can decide the matter on the balance of probabilities, but if there is an apparently persuasive assertion that an arbitration agreement exists, then a court might prefer to grant a stay and remit the matter to the tribunal for it to decide in the first instance. We think that this current position is defensible, and its development is a matter best left to the courts.

30. In our view, the standard of proof for sections 9(1) and 9(4) should be reconsidered as part of a wider review of the English approach to the principle of an arbitral tribunal's *compétence-compétence*, in comparison with the approach adopted in other jurisdictions.
31. This does require a review of the various ways in which the jurisdiction of the arbitral tribunal can be challenged in court.

32. As explained in our response to Consultation Question 22 above, the courts must have the right to determine questions of jurisdiction. This response addresses separate but related issues. First, if both the courts and the arbitral tribunal have the right to determine questions of jurisdiction, which, in principle, should determine the issue first? Secondly, how does one ensure that they are working together in an efficient and cost-effective manner?
33. By way of comparison, we note that in France, full effect is given to the so-called negative effect of *compétence-compétence*. As such, no party can seize a French court of the question whether a certain arbitration agreement is valid or whether it is applicable to a given dispute before an arbitral tribunal is seized or pending arbitral proceedings. This approach has the practical advantage of being clear, but arguably there are circumstances in which it leads to unwarranted delay and wasted costs. There is a limited exception to this pursuant to article 1448 of the French Code of Civil Procedure: where a party has issued proceedings in the French courts and the respondent objects to the court's jurisdiction by invoking the existence of an arbitration agreement, the court will retain its jurisdiction if the arbitration agreement is *manifestly* void or inapplicable to the claim. If the nullity or inapplicability is not manifest, the court does not decide the validity or applicability of the arbitration agreement, and it declines jurisdiction to deal with the merits.
34. A hybrid approach is adopted in Switzerland, where the relevant legal provision in relation to stay of court proceedings is couched in very similar terms to section 9 of the 1996 Act. Article 7 of the Private International Law Act ("PILA") provides:

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

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

35. According to the Swiss Federal Tribunal’s case law, the negative effect of *compétence-compétence* applies in full if the arbitration clause provides for arbitration in Switzerland. In such circumstances, the power of review is restricted to a summary examination. The reason underlying this rule is expressed by the Swiss Federal Tribunal as being “*to avoid turning Article 7 PILA into an instrument that can paralyse any arbitral procedure*” (ATF 122 III 139). However, we note that this approach does not apply if the seat of the arbitration is not in Switzerland, in which case the Swiss court’s power of review is unrestricted. We express no view on whether this approach is justified, save as to note the overlap between the extent to which the negative effect of *compétence-compétence* is upheld and the power of the court to ultimately have the last word.
36. In contrast to the streamlined approach described in France and Switzerland, we note that there are at least four procedural avenues for challenging jurisdiction under the Arbitration Act 1996, which are addressed in turn below.

(C3) Section 9

37. Section 9 governs applications to the court to stay court proceedings where one party alleges that an arbitration agreement covers the dispute in question. Sections 9(1) and (4) are essentially based on Article II(3) of the New York Convention, which provides that there must be a stay of court proceedings “*unless [the court] finds that the same agreement is null and void, inoperative or incapable of being performed.*” The position summarised in the Consultation Paper in connection with the application of section 9 is indicative of a lack of clarity as to rules of priority in the law of England and Wales.
38. In our submission, the approach in England and Wales should be streamlined so that a clearer rule of priority emerges, enabling the parties to know where they stand, and giving a clear indication of the importance given to international arbitration in this jurisdiction. We therefore propose that section 9 be amended as follows (with proposed amendments in underlined and struck out text):

“(1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which that party contends ~~under the agreement~~ is to be referred to arbitration under the agreement may (upon notice to the other parties to the proceedings) apply to the court in which the

proceedings have been brought to stay the proceedings so far as they concern that matter.

... (sub-sections (2) and (3) unchanged)

(4) On an application under this section, if the applicant contends that an arbitration agreement exists and covers the dispute in question, the court shall grant a stay unless satisfied the opposing party shows, on a *prima facie* basis, that there is a very strong probability that the arbitration agreement is may be null and void, inoperative or incapable of being performed, in which case it shall itself proceed finally to determine whether the arbitration agreement is null and void, inoperative or incapable of being performed.”

39. This change would bring the position in England and Wales in line with the position adopted by all leading Model Law jurisdictions (Canada, Hong Kong, Singapore) where it has been held that Article 8 of the Model Law, which has wording identical to Article II.3 of the New York Convention, does not require a full determination of the issue of jurisdiction but only a *prima facie* determination in order to grant a stay: see *Tomolugen Holdings* (Singapore CA, attached) which has a very helpful discussion at para. 25-70 with reference to all these jurisdictions (England, Canada, Hong Kong, Singapore) and which notes that England is out of step with other jurisdictions.

(C4) Sections 32 and 72(1)

40. Section 32 provides a relatively limited power to the court to determine a preliminary point on the “substantive jurisdiction” of the tribunal. The court can only intervene in narrowly confined circumstances: (a) if all the parties agree in writing, which is presumably possible even before an arbitral tribunal is constituted; or (b) the application is made with the permission of the tribunal and the court is satisfied that (i) the determination of the question is likely to produce substantial savings in costs; (ii) the application was made without delay; and (iii) there is good reason why the matter should be decided by the court. However, unless otherwise agreed by the parties, the arbitral tribunal may continue the arbitral proceedings and make an award while an application to the court under this section is pending. This provision does not appear to be used frequently in practice, as indicated by the very limited number of reported cases. It is

respectfully submitted that it is duplicative and serves no purpose and should be repealed as part of the proposed process of rationalisation of avenues of challenge to jurisdiction.

41. Section 72(1) provides that a person who takes no part in arbitral proceedings can challenge jurisdiction *before* an award is issued. Section 72(1) has no equivalent in the Model Law, and in practice appears to be very rarely used. Lord Justice Longmore noted that the court should “*be very cautious about agreeing that [the s.72] process should be so utilised. If there is a valid arbitration agreement, proceedings should not be launched under section 72(1)(a) at all*”: *Fiona Trust and Holding Corp v Privalov* [2007] EWCA Civ 20; [2007] Bus LR 686 at [34]. Given that a party who takes no part in the proceedings may challenge an award under section 67, there is no justification for permitting such a party to trample on the principle of *compétence-compétence*. Accordingly, in our view, this provision should also be repealed.
42. For the avoidance of doubt, we do not propose that section 72(2) (which serves the useful purpose of spelling out that a person alleged to be a party to arbitral proceedings but who takes no part in the proceedings retains its rights to challenge the award under sections 67 and 68) should be repealed. As a consequence of the proposed repeal of section 72(1), it would have to be amended as follows: “Subject to section 73, a person alleged to be a party to arbitral proceedings but who takes no part in the proceedings ~~He also~~ has the same right as a party to the arbitral proceedings to challenge an award [*etc. unchanged*]”.

(C5) Section 67

43. This is addressed in Part B above. For the reasons there set out, we respectfully propose that this should remain as the sole route for challenges to jurisdiction, with no change made to the re-hearing rule in *Dallah*.
44. The upshot of this proposed rationalisation of the avenues of challenge to jurisdiction would be that:
 - (a) Where the party challenging jurisdiction has commenced court proceedings in England and Wales, those proceedings will normally be stayed save where the

arbitration agreement is manifestly null and void etc. with the issue of jurisdiction going to the tribunal;

- (b) The tribunal’s determination of its own jurisdiction (whether following a court stay under section 9 or not) will then be challengeable in court under section 67 (and section 67 only).

45. This simple and streamlined regime would have the benefit of clarity and, even more importantly, avoid the inefficiencies arising from the court’s current application of section 9 (which results in a case management decision having to be made in every case as to which forum ought to have priority to determine jurisdiction, court or tribunal). The proviso proposed to section 9(4) would also mean that the matter would not proceed to the tribunal when the arbitration clause is manifestly inapplicable thus providing for flexibility and avoiding wasted costs in clear cases of lack of jurisdiction.

(D) The law applicable to the arbitration agreement

(D1) Consultation Question 37, paragraph 11.8

- 46. Question 37 of the Consultation Paper refers to a number of suggestions for review which have not been shortlisted for further action. The question asks consultees whether they consider that any such suggestion should be reconsidered in full and if so why.
- 47. One such suggestion recorded at paragraph 11.8 is that there should be a default rule that the law governing the arbitration agreement is the law of the seat, save where the parties have expressly agreed otherwise in the arbitration agreement itself. That suggestion was made by some of those subscribing to this response (viz. Lord Hoffmann, Sir Richard Aikens, Salim Moollan KC and Ricky Diwan KC) and their Note of 7 June 2022 on the point is annexed to the present response for the Commission’s ease of reference.
- 48. The Consultation Paper gives a number of reasons as to why the suggestion had not been retained for review.
 - a. First, the question is framed in terms of “whether *Enka v Chubb* was wrong”.²⁸

²⁸ Paragraph 11. 8.

- b. The *Enka v Chubb* approach is then described as one whereby the Supreme Court decided unanimously (on this point) that an express or implied choice of law to govern the main contract carries across as an implied choice of law to govern the arbitration agreement.²⁹
- c. Reference is then made to Scottish legislation which has a default rule that, absent any specification in the arbitration agreement, then the law of the arbitration agreement is the law of the seat, “unless the parties agree otherwise.”³⁰ The Consultation Paper records (it is submitted, correctly) that given that *Enka v Chubb* says that where the parties expressly or impliedly chose the applicable law of the main contract, that is also an implied choice of the proper law of the arbitration agreement, and so is thus “an agreement otherwise”, therefore a default rule such as that of Scots law would not apply. Thus, if the parties have chosen a non-English law as the applicable law of the main contract, that would also be the proper law of the arbitration agreement.³¹
- d. The question posed by the Law Commission was thus whether there ought to be a rule that the proper law of the arbitration agreement will be the law of the seat with the only exception being where the arbitration agreement itself expressly chooses a different law.³² (We refer to that suggestion in this response as “the Law of the Seat Default Rule”, as noted in Part A above).
- e. The Law Commission concluded provisionally that the DAC deliberately omitted conflicts of laws from the Act and that it was not yet persuaded that it needed a new regime departing from *Enka v Chubb*.³³
49. Those provisional reasons given by the Commission for not adopting the Law of the Seat Default Rule were comprehensively addressed on the third panel of the BCC Conference and are not reiterated verbatim in this response: the relevant paper³⁴ is annexed thereto and we would respectfully ask the Commission to have regard to the same in its deliberations.

²⁹ Paragraph 11. 9.
³⁰ Paragraph 11. 11.
³¹ Paragraph 11. 11.
³² Paragraph 11. 11.
³³ Paragraph 11.12.
³⁴ By Salim Moollan KC.

50. As there explained, we remain of the view that the Law of the Seat Default Rule should be adopted for the following reasons.
51. First and importantly, it is submitted that the relevant question is not whether the decision in *Enka v Chubb* was wrong. The proposed change to the law does not impugn the decision in *Enka* in terms of pure conflicts of law rules. We think it fair to say that the Supreme Court in *Enka* was to an extent hamstrung by the historical baggage of prior case-law and was thus driven to analyse the issue in terms of pure conflict of laws rules. But, as Lord Mustill noted when the 1996 Act was passed, “[c]onceptually ... the Act marks a radical change of direction. No longer are the internal rules to be derived by analysing the contracts between the parties inter se and between themselves and the arbitrators. The arbitral process is still consensual to the extent that the proceedings would not take place but for the agreement to arbitrate. But by making this agreement the parties contract into a framework, not chosen by themselves but imposed by Parliament, save only to the extent that they avail themselves of the opportunity to depart from the semi-mandatory provisions.” (Mustill & Boyd, Companion Volume in Part I.G.6.)³⁵ The question should thus be one of legislative policy: what policy makes sense for London as a seat, and thus what should be the framework set by Parliament into which Parties who choose London as a seat will therefore opt. That is a question singularly within the remit of the Law Commission.
52. Once that correct question is posed, the answer is (it is submitted) inescapable. The default applicability of the *lex contractus* arising from *Enka v Chubb* means that in a vast number of London seated arbitrations (in which the parties have expressly or impliedly chosen a foreign law as the applicable law of the main contract), all aspects of the arbitration agreement, from arbitrability to the scope of the arbitration clause will be governed by that foreign law. This creates considerable substantive legal uncertainty as well as practical issues for parties which choose London as a seat for their arbitration and it goes against the evidence of market practice.
53. First, there is the issue of substantive legal uncertainty. The result of *Enka v Chubb* is that in every London seated arbitration with an express or implied choice of foreign substantive law, the arbitration agreement will be governed by that foreign law, unless

³⁵ See further in that respect, Salim Moollan, Some Thoughts on Emmanuel Gaillard’s “Vertus de la règle matérielle” in *Liber Amicorum Emmanuel Gaillard* (to be published in 2023), attached.

“the validation principle” is invoked. This, in turn, means that issues such as arbitrability or the scope of the arbitration clause will be governed by that foreign law:

- a. Challenging the arbitrability of a dispute is one of the most common ways for recalcitrant parties to impugn the jurisdiction of arbitrators and renege on their agreement to arbitrate. English law has developed a robust approach to discourage such attempts,³⁶ which contributed to London’s attractiveness as a safe seat of arbitration. However, in the post *Enka v Chubb* world, recalcitrant parties will be able to rely on alleged peculiarities of the substantive applicable law of the contract as making certain matters unarbitrable. This is a real risk, particularly when certain foreign laws take a narrower approach to arbitrability than English law³⁷ and/or do not have well-developed precedent in this respect which creates uncertainty.
 - b. The same is true with respect to the scope of the arbitration clause. The House of Lords in *Fiona Trust* did away with the former literalist approach to the interpretation of arbitration clauses and established a presumption of “one stop adjudication.” Post *Enka v Chubb*, these principles will no longer find any application if the proper law of the arbitration agreement follows the foreign law expressly or impliedly chosen by the parties for the main contract. Parties will have to look instead to the relevant foreign law which may or may not contain any equivalent principles assisting in having a safe, comprehensive and efficient arbitration.
54. As to practical issues, the implication of *Enka v Chubb* is that where foreign law governs the arbitration clause and there is a challenge, foreign law evidence will now routinely be needed before the Commercial Court on issues of arbitrability and interpretation of the arbitration clause, including who is bound by it and the scope of such clause. While our courts are undoubtedly well versed in hearing evidence of foreign law, there is nothing to be gained in creating this possibility in every challenge to jurisdiction

³⁶ See for instance *Tamil Nadu Electricity Board v ST-CMS Electric Company Private Ltd* [2007] EWHC 1713 (Comm), Cooke J., giving short shrift to a party’s attempt to rely on the substantive *lex causae* (Indian law) to argue that a contractual dispute as to the applicable tariff payable for electricity was not arbitrable because of the existence of statutory mechanisms for the settlement of tariff disputes (on terms materially different from those agreed in the contract) under Indian law.

³⁷ For instance, on the facts of the *Tamil Nadu* case (supra), the Indian Supreme Court has very recently reasserted that the existence of statutory mechanisms for the settlement of tariff disputes does render a contractual tariff dispute unarbitrable under Indian law: see *Gujarat Civil Supplies v. Mahakali Foods* (31 October 2022, attached).

involving a foreign law contract, as the decision in *Enka* has done; and the resulting inefficiencies in additional time and costs are obvious and unnecessary.

55. Furthermore, there is evidence that the market practice in London favours arbitration rules providing that the law of the seat governs the arbitration agreement, which is the opposite solution to that retained in *Enka v Chubb*. Indeed, para. 11.9 of the Consultation Paper refers to Article 6 of the LMAA Terms 2021 and to Article 16.4 of the LCIA Rules 2021. Yet, importantly, those rules now find no application post *Enka*. Because the parties' choice of foreign substantive law for the main contract is to be treated as an implied choice made by the parties as the proper law of the arbitration agreement, that specific choice made in the contract itself will oust generic provisions in arbitral rules such as Article 6 of the LMAA Terms and Article 16.4 of the LCIA Rules.³⁸ This means that the problems created by *Enka* (noted above) cannot be resolved through amendments to arbitral rules, and can only be resolved through a statutory change.³⁹
56. Turning to the second rule in *Enka*, the effect of the Supreme Court's interpretation of section 4(5) of the Act⁴⁰ is that an implied choice of foreign law as the proper law of the arbitration agreement will automatically displace the non-mandatory provisions of the Act where the provision is "substantive" as opposed to being "procedural".⁴¹ The consequence is the potential for unnecessary litigation about which non-mandatory provisions are "substantive" or "procedural."
57. There is a genuine prospect of having to argue this distinction on potentially every non-mandatory provision of the Act in future cases.

³⁸ This is addressed in some more detail in the short attached note (entitled: 'Change to Arbitral Rules not an answer').

³⁹ Lord Hoffmann takes the contrary view that such amendments could be effective, where they would have the effect of constituting a specific agreement as to the law of the arbitration agreement which would prevail over the choice of law clause in the written document. But it is common ground that (i) there is doubt on the question, which in itself justifies dealing with this in the statute; and (ii) that it would in any event be unrealistic to expect international institutions such as the ICC or UNCITRAL to change their global rules to resolve what is an essentially English problem of very recent creation.

⁴⁰ Section 4(5) reads as follows: "*The choice of a law other than the law of England and Wales or Northern Ireland as the applicable law in respect of a matter provided for by a non-mandatory provision of this Part is equivalent to an agreement making provision about that matter. For this purpose an applicable law determined in accordance with the parties' agreement, or which is objectively determined in the absence of any express or implied choice, shall be treated as chosen by the parties.*"

⁴¹ This reverses the pre-*Enka v Chubb* position whereby that there had to be a choice of law with regard to the specific provision of the Act which the parties agree is not to apply (Longmore LJ in *C v D* [2008] Bus LR 943 at para. 19 (applied by Burton J in *NIOC v Crescent* [2016] 2 Lloyds' Rep. 146 at paras. 12-18)).

58. Yet, the distinction between what is “substantive” and what is “procedural” is a notoriously vexed question. Indeed, the Supreme Court itself in *Enka v Chubb* expressly recognised (in the words of the DAC) that it was an “*extremely difficult and complex*” one.
59. There are numerous examples of potentially problematic provisions which are not evidently “procedural” or “substantive”. Prime examples are section 48 (which deals with remedies) or section 49 (which deals with interest). While the Supreme Court in *Enka* stated that other provisions such as section 30 (which sets out the principle of *compétence-compétence* but is non-mandatory) and section 58 (which sets out the principle of finality of arbitral awards but is also non-mandatory) are “procedural”,⁴² those specific pronouncements must be *obiter* – sections 30 and 58 were not at issue in *Enka*. It is, with respect, not self-evident that those sections are “procedural”. The *Enka* court recognised that the concept of “separability” is not procedural but substantive, but it is by no means obvious why *compétence-compétence*, a principle closely entwined with separability, should be treated any differently. Similarly, it is not clear why the question of whether an award creates final substantive rights should not be considered as substantive. Under English law *res judicata* is considered to be partly procedural and partly substantive.⁴³
60. Third and relatedly, the all-important question of separability of the arbitration clause, provided for at section 7 of the Act, will now routinely be governed by foreign law as a result of the Court holding in *Enka v Chubb* that section 7 of the Act is a substantive (non-mandatory) provision.
61. The decision in respect of section 7 paired with the default applicability of the *lex contractus* means that unknown principles which may be adduced by way of foreign law evidence will govern this central pillar of international arbitration rather than the well-established principles developed by the English courts (most recently in *Fiona Trust*) to

⁴² *Enka* at para. 91-92.

⁴³ See *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46, [2014] AC 160 at paras 17-26 per Lord Sumption. All the other Justices agreed on his exposition of the law in relation to *res judicata*.

protect English-seated arbitrations. If one takes the example of a foreign law which does not recognise separability:⁴⁴

- a. Each and every allegation against the main contract - such as allegations of mistake, fraud or corruption - will fall to be entirely relitigated before the English Court as they will go to the heart of the arbitrators' jurisdiction as well, just as they were alleged to do in *Fiona Trust*.
 - b. The arbitration may have otherwise proceeded under arbitration rules which call for application of such principle (see e.g. ICC Rules 2021 Article 6(9); LCIA Rules 2020 Article 23.2; UNCITRAL Rules 2010 Article 23(1)). But the *Enka* decision will mean that one gets into difficult (and unnecessary) arguments on which regime (that of the chosen proper law of the arbitration agreement or the provisions of the chosen arbitration rules) will prevail; and/or whether the peculiar concept of (non)-separability under the chosen foreign law is mandatory or not under that foreign law?
62. This also creates conceptual issues in that it places separability on a par with matters of the scope of the arbitration agreement (e.g. scope *ratione materiae* or *ratione personae* of the arbitration clause) which everyone accepts may well be governed by a foreign law in an English-seated arbitration.
63. However, in all arbitration rules,⁴⁵ and in most countries' arbitration laws,⁴⁶ separability is treated as a part of the concept of *compétence-compétence*. Yet, it could be said that the very reason why a separate conflict of laws analysis is required for the arbitration agreement (separate from that which one would apply to the main contract) is separability; and the *Enka* Supreme Court took into account the effect of section 7 of the

⁴⁴ As was alleged to be the case of Iranian law in *NIOC v. Crescent* [2016] 2 Lloyds' Rep. 146, a case in which such attempts to relitigate were shut out applying *Fiona Trust*. That decision was specifically overruled by *Enka*.

⁴⁵ See e.g. UNCITRAL Model Law, Article 16; UNCITRAL Arbitration Rules 2010, Article 23(1); LCIA Rules 2020 Article 23.2; ICC Rules 2021, Article 6.

⁴⁶ e.g. in France the concept of separability is subsumed in the wider material rule (*règle matérielle*) of '*autonomie de la clause d'arbitrage*' which applies to every arbitration seated in France (and which the French courts apply whenever they hear an international arbitration matter, irrespective of its seat: see most recently the decision of the *Cour de Cassation* No 20-20.260 of 28 September 2022: *Kabab-Ji v Kout Food Group*). In Switzerland, Article 178(3) of the Swiss Private International Law Act postulates a material rule of Swiss law that "[t]he validity of an arbitration agreement may not be contested on the grounds that the main contract is invalid (...)". While it is generally thought that that provision could be contracted out of, that cannot happen through a general choice of law clause in the main contract.

Act in its conflict of laws analysis (at para. 40-41) only to reach a conclusion that would disapply that premise in a great number of cases.

64. To conclude, the Law of the Seat Default Rule is necessary to maintain the standing of London as a safe and leading seat for international arbitration.
65. The question is one of policy, and the policy reasons for the law of the seat being the default rule for the proper law of the arbitration agreement are overwhelming: by choosing London as a seat, the parties opt into the framework of a neutral and efficient seat, i.e. one that will protect their arbitration agreement and make it efficient. This includes *inter alia* pro-arbitration rules as to (i) arbitrability; (ii) scope (including the principle of one-stop adjudication); and (iii) separability. There is no sense in displacing that carefully constructed system automatically to the benefit of a foreign law of unknown content, while concurrently handing a new toolbox for recalcitrant parties to slow down or altogether scupper London-seated arbitrations.
66. There is a final question as to the remit of the proposed rule, i.e. should the Law of the Seat Default Rule apply only to arbitrations seated in England and Wales (which is the remit of the decision in *Enka*) or should it apply more broadly to every court application under the Act, including applications for the enforcement of foreign awards under section 103 of the Act. We are of the view that it should have that broader application. This would have the benefit of clarity and avoid further arguments as to the law applicable to the arbitration agreement in enforcement proceedings. It would 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 (which it is not). It would resolve problems such as those which arose in *Kabab-ji v Kout Food*⁴⁷, where in relation to a French-seated arbitration the English courts applied English law to the question of the validity of the arbitration clause (as being the implied choice of the parties as it was the applicable law of the main contract) rather than applying French law, resulting in different outcomes as to the validity of the award in England and in France.

⁴⁷ [2021] UKSC 48.

(D2) Consultation Question 28

67. Question 28 asks consultees whether they think that section 7 of the Act (separability of arbitration agreement) should be mandatory, and why.
68. For the reasons set out above, we regard this reform is an absolute minimum to address the effects of *Enka v Chubb* detailed above. It may not be necessary in practice once the Law of the Seat Default Rule is adopted, but it would be safer to adopt it.
69. Similarly, we are of the view that, while this may not be strictly necessary once the Law of the Seat Default Rule is adopted, section 4(5) should be amended to revert to the position which existed prior to the decision in *Enka*.

London, 15 December 2022

Annex 1

Further members of Brick Court Chambers referred in paragraph 1

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

Annex 2

List of Attachments

1. Papers delivered at the Brick Court Chambers Commercial Conference
2. Prof WW Park, *The Arbitrator's Jurisdiction to Determine Jurisdiction* in ICCA Congress Series, Vol 13 pp55-113
3. *Tomulgen Holdings* (Singapore CA)
4. Note of 7 June 2022 (Lord Hoffmann, Sir Richard Aikens, Salim Moollan KC, Ricky Diwan KC)
5. Salim Moollan KC, 'Some thoughts on Emmanuel Gaillard's "Vertus de la règle matérielle"' in *Liber Amicorum Emmanuel Gaillard* (to be published in 2023)
6. *Gujarat Civil Supplies v Mahakali Foods* (31 October 2022)
7. Note: 'Change to Arbitral Rules not an answer.'

Submitted to Law Commission Consultation: Review of the Arbitration Act 1996
Submitted on 2022-12-14 09:53:58

About you

What is your name?

Name:

[REDACTED]

What is the name of your organisation?

Enter the name of your organisation:

British Coffee Association

The British Coffee Association (BCA) represents, promotes and supports all aspects of the UK coffee trade and industry. Coffee traded into the UK is done so on the European Standard Contract for Coffee, produced by the European Coffee Federation. The majority of the arbitration cases heard under the arbitration clause within this contract are dealt with under the arbitration service operated by the BCA.

BCA was pleased to hear from the Law Commission, when it presented to the Federation of Commodities Association meeting in December 2021. This meeting was an opportunity to hear about the reasons for and the scope of the review of the Arbitration Act 1996 and BCA was pleased to hear that the intention of the Commission was to update the Act given there appeared to be a broad consensus from those spoken to at that point, and supported at the FCA meeting, that the Act has predominantly met its objectives and proved its usefulness in the 25 years since its introduction.

BCA will limit its response to those questions where we have a particular point to make or where we disagree with the proposed approach of the consultation.

Are you responding to this consultation in a personal capacity or on behalf of your organisation?

Response on behalf of organisation

If other, please state::

Please select your state or province

What is your email address?

Email:

[REDACTED]

What is your telephone number?

Telephone number:

[REDACTED]

If you want the information that you provide in response to this consultation to be treated as confidential, please explain to us why you regard the information as confidential. As explained in our privacy notice, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

Please explain to us why you regard the information as confidential:

Consultation questions

Consultation Question 1: 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?

Agree

Please share your views below.:

BCA would support the proposal within the consultation that confidentiality in arbitration is a matter best left to the courts to develop.

Consultation Question 2: We provisionally conclude that the Arbitration Act 1996 should not impose a duty of independence on arbitrators. Do you agree?

Agree

Please share your views below.:

BCA would agree that the Act should not import a duty of independence on arbitrators. Within the commodity sector it is imperative that arbitrators can be drawn from the industry as their industry technical and commercial knowledge & expertise is invaluable. Arbitrators are already required to act impartially under the Act as it currently stands. Furthermore under BCA arbitrations it is the association which appoints arbitrators rather than the parties. This therefore allows greater control over the number of arbitrations each arbitrator may be involved in at any point in time.

It is important also to recognise that for arbitrations requested in the soft commodity sector there are reasons for initiating an arbitration which can often also include an attempt to bring the other party to a negotiated settlement, and at the same time protecting any relevant time limits for claiming arbitration. Whilst it is much less frequently seen in coffee, other commodities will therefore often see arbitrations initiated but then withdrawn as the parties reach agreement.

Consultation Question 3: 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. Do you agree?

Agree

Please share your views below.:

We would support the Act providing that arbitrators have a continuing duty to disclose any circumstances which might reasonably give rise to justifiable doubts as to their impartiality. We would however advise against the Act seeking to provide greater detail on these circumstances or requiring that there be a single set of circumstances which are set out. Sufficient flexibility is required to ensure sector or commodity specific arbitration rules can continue to operate effectively.

Consultation Question 4: Should the Arbitration Act 1996 specify the state of knowledge required of an arbitrator's duty of disclosure, and why?

No

Please share your views below.:

We do not believe there is a need for the Act to specify the state of knowledge required of an arbitrator's duty of disclosure for the reasons set out in response to the previous question. These are dealt with, with the required degree of reference to the specific situations, by the sector specific arbitration rules.

Consultation Question 5: 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?

Other

Please share your views below.:

Q5: For the reasons previously set out we do not support the Act specifying the state of knowledge required under a duty of disclosure. If the Act was to be amended to require this then it is imperative that an exemption is granted for those sectors, including soft commodities. We would see this as in line with the view of the Supreme Court given in *Halliburton v Chubb*, 2020.

Consultation Question 6:

More broadly justified

Please share your views below.:

From a BCA perspective, whilst we have no particular views on protected characteristics, we would support those arbitral bodies that do include specific requirements – for example requirements which link to the need for arbitrators to be able to maintain an up-to-date and current knowledge of the industry in which they are arbitrating.

Consultation Question 7:

Disagree

Please share your views below.:

As per response to previous question

Consultation Question 8: Should arbitrators incur liability for resignation at all, and why?

Other

Please share your views below.:

[Link to response to questions 9 & 10](#)

Consultation Question 9: Should arbitrators incur liability for resignation only if the resignation is proved to be unreasonable?

Yes

Please share your views below.:

We would support the proposal that liability for resignation should only apply if the resignation is proved to be unreasonable.

Consultation Question 10: 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. Do you agree?

Agree

Please share your views below.:

We would support the proposal that arbitrator immunity should be extended to the costs of court proceedings, for example an application to remove an arbitrator.

Consultation Question 11: 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. Do you agree?

Not Answered

Please share your views below.:

No view

Consultation Question 12: 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. Do you agree?

Not Answered

Please share your views below.:

No view

Consultation Question 13: We provisionally propose that the Arbitration Act 1996 should stipulate the threshold for success in any summary procedure. Do you agree?

Not Answered

Please share your views below.:

No view

Consultation Question 14: 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. Do you agree?

Not Answered

Please share your views below.:

No view

Consultation Question 15: 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. Do you agree?

Not Answered

Please share your views below.:

No view

Consultation Question 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?

Not Answered

Please share your views below.:

No view

Consultation Question 17: 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. Do you agree?

Not Answered

Please share your views below.:

No view

Consultation Question 18: We provisionally conclude that the provisions of the Arbitration Act 1996 should not apply generally to emergency arbitrators. Do you agree?

Not Answered

Please share your views below.:

No view

Consultation Question 19: 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?

Not Answered

Please share your views below.:

No view

Consultation Question 20: Do you think that section 44(5) of the Arbitration Act 1996 should be repealed, and why?

Not Answered

Please share your views below.:

No view

Consultation Question 21:

Not Answered

Please share your views below.:

No view

Consultation Question 22:

Not Answered

Please share your views below.:

No view

Consultation Question 23: 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?

Not Answered

Please share your views below.:

No view

Consultation Question 24: We provisionally conclude that our proposed change to section 67 of the Arbitration Act 1996 would not require any similar change to section 103. Do you agree?

Not Answered

Please share your views below.:

No view

Consultation Question 25: 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. Do you agree?

Not Answered

Please share your views below.:

No view

Consultation Question 26: 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?

Not Answered

Please share your views below.:

No view

Consultation Question 27: 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?

Agree

Please share your views below.:

BCA would support the view of the Commission that Section 69 of the Act provides the right balance between competing interests in terms of allowing appeals against arbitral awards where that appeal is made on a point of law. We see no justifiable reason for the current section 69 to be amended to give either more or less flexibility to the parties. As is stated by the Commission, evidence over the past number of years does not show it to be a significant area of concern in either way.

Consultation Question 28: Do you think that section 7 of the Arbitration Act 1996 (separability of arbitration agreement) should be mandatory, and why?

Not Answered

Please share your views below.:

No view

Consultation Question 29: 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?

Not Answered

Please share your views below.:

No view

Consultation Question 30: 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?

Not Answered

Please share your views below.:

No view

Consultation Question 31: 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?

Yes

Please share your views below.:

We would agree that the Act, as currently written, is sufficiently broad to give direction on remote hearings and electronic documentation. Whilst all arbitral bodies should be encouraged to consider their procedures in respect of omissions, we feel it is not the role of the Act to address these issues more expressly than is currently the case.

Consultation Question 32: Do you think that section 39 of the Arbitration Act 1996 should be amended to refer to "orders" (rather than "awards"), and why?

Not Answered

Please share your views below.:

No view

Consultation Question 33: Do you think that section 39(1) of the Arbitration Act 1996 should be amended to refer to “remedies” (rather than “relief”), and why?

Not Answered

Please share your views below.:

No view

Consultation Question 34: 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 appellants was notified of the result of that request. Do you agree?

Not Answered

Please share your views below.:

No view

Consultation Question 35: 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?

Not Answered

Please share your views below.:

No view

Consultation Question 36: We provisionally propose that sections 85 to 87 of the Arbitration Act 1996 (on domestic arbitration agreements) should be repealed. Do you agree?

Not Answered

Please share your views below.:

No view

Consultation Question 37: Do you think that any of the suggestions discussed in Chapter 11 needs revisiting in full, and if so, why?

Please share your views below.:

No view

Consultation Question 38: 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?

Please share your views below.:

No view

From: [REDACTED]
Sent: 15 December 2022 12:34
To: arbitration
Subject: BRITISH INSURANCE LAW ASSOCIATION'S RESPONSE TO LAW COMMISSION'S CONSULTATION PAPER ON THE REVIEW OF THE ARBITRATION ACT 1996

Importance: High

Good afternoon,

This is a response provided by the British Insurance Law Association (BILA) with a view to providing some assistance in relation to questions posed by the Law Commission in its Consultation Paper on the Review of the Arbitration Act 1996. The response has been prepared by two members of the BILA Committee, but the answers given should not be taken as representing the views of the BILA membership as a whole or of all individual members of the BILA Committee

BILA is an independent non-profit making organisation. Its membership is drawn from insurers, insurance brokers and other intermediaries, academic lawyers, solicitors and barristers.

Consultation Question 1. 12.1 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? Paragraph 2.47

We agree. It is our experience that insurers and reinsurers particularly value confidentiality in arbitration. We prefer confidentiality and exceptions thereto to be developed by the courts.

Consultation Question 2. 12.2 We provisionally conclude that the Arbitration Act 1996 should not impose a duty of independence on arbitrators. Do you agree? Paragraph 3.44

We agree that the Arbitration Act should not impose a duty of independence on arbitrators and that the crucial consideration is the impartiality of an arbitrator.

Consultation Question 3. 12.3 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. Do you agree? Paragraph 3.51

If there is to be a statutory provision that arbitrators have a continuing duty to disclose any circumstances which might reasonably give rise to justifiable doubts as to their impartiality, then we consider it might be beneficial to specify explicitly in such a provision that this includes circumstances involving a connection between the arbitrator and a third-party funder of the arbitration. While there is little case law on this point, a connection, especially one of a financial nature, between an arbitrator and a third-party funder could raise justifiable doubts as to the arbitrator's impartiality.

Consultation Question 4. 12.4 Should the Arbitration Act 1996 specify the state of knowledge required of an arbitrator's duty of disclosure, and why? Paragraph 3.55

We do not think the state of knowledge required of an arbitrator should be specified. It should be left to the courts to develop. While this may impact negatively upon certainty in the short term, it is preferable for this to be formulated by the courts.

Consultation Question 5. 12.5 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? Paragraph 3.56

We would favour leaving this unspecified as indicated in our answer to CQ 4, however if the Arbitration Act (AA) were to specify the state of knowledge required of an arbitrator, we would suggest that the duty should be based not only on their actual knowledge but also on what they ought to know after making reasonable inquiries. We would propose that it should be the same test as applies to disclosures under the Insurance Act 2015, s 4(6) by substituting the word "insured" with the word "arbitrator" (an insured ought to know what should reasonably have been revealed by a reasonable search of information available to the insured (whether the search is conducted by making enquiries or by any other means). This would serve to promote consistency in the law.

Consultation Question 6. 12.6 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 by the House of Lords)? Paragraph 4.10

We are not entirely convinced that this is something that should be dealt with expressly by the Arbitration Act (see answer to CQ 7 below).

If the Law Commission does decide to include a provision on this, the broader approach might be preferable. Arbitrators do not just have to apply the law but also (and in the first place) determine the facts and assess which of them are material to the decision. Having, for example, a certain religious background might assist them to do so.

Consultation Question 7. 12.7 We provisionally propose that:

(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. Do you agree? Paragraph 4.36

We oppose discrimination on the basis of protected characteristics and would welcome a situation where the provisions in s.4 of the Equality Act 2010 were applicable to the appointment of arbitrators, however we do have a concern regarding the impact that such a provision might have when seeking to enforce an award under the New York Convention (NYC). By way of example if the arbitration agreement called for the dispute to be decided by "commercial men" and one of the arbitrators appointed is a woman. One of the parties objects to this appointment, which however is upheld under English law, by reason of the new provision. That party participates in the arbitration under protest and is unsuccessful. The other party attempts to enforce the award made in its favour in a NYC state the courts of which interpret the arbitration agreement literally, and read it as requiring exclusively male arbitrators. The award is not upheld. In other words, there is a risk that such a provision might be incompatible with the NYC. While this may be a risk worth running, it is still a risk which should be considered prior to adopting such a provision.

Consultation Question 8. 12.8 Should arbitrators incur liability for resignation at all, and why?

We are of the view that there are some circumstances in which arbitrators should incur liability for resigning, although these should be limited as there will be situations in which the arbitrator has little choice but to resign and should be able to do so without the fear of liability. Resignation can have a major impact on the parties in terms of costs and delays. Arbitrators often have to make findings of fact based on examining copious written evidence and (sometimes) hold oral hearings, which can be enormously expensive. Arbitrators should be discouraged from resigning unreasonably after these expenses have already been incurred, leaving the parties to undergo them again with a new arbitrator and further delays. If arbitrators were immune from any liability at all, there is the risk that arbitrators might abandon an arbitration to which they have already committed in order to enable them to take on a more lucrative one.

Consultation Question 9. 12.9 Should arbitrators incur liability for resignation only if the resignation is proved to be unreasonable? Paragraph 5.24

Yes, for the reasons given in our answer to CQ 8.

Consultation Question 10. 12.10 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. Do you agree? Paragraph 5.45

We agree.

Consultation Question 11. 12.11 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. Do you agree? Paragraph 6.25

We agree that there should be a specific provision in the AA for a summary procedure, unless the parties agree otherwise, as there is some reluctance on the part of some arbitrators to adopt a summary procedure in suitable situations. Provided the arbitral tribunal acts fairly in considering summary procedure, we do not anticipate that such a procedure will fall foul of the enforcement provisions of the New York Convention.

*Some attention should however be given to whether or not the tribunal's decision to adopt or not to adopt a summary procedure should be open to challenge. Our understanding of current law is as follows. If the tribunal decides to adopt a summary procedure, it is not clear whether this would open the door to a challenge under section 68 AA. It should be noted that legitimate case management decisions would not normally call into play s 68: see *BSG Resources Ltd v Vale SA* [2019] EWHC 2456 (Comm) and *Eric Wright Group v Manchester City Council* [2020] EWHC 2089 (Ch), but would this be treated as a case management decision? If the tribunal decides not to adopt a summary procedure, and the arbitration takes longer as a result, it is also unclear whether this decision would be subject to challenge under s 68. We do have precedents holding that delay by the tribunal in making its award does not alone amount to serious irregularity: *A v B* [2018] EWHC 2325 (Comm), [82]; *The Celtic Explorer* [2015] EWHC 1810 (Comm), [8], but would the tribunal's decision not to adopt a summary procedure be treated as analogous to this?*

Consultation Question 12. 12.12 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. Do you agree? Paragraph 6.29

We agree.

Consultation Question 13. 12.13 We provisionally propose that the Arbitration Act 1996 should stipulate the threshold for success in any summary procedure. Do you agree? Paragraph 6.31

We agree. It would be desirable for there to be a set threshold for success as that would promote consistency.

Consultation Question 14.12.14 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. Do you agree? Paragraph 6.35

We agree with this test being adopted as it has been tried and tested by the courts for some years and there is guidance from reported cases. We do, however, think that this test should only be applied if the parties expressly agree to it, as some foreign parties may not be so familiar with this test or willing to adopt it.

Consultation Question 15. 12.15 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. Do you agree? Paragraph 7.22

*We agree that it should be confirmed by amendment that s.44(2)(a) applies to the taking of evidence of witnesses by deposition only. We note that in *A and B v C, D and E* [2020] EWCA 409 (*A v C*), a case involving the proposed taking of evidence by way of deposition in aid of a foreign arbitration, there was confirmation that s.44(2) (a) of the AA conferred jurisdiction to make an order against a non-party witness.*

Consultation Question 16. 12.16 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? Paragraph 7.36

We are of the view that it would assist if s.44 were amended to confirm that its orders can be made against third parties as that would clarify the position.

Consultation Question 17. 12.17 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. Do you agree? Paragraph 7.39

We agree that third parties should have the usual rights to appeal as they did not agree to the terms of the arbitration, and they may have strong and justifiable reasons for not wishing to give evidence or oppose injunctions.

Consultation Question 18. 12.18 We provisionally conclude that the provisions of the Arbitration Act 1996 should not apply generally to emergency arbitrators. Do you agree? Paragraph 7.48

We agree as there are different rules under different arbitral regimes relating to emergency arbitrators. In our view, if parties choose to conduct their arbitrations according to the rules of an arbitral institution which provide for emergency arbitrators, then those rules should govern the emergency arbitrators. The appointment of emergency arbitrators does not preclude applications to a court in appropriate circumstances. Nevertheless, we consider that certain provisions of the Act should apply equally to emergency arbitrators as they do to any arbitrator, for example the provisions of s 29 on immunity from liability and s 33 on the tribunal's general duties.

Consultation Question 19. 12.19 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? Paragraph 7.51

We agree that the court should not administer a scheme of emergency arbitrators. That should be left to arbitral institutions.

Consultation Question 20. 12.20 Do you think that section 44(5) of the Arbitration Act 1996 should be repealed, and why? Paragraph 7.87

We consider that s.44(5) should be repealed for the reasons given in the Consultation Paper.

Consultation Question 21. 12.21 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. Paragraph 7.97

If an emergency arbitrator has been appointed and their order has been ignored, then we would favour allowing the emergency arbitrator to give permission for an application under s.44(4). This appears to us to be a practical measure and time saving measure.

Option 2 is clearer and more appropriate to deal with an urgent situation as it does not require a peremptory order to be made.

Consultation Question 22. 12.22 We provisionally propose that:

(1) where a party has participated in arbitral proceedings, and has objected to the jurisdiction of the arbitral tribunal; and

(2) 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. Do you agree? Paragraph 8.46 *We appreciate the arguments for treating such a jurisdictional challenge as an appeal rather than a rehearing, however we have some concerns that this may not be appropriate in all circumstances. While it is our understanding that new evidence that was not available at the time of the tribunal hearing may still be adduced and admissible if the hearing before the court were considered an appeal, we are concerned that treating it as an appeal would mean that the court would consider itself bound by the tribunal's findings of fact, which would not be desirable in a situation where, at law, the tribunal had no jurisdiction though they thought they did. In Azov Shipping Co v Baltic Shipping Co (No. 2) [1999] C.L.C. 1425, 1449 the court specifically noted: 'In the course of this judgment I have deliberately not referred to Mr Davies's findings. This has been a re-hearing of the issues and evidence has been adduced before me which was not before him.' The court must not be in a situation where it is hindered from making findings of fact that differ from those of the tribunal when that is appropriate. Perhaps a better way of addressing the issues rightly identified by the Law Commission might be to include in s 67 a provision that, in the circumstances indicated in CQ 22, in making its decision the court should take into account the submissions to and the arguments made before the tribunal, but is not bound by the tribunal's findings. After all, new evidence may genuinely emerge subsequent to the tribunal making its award, even where the party participated in the proceedings under protest.*

Consultation Question 23. 12.23 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? Paragraph 8.51

As indicated in our answer to CQ 22, we are not sure that it is appropriate to treat a s 67 challenge as an appeal rather than a rehearing. There should nevertheless be consistency between s 32 and s 67.

Consultation Question 24. 12.24 We provisionally conclude that our proposed change to section 67 of the Arbitration Act 1996 would not require any similar change to section 103. Do you agree? Paragraph 8.57 *Our understanding is that s 103 reflects the NY Convention and the wording should remain consistent with that Convention.*

Consultation Question 25. 12.25 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. Do you agree? Paragraph 8.64 *We agree.*

Consultation Question 26. 12.26 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? Paragraph 8.71

We agree that the arbitral tribunal should be able to make an award of costs in these circumstances. As this provision would effectively be granting a special jurisdiction to make an award of costs to a tribunal which does not have jurisdiction to make an award on the merits, we consider that this special jurisdiction should be limited to awarding reasonable costs, and that the award should be open to challenge for want of reasonableness.

Consultation Question 27. 12.27 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? Paragraph 9.53 *We agree that s.69 strikes the right balance and that there is no need for reform.*

Consultation Question 28. 12.28 Do you think that section 7 of the Arbitration Act 1996 (separability of arbitration agreement) should be mandatory, and why? Paragraph 10.11

We agree that there are arguments for making it mandatory, especially as the parties can still agree, should they so wish, that any questions as to validity of the underlying contract are to be decided by a court rather than an arbitral tribunal. If they believe that the arbitral agreement itself is invalid, they also have available pathways to challenge the tribunal's jurisdiction.

Consultation Question 29. 12.29 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? Paragraph 10.17

We agree that there should be an appeal from a decision of the court under s.9 and that the drafting error should be confined to history.

Consultation Question 30. 12.30 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? Paragraph 10.34

We do not see the reasons for reducing the criteria under s.32 and s.45.

As the Commission itself noted, parties do not appear to have experienced any difficulty fulfilling these criteria in practice.

If the Commission were to proceed with reducing the criteria, we would be against repealing s 32(2)(b)(iii), although, in line with the principle of minimalist court intervention, it could be reformulated as a requirement to state the reasons why the issue should be decided by a court rather than an arbitral tribunal. This would mean that s 32(3) would remain necessary, but the two provisions could be combined. Section 45(3) does not just require the application to set out how the requirements in 45(2)(b) are met. It also requires the application to "identify the question of law to be determined". Therefore s 45(3) should not be repealed.

Consultation Question 31. 12.31 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? Paragraph 10.42

We do not consider this is necessary as arbitral tribunals have wide powers regarding procedural matters and in practice remote hearings and electronic documentation have been used. We are not aware of any problems having arisen so far due to the absence of an explicit provision.

Consultation Question 32. 12.32 Do you think that section 39 of the Arbitration Act 1996 should be amended to refer to "orders" (rather than "awards"), and why? Paragraph 10.47

We agree as this may reduce confusion.

Consultation Question 33. 12.33 Do you think that section 39(1) of the Arbitration Act 1996 should be amended to refer to "remedies" (rather than "relief"), and why? Paragraph 10.49

We agree that it would be appropriate to refer to "remedies" for consistency of language used.

Consultation Question 34. 12.34 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? Paragraph 10.59

We agree

Consultation Question 35. 12.35 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? Paragraph 10.64

We agree

Consultation Question 36. 12.36 We provisionally propose that sections 85 to 87 of the Arbitration Act 1996 (on domestic arbitration agreements) should be repealed. Do you agree? Paragraph 10.69

We agree

Consultation Question 37. 12.37 Do you think that any of the suggestions discussed in Chapter 11 needs revisiting in full, and if so, why? Paragraph 11.5

No.

Consultation Question 38. 12.38 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? Paragraph 11.7

No.

Please acknowledge safe receipt.

Thank you.

Kind regards,

[Redacted signature]

British Insurance Law Association

Peershaws
Berwyk Hall Court
White Colne
CO6 2QB



[Redacted contact information]

Web site: www.bila.org.uk

BILA DOES NOT GIVE ADVICE TO THE GENERAL PUBLIC, NOR DOES IT MAKE RECOMMENDATIONS AND/OR ENDORSE LAW FIRMS AND OTHER PROFESSIONALS WHO MAY FROM TIME TO TIME BE MEMBERS OF BILA.

If you wish to be deleted from the British Insurance Law Association contact list, please respond to us through a correspondence channel of your choice as included in this email. Emails sent via the internet can be altered by third parties; we therefore cannot assume any responsibility for changes made to this message after it was sent. Please also note that the information, including attachments, in this email is strictly confidential and solely intended for the addressee named above. If you are neither the intended recipient nor an employee, nor agent responsible for delivering this message to the intended recipient, we hereby notify you that any form of unauthorised use, publication, reproduction, copying or disclosure of this email's content is not permitted. If you have received this communication in error, please notify the sender and delete the email from your computer system.

Response ID ANON-PT57-RUKH-A

Submitted to Law Commission Consultation: Review of the Arbitration Act 1996
Submitted on 2022-12-14 14:21:46

About you

What is your name?

Name:

[REDACTED]

What is the name of your organisation?

Enter the name of your organisation:

Bryan Cave Leighton Paisner LLP

Are you responding to this consultation in a personal capacity or on behalf of your organisation?

Response on behalf of organisation

If other, please state::

What is your email address?

Email:

[REDACTED]

What is your telephone number?

Telephone number:

[REDACTED]

If you want the information that you provide in response to this consultation to be treated as confidential, please explain to us why you regard the information as confidential. As explained in our privacy notice, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

Please explain to us why you regard the information as confidential:

Consultation questions

Consultation Question 1: 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?

Disagree

Please share your views below.:

We are of the opinion that the Act should include provisions dealing with confidentiality.

Confidentiality is one of the major selling points of arbitration. Users of arbitration place much importance on privacy and confidentiality and many assume that confidentiality is a feature of commercial arbitration in England. Whilst most UK-based arbitration practitioners are familiar with the common law principle of arbitral confidentiality (and its limitations), international parties and practitioners may not be. For them, the absence of an express provision in the Act addressing confidentiality is a notable omission.

The review of the Act is an opportunity to improve accessibility for all users – not just UK- based practitioners. International lawyers, international parties and international tribunals should be confident that the Act provides a comprehensive guide as to the conduct of commercial arbitration in accordance with English law.

An overwhelming majority (83%) of respondents to our Annual Arbitration survey thought that the Act should address the issue of confidentiality. 46% were in favour of codifying the duty of confidentiality. 37% thought the Act should include a general principle of confidentiality and set out the grounds on which the parties may derogate from that principle.

We recognise the difficulties in codifying a duty of confidentiality. However, we think that the inclusion of a statement of general principle of confidentiality in arbitration, reflecting the common law position, would be a positive reform and reflective of the expectations of end users. A statement of general principle would not preclude further development by case law.

The provision could allow the parties to opt out or to agree alternative provisions. This has the advantage of prompting parties to consider the question

of confidentiality and to decide whether the default provision in the Act is appropriate for them.

Proposed wording for the provision (based on Article 30 of the LCIA Rules, which reflects the English common law position).

“The parties are free to agree confidentiality provisions that will apply. Unless otherwise agreed, all awards in the arbitral proceedings under the arbitration agreement, together with all materials in the proceedings created for the purpose of arbitration and all other documents produced by another party in the proceedings not otherwise in the public domain, shall be confidential. The general principle of confidentiality shall not apply in circumstances where disclosure may be required of a party by legal duty, to protect or pursue a legal right, to enforce or challenge an award in legal proceedings before a state court or other legal authority or in the interests of justice or public order.”

Consultation Question 2: We provisionally conclude that the Arbitration Act 1996 should not impose a duty of independence on arbitrators. Do you agree?

Agree

Please share your views below.:

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.

We think it is important that the Act reflects the fact that different fields of arbitration have different customs and practices regarding multiple appointments. We think that this is best achieved by focusing on a duty of disclosure rather than introducing a duty of independence.

It is also important to ensure that arbitrations run smoothly and that parties to arbitrations receive enforceable awards. A duty of disclosure should require all arbitrators, before their appointment, to disclose any circumstances known to them likely to give rise to any justifiable doubts as to their impartiality or independence. We agree that this duty should be a continuing obligation during the course of the arbitration.

We think that the duty of disclosure should be based on an arbitrator’s knowledge after making reasonable enquiries (in line with IBA Guidelines on Conflicts of Interest in International Arbitration) and that any doubt as to whether a relationship should be disclosed should be resolved in favour of disclosure.

We also think that the Act should set out the consequences of breach of the duty of disclosure. We think that breach of the duty of disclosure, in circumstances where the fact not disclosed would or might give rise to justifiable doubts as to the impartiality of the arbitrator, should be a ground for an application to the court to remove an arbitrator under section 24.

Consultation Question 3: 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. Do you agree?

Agree

Please share your views below.:

See response to Q.2.

We think that the duty of disclosure should require all arbitrators, before their appointment, to disclose any circumstances known to them likely to give rise to any justifiable doubts as to their impartiality or independence. We agree that this duty should be a continuing obligation during the course of the arbitration.

Consultation Question 4: Should the Arbitration Act 1996 specify the state of knowledge required of an arbitrator’s duty of disclosure, and why?

Yes

Please share your views below.:

See response to Q.2.

We think that the duty of disclosure should be based on an arbitrator’s knowledge after making reasonable enquiries (in line with IBA Guidelines on Conflicts of Interest in International Arbitration) and that any doubt as to whether a relationship should be disclosed should be resolved in favour of disclosure.

We also think that the Act should set out the consequences of breach of the duty of disclosure. We think that breach of the duty of disclosure, in circumstances where the fact not disclosed would or might give rise to justifiable doubts as to the impartiality of the arbitrator, should be a ground for an application to the court to remove an arbitrator under section 24.

Consultation Question 5: 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?

What they ought to know

Please share your views below.:

See response to Q.2.

We think that the duty of disclosure should be based on an arbitrator's knowledge after making reasonable enquiries (in line with IBA Guidelines on Conflicts of Interest in International Arbitration) and that any doubt as to whether a relationship should be disclosed should be resolved in favour of disclosure.

We also think that the Act should set out the consequences of breach of the duty of disclosure. We think that breach of the duty of disclosure, in circumstances where the fact not disclosed would or might give rise to justifiable doubts as to the impartiality of the arbitrator, should be a ground for an application to the court to remove an arbitrator under section 24.

Consultation Question 6:

More broadly justified

Please share your views below.:

We question whether this is a significant issue in practice and whether there is a need to amend the Act.

We think it is important that the Act respects party autonomy in arbitrator selection, particularly cases where the parties are from a particular community and choose to refer their disputes to an arbitrator/arbitrators from that community.

We think that the requirement of a protected characteristic should be enforceable in cases where is a genuine occupational requirement – as per the decision of the House of Lords in *Hashwani v Jivraj*. We think this test strikes the right balance between party autonomy in arbitrator selection and public policy to prevent discrimination.

We think the phrase “proportionate means of achieving a legitimate aim” is quite vague and that lack of certainty is undesirable when it comes to resolving arbitrator challenges.

We do not think that the Act should include the “proportionate means” requirement. We think that this imports an additional external assessment of the parties’ choice of arbitrator and an unnecessary fetter on party autonomy in arbitrator selection. In our view, if the parties have agreed that an arbitrator should have a specific characteristic, and the “genuine occupational requirement” test is met, that should be sufficient.

Consultation Question 7:

Other

Please share your views below.:

See response to Q.6.

We think the phrase “proportionate means of achieving a legitimate aim” is quite vague and that lack of certainty is undesirable when it comes to resolving arbitrator challenges.

We do not think that the Act should include the “proportionate means” requirement. We think that this imports an additional external assessment of the parties’ choice of arbitrator and an unnecessary fetter on party autonomy in arbitrator selection. In our view, if the parties have agreed that an arbitrator should have a specific characteristic, and the “genuine occupational requirement” test is met, that should be sufficient.

Consultation Question 8: Should arbitrators incur liability for resignation at all, and why?

Other

Please share your views below.:

We think that arbitrators should incur liability for resignation only if the resignation has no reasonable justification.

Consultation Question 9: Should arbitrators incur liability for resignation only if the resignation is proved to be unreasonable?

Yes

Please share your views below.:

Consultation Question 10: 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. Do you agree?

Agree

Please share your views below.:

We agree that arbitrator immunity should extend to the costs of court proceedings arising out of the arbitration. We think that the phrase "court proceedings arising out of the arbitration" could give rise to uncertainty as to the scope of the immunity. We think the drafting should make it clear that the immunity extends to all costs howsoever and wheresoever arising.

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.

Consultation Question 11: 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. Do you agree?

Agree

Please share your views below.:

One of the perceived limitations of arbitration is the absence of summary disposition, which would allow the rapid adjudication of claims in appropriate cases. We think that the introduction of an express power to adopt a summary procedure would be a positive and welcome amendment to the Act. It would empower arbitrators to make prompt decisions on claims and defences in appropriate cases, avoiding unnecessary delay and expense. This would make arbitration a more attractive option for a range of business sectors, particularly the banking and finance sector.

Whilst sections 33 and 34 give the tribunal a broad discretion to adopt procedures suitable to the circumstances of a particular case, tribunals are often reluctant to adopt summary procedures on account of due process concerns. The introduction of an express power would address this concern and allow tribunals to make greater use of the procedural flexibility of arbitration in appropriate cases.

We agree that, to preserve party autonomy and avoid due process concerns, such a provision should be non-mandatory.

We think that the provision should extend in scope to any claim, defence or issue in an arbitration.

Consultation Question 12: 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. Do you agree?

Agree

Please share your views below.:

To preserve flexibility, we think that the timing of any application and the summary procedure to be adopted should be a matter for the arbitral tribunal to determine, in consultation with the parties.

Consultation Question 13: We provisionally propose that the Arbitration Act 1996 should stipulate the threshold for success in any summary procedure. Do you agree?

Agree

Please share your views below.:

We think it is important that the Act specify a clear threshold test to strike a balance between: (a) obtaining efficient awards in cases where claims or defences are evidently unmeritorious, and (b) preventing unmeritorious applications.

Consultation Question 14: 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. Do you agree?

Disagree

Please share your views below.:

We think that the threshold test should be one that is familiar to users of arbitration. For that reason, we think that the Act should use the same phrase as has been adopted by some arbitral rules "manifestly without merit" as the threshold test rather than the "no real prospect of success" test used in court proceedings in England and Wales.

We do not think that the threshold test should include the additional requirement that "there is no other compelling reason for it to continue to a full hearing". Whilst there may be a rationale for this in court proceedings, where matters of public interest may be determined, we do not think it necessary for summary procedure in arbitration.

Consultation Question 15: 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. Do you agree?

Other

Please share your views below.:

We think that all powers relating to the taking of evidence of witnesses (those both within the UK and outside the UK) should be dealt with in the same section of the Act rather than being split between sections 43 and 44.

We suggest that section 44(2)(a) be incorporated into section 43. Section 43 could then be re-drafted to set out the different procedures relating to the taking of evidence from witnesses in circumstances where: (a) the arbitration and witness are both in UK; (b) the arbitration is in the UK and the witness is abroad; and (c) the arbitration is abroad and the witness in the UK. Section 43 could also clarify whether the court has any residual jurisdiction as regards the taking of evidence of witnesses if both the arbitration and the witness are abroad.

We think this would improve the clarity and accessibility of the Act.

Consultation Question 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?

Yes

Please share your views below.:

In our view the history of arbitration in England; the legislative intentions of the Act and section 44; and a purposive and textual analysis of section 44 all point to the conclusion that section 44 applies to third parties to arbitration.

Covering third parties to arbitration is one of the main reasons why, internationally, national courts have a jurisdiction to order interim measures in support of arbitration. However, court decisions in *Cruz City v Unitech* [2014] EWHC 3704 (Comm) and *DTEK Trading S.A. v Morozov* [2017] EWHC 94 (Comm) have restricted the application of section 44 and created a damaging lacuna in which court powers are not available against third parties,

As tribunals are also fundamentally powerless against third parties to arbitration, this lacuna is one that could be abused, damaging England's reputation as a seat for arbitration and a supportive jurisdiction.

The lacuna has been created by judicial interpretation of section 44 that, in our view, places undue emphasis on textual references to the concept of privity rather than on role of the courts to facilitate the arbitration process and to aid tribunals to attain that purpose.

The decision in *A v C* [2020] EWCA Civ 409, has gone some way to address this, supporting an interpretation that it has powers under section 44 as against third parties. However, the lacuna technically remains as the Court of Appeal declined to confirm in *A v C* whether its ratio with respect to section 44(2)(a) should apply also with respect to its other powers under section 44.

We think that this could be addressed and, future issues averted, by an amendment to section 44 making it clear that court orders can be made against third parties.

Consultation Question 17: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 18: We provisionally conclude that the provisions of the Arbitration Act 1996 should not apply generally to emergency arbitrators. Do you agree?

Agree

Please share your views below.:

Consultation Question 19: 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?

Agree

Please share your views below.:

Consultation Question 20: Do you think that section 44(5) of the Arbitration Act 1996 should be repealed, and why?

Yes

Please share your views below.:

Our initial view was that repealing section 44(5) would be a significant step – given that this is one of the key provisions that balances the role of the court and the role of the tribunal – and that the *Gerald Metals* problem (to the extent it exists) could be addressed by amending section 44(5) to clarify that recourse to the courts is not precluded in circumstances where parties have agreed emergency arbitrator provisions. However, having read the proposal, we found the reasoning persuasive.

We agree that section 44(5) does seem redundant in light of the restrictions of sections 44(3) and (4) and note that there is no equivalent provision in the UNCITRAL Model Law or in the arbitration laws of Scotland or Hong Kong. Further, 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. We agree that this tips the balance in favour of the repeal of section 44(5).

Consultation Question 21:

Permission under section 44

Please share your views below.:

We feel that an amendment which allows an emergency arbitrator to give permission for an application under section 44(4) provides a more direct, and therefore more cost effective, solution for enforcing orders of emergency arbitrators.

Consultation Question 22:

Agree

Please share your views below.:

We support this proposal.

We think that there would be sufficient protection for the rights of the party challenging jurisdiction to limit the court process to an appeal. This would represent support for arbitrators and the arbitral process. Given the terms of sections 30-32 and section 73, a party that wants to challenge jurisdiction would effectively be forced to put its case fully at the early stages within the arbitration, or potentially for an early court review under section 32. Therefore, everyone would know – subject only to the possibility of a section 67 appeal (not de novo rehearing) – that issues of the tribunal's jurisdiction had been decided. We think that this would be a positive development.

Consultation Question 23: 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?

Yes

Please share your views below.:

See response to Q.22.

Consultation Question 24: We provisionally conclude that our proposed change to section 67 of the Arbitration Act 1996 would not require any similar change to section 103. Do you agree?

Agree

Please share your views below.:

Consultation Question 25: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 26: 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?

Agree

Please share your views below.:

Consultation Question 27: 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?

Agree

Please share your views below.:

In our experience, the impact of section 69 in English seated arbitration is limited as many parties choose to exclude the right of appeal on a point of law – either by express words in their arbitration agreement or by the adoption of institutional rules that exclude a right of appeal.

That said, we think Section 69 is a positive feature of the Act and an important safeguard in cases where an arbitral tribunal gets the law wrong.

We think that the existing, limited and controlled, right to appeal to the court on a question of law under section 69 strikes the right balance and agree that no reform is required.

Consultation Question 28: Do you think that section 7 of the Arbitration Act 1996 (separability of arbitration agreement) should be mandatory, and why?

Yes

Please share your views below.:

We think that this would provide greater levels of certainty and would be consistent with the developing case law and practice.

Consultation Question 29: 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?

Disagree

Please share your views below.:

We are concerned that allowing appeals on stay of proceeding applications will create new avenues for complicating multi-jurisdictional cases and slowing down the arbitral process. The court could perhaps be given enhanced powers to ensure that the relevant arbitration is pursued timeously or to impose conditions, but we are concerned that allowing appeals gives mischievous respondents too much scope to wage guerrilla warfare on the arbitral process.

Consultation Question 30: 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?

Yes

Please share your views below.:

We think that this would simplify the process.

Consultation Question 31: 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?

Yes

Please share your views below.:

We think that this might help to close off objections from courts in jurisdictions in which enforcement of awards are sought to have an express right to move to remote hearings and electronic documentation. It would also be consistent with attempts to make the conduct of arbitration greener, by reducing the use of paper and the need for flights.

Consultation Question 32: Do you think that section 39 of the Arbitration Act 1996 should be amended to refer to "orders" (rather than "awards"), and why?

Yes

Please share your views below.:

This would be more consistent.

Consultation Question 33: Do you think that section 39(1) of the Arbitration Act 1996 should be amended to refer to "remedies" (rather than "relief"), and why?

Yes

Please share your views below.:

This would improve clarity.

Consultation Question 34: 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?

Agree

Please share your views below.:

We think that this would be a welcome clarification that reflects the recent case law. We think that additional guidance on the meaning of “material” would also be welcome. We suggest that the wording be amended to “material to the outcome of the application or appeal”.

Consultation Question 35: 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?

Agree

Please share your views below.:

Consultation Question 36: We provisionally propose that sections 85 to 87 of the Arbitration Act 1996 (on domestic arbitration agreements) should be repealed. Do you agree?

Agree

Please share your views below.:

Consultation Question 37: Do you think that any of the suggestions discussed in Chapter 11 needs revisiting in full, and if so, why?

Please share your views below.:

We think there are two areas that should be given further consideration.

Whether the Act should include a default rule that the governing law of the arbitration agreement should be the law of the seat of the arbitration.

Whether the Act should address third party funding and specifically the requirement to disclose the existence of third-party funding.

Consultation Question 38: 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?

Please share your views below.:

Response ID ANON-PT57-RUBK-4

Submitted to Law Commission Consultation: Review of the Arbitration Act 1996
Submitted on 2022-12-14 16:24:59

About you

What is your name?

Name:
Andrew Burr

What is the name of your organisation?

Enter the name of your organisation:
16 Marina One Chambers

Are you responding to this consultation in a personal capacity or on behalf of your organisation?

Personal response

If other, please state::

What is your email address?

Email:
[REDACTED]

What is your telephone number?

Telephone number:
[REDACTED]

If you want the information that you provide in response to this consultation to be treated as confidential, please explain to us why you regard the information as confidential. As explained in our privacy notice, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

Please explain to us why you regard the information as confidential:

Consultation questions

Consultation Question 1: 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?

Disagree

Please share your views below.:

I believe that a statutory requirement is now required

Consultation Question 2: We provisionally conclude that the Arbitration Act 1996 should not impose a duty of independence on arbitrators. Do you agree?

Disagree

Please share your views below.:

Given the case law, I believe that a statutory duty is now required

Consultation Question 3: 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. Do you agree?

Agree

Please share your views below.:

Could not agree more

Consultation Question 4: Should the Arbitration Act 1996 specify the state of knowledge required of an arbitrator's duty of disclosure, and why?

Yes

Please share your views below.:

See following answer

Consultation Question 5: 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?

What they ought to know

Please share your views below.:

I believe reasonable enquiries are necessary

Consultation Question 6:

More broadly justified

Please share your views below.:

I concur with the House of Lords

Consultation Question 7:

Disagree

Please share your views below.:

Party autonomy should remain paramount

Consultation Question 8: Should arbitrators incur liability for resignation at all, and why?

Other

Please share your views below.:

It all depends upon the circumstances!

Consultation Question 9: Should arbitrators incur liability for resignation only if the resignation is proved to be unreasonable?

Yes

Please share your views below.:

Not if resignation was reasonable

Consultation Question 10: 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. Do you agree?

Agree

Please share your views below.:

Arbitrators must take the rough with the smooth

Consultation Question 11: 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. Do you agree?

Agree

Please share your views below.:

Summary procedures should be expressly provided for by statute

Consultation Question 12: 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. Do you agree?

Agree

Please share your views below.:

Procedural matters should always be for the arbitrary tribunal

Consultation Question 13: We provisionally propose that the Arbitration Act 1996 should stipulate the threshold for success in any summary procedure. Do you agree?

Agree

Please share your views below.:

The threshold should mirror that in litigation

Consultation Question 14: 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. Do you agree?

Agree

Please share your views below.:

Absolutely! Why permit any such defence to proceed?

Consultation Question 15: 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. Do you agree?

Agree

Please share your views below.:

Clarity is required

Consultation Question 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?

No

Please share your views below.:

Party autonomy should prevail

Consultation Question 17: 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. Do you agree?

Agree

Please share your views below.:

My previous answer is repeated

Consultation Question 18: We provisionally conclude that the provisions of the Arbitration Act 1996 should not apply generally to emergency arbitrators. Do you agree?

Disagree

Please share your views below.:

Why ever not?

Consultation Question 19: 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?

Agree

Please share your views below.:

Leave the courts out of this!

Consultation Question 20: Do you think that section 44(5) of the Arbitration Act 1996 should be repealed, and why?

Other

Please share your views below.:

No idea what it says!

Consultation Question 21:

Peremptory order

Please share your views below.:

Emergency arbitrators' orders need some teeth!

Consultation Question 22:

Agree

Please share your views below.:

The arbitral tribunal should control procedural matters

Consultation Question 23: 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?

Yes

Please share your views below.:

Keep re-hearings to a minimum

Consultation Question 24: We provisionally conclude that our proposed change to section 67 of the Arbitration Act 1996 would not require any similar change to section 103. Do you agree?

Other

Please share your views below.:

Not got the provisions to hand

Consultation Question 25: 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. Do you agree?

Agree

Please share your views below.:

It's a useful additional remedy

Consultation Question 26: 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?

Agree

Please share your views below.:

If arbitral proceedings are commenced without justification, this should be punished in costs

Consultation Question 27: 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?

Agree

Please share your views below.:

Settled law

Consultation Question 28: Do you think that section 7 of the Arbitration Act 1996 (separability of arbitration agreement) should be mandatory, and why?

Yes

Please share your views below.:

Settled law

Consultation Question 29: 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?

Agree

Please share your views below.:

Rogue judges need to be subject to control

Consultation Question 30: 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?

Yes

Please share your views below.:

Keep it simple!

Consultation Question 31: 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?

Yes

Please share your views below.:

The Pandemic experience and the benefits of remote procedural (not substantive) hearings should be encouraged

Consultation Question 32: Do you think that section 39 of the Arbitration Act 1996 should be amended to refer to "orders" (rather than "awards"), and why?

Yes

Please share your views below.:

In order to bring clarity

Consultation Question 33: Do you think that section 39(1) of the Arbitration Act 1996 should be amended to refer to "remedies" (rather than "relief"), and why?

Yes

Please share your views below.:

Modern usage

Consultation Question 34: 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?

Agree

Please share your views below.:

That is more just

Consultation Question 35: 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?

Agree

Please share your views below.:

Conditional leave can concentrate the mind of the appellant

Consultation Question 36: We provisionally propose that sections 85 to 87 of the Arbitration Act 1996 (on domestic arbitration agreements) should be repealed. Do you agree?

Other

Please share your views below.:

Agnostic

Consultation Question 37: Do you think that any of the suggestions discussed in Chapter 11 needs revisiting in full, and if so, why?

Please share your views below.:

Agnostic

Consultation Question 38: 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?

Please share your views below.:

No; a comprehensive review of my concerns

Response ID ANON-PT57-RUBP-9

Submitted to Law Commission Consultation: Review of the Arbitration Act 1996
Submitted on 2022-12-15 12:38:54

About you

What is your name?

Name:
Mark Campbell

What is the name of your organisation?

Enter the name of your organisation:
University of Bristol Law School

Are you responding to this consultation in a personal capacity or on behalf of your organisation?

Personal response

If other, please state::

What is your email address?

Email:
[REDACTED]

What is your telephone number?

Telephone number:
[REDACTED]

If you want the information that you provide in response to this consultation to be treated as confidential, please explain to us why you regard the information as confidential. As explained in our privacy notice, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

Please explain to us why you regard the information as confidential:

Consultation questions

Consultation Question 1: 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?

Agree

Please share your views below.:

I don't think much has changed since the DAC report prior to the 1996 Act. And given that the exceptions to confidentiality are the most difficult aspects of the law in this area confidentiality is better served by the flexibility afforded by the common law.

Consultation Question 2: We provisionally conclude that the Arbitration Act 1996 should not impose a duty of independence on arbitrators. Do you agree?

Other

Please share your views below.:

No strong views either way.

Consultation Question 3: 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. Do you agree?

Agree

Please share your views below.:

It would remove any doubt and is, I would say, a matter of common sense.

Consultation Question 4: Should the Arbitration Act 1996 specify the state of knowledge required of an arbitrator's duty of disclosure, and why?

No

Please share your views below.:

While further detail in the statute might seem desirable I am inclined to think that a point such as this is better left to the courts where the found can be on the substance of matter.

Consultation Question 5: 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?

What they ought to know

Please share your views below.:

On objective approach to this would fit better with the general approach to such questions within the law more generally. It would also evidential challenges around proving what the actual state of mind was or was not.

Consultation Question 6:

Not Answered

Please share your views below.:

No particular view here.

Consultation Question 7:

Not Answered

Please share your views below.:

No particular view here.

Consultation Question 8: Should arbitrators incur liability for resignation at all, and why?

No liability for resignation

Please share your views below.:

The general principle should be no liability. I would say the possibility an arbitrator might resign is a risk parties take when agreeing to arbitration.

Consultation Question 9: Should arbitrators incur liability for resignation only if the resignation is proved to be unreasonable?

No

Please share your views below.:

I would only allow for liability where the resignation is clearly as a result of the arbitrator's dishonest or bad faith conduct. That seems to be a higher threshold than unreasonableness.

Consultation Question 10: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 11: 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. Do you agree?

Agree

Please share your views below.:

Another way of recognising the importance of party autonomy and procedural flexibility,

Consultation Question 12: 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. Do you agree?

Agree

Please share your views below.:

Yes, that fits with the empowerment of arbitral tribunals and the exercise of their discretion.

Consultation Question 13: We provisionally propose that the Arbitration Act 1996 should stipulate the threshold for success in any summary procedure. Do you agree?

Agree

Please share your views below.:

No particular view here.

Consultation Question 14: 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. Do you agree?

Agree

Please share your views below.:

In the abstract and in principle I would say 'manifestly without merit'. But given that the English courts may have to address this, I would support 'no real prospect of success' on pragmatic grounds.

Consultation Question 15: 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. Do you agree?

Agree

Please share your views below.:

Agree for reasons set out in 7.23 to 7.25.

Consultation Question 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?

Yes

Please share your views below.:

Yes, for the sake of clarity.

Consultation Question 17: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 18: We provisionally conclude that the provisions of the Arbitration Act 1996 should not apply generally to emergency arbitrators. Do you agree?

Not Answered

Please share your views below.:

No particular view here.

Consultation Question 19: 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?

Not Answered

Please share your views below.:

No particular view here.

Consultation Question 20: Do you think that section 44(5) of the Arbitration Act 1996 should be repealed, and why?

Not Answered

Please share your views below.:

No particular view here.

Consultation Question 21:

Not Answered

Please share your views below.:

No particular view here.

Consultation Question 22:

Agree

Please share your views below.:

I don't think it is likely to affect the outcomes in cases but if it is stated to be an 'appeal' it focuses the issues for the court and enables the jurisdictional issues to be assessed more efficiently.

Consultation Question 23: 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?

Yes

Please share your views below.:

Agree that there should be consistent approaches between s 32 and s 67.

Consultation Question 24: We provisionally conclude that our proposed change to section 67 of the Arbitration Act 1996 would not require any similar change to section 103. Do you agree?

Agree

Please share your views below.:

In the interests of clarity and for reasons given in 8.54 to 8.56 it makes sense not to interfere with those provisions which give effect to NYC 1958.

Consultation Question 25: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 26: 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?

Agree

Please share your views below.:

Given the consensual nature of the tribunal's jurisdictions, there needs to be some legal rule to this effect if the tribunal reaches the conclusion it has no jurisdiction. It allows the tribunal with no jurisdiction to draw a line under the matter.

Consultation Question 27: 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?

Agree

Please share your views below.:

Consultation Question 28: Do you think that section 7 of the Arbitration Act 1996 (separability of arbitration agreement) should be mandatory, and why?

Yes

Please share your views below.:

Sometimes a default rule (reflecting the importance of party autonomy) is clearly needed as part of a pro-arbitration approach. But here a default rule (ie not mandatory) is likely to be produce anti- rather than pro-arbitration consequences.

Consultation Question 29: 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?

Agree

Please share your views below.:

Consultation Question 30: 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?

Other

Please share your views below.:

No particular view here.

Consultation Question 31: 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?

Yes

Please share your views below.:

Yes, provide clarity and avoid any suggestion at a later point the matter was not within tribunal's power.

Consultation Question 32: Do you think that section 39 of the Arbitration Act 1996 should be amended to refer to "orders" (rather than "awards"), and why?

Yes

Please share your views below.:

It makes sense to refer to orders here. That seems correct as a matter of principle within arbitration law and practice and agree the main text of the provision should prevail over what is currently in the heading (para 10.46).

Consultation Question 33: Do you think that section 39(1) of the Arbitration Act 1996 should be amended to refer to "remedies" (rather than "relief"), and why?

Not Answered

Please share your views below.:

No particular view here.

Consultation Question 34: 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 appelliant was notified of the result of that request. Do you agree?

Not Answered

Please share your views below.:

No particular view here.

Consultation Question 35: 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?

Not Answered

Please share your views below.:

No particular view here.

Consultation Question 36: We provisionally propose that sections 85 to 87 of the Arbitration Act 1996 (on domestic arbitration agreements) should be repealed. Do you agree?

Not Answered

Please share your views below.:

No particular view here.

Consultation Question 37: Do you think that any of the suggestions discussed in Chapter 11 needs revisiting in full, and if so, why?

Please share your views below.:

No particular view here.

Consultation Question 38: 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?

Please share your views below.:

The law governing the arbitration agreement (as suggested in 11.8ff). In case comments after the Court of Appeal and UKSC decisions in *Enka v Chubb* I suggested that the most straightforward and transparent way of dealing with the matter was a simple (statutory) rule that the law of the seat should apply where the parties have not made a specific choice of law for the arbitration agreement: Mark Campbell, 'The Law Applicable to International Arbitration Agreements: the English Court of Appeal Departs from *Sulamérica*' (2020) 23 *International Arbitration Law Review* 193, 187-98 and 'How to determine the law governing an arbitration agreement: direction from the UK Supreme Court' (2021) 24 *International Arbitration Law Review* 28, 31. ■

■ My impression was that statutory intervention on this aspect of arbitration law was unlikely in the wake of *Enka v Chubb*. While the reference in the consultation document is welcome, I respectfully disagree with Law Commission's view at 11.12 and instead suggest that this would a good opportunity to consider whether the 1996 Act should be amended along these lines. While the majority approach in *Enka v Chubb* (UKSC) clearly allows for significant judicial flexibility in pursuit of pro-arbitration outcomes it is not a particularly transparent way of dealing with the matter.

Response ID ANON-PT57-RURY-2

Submitted to Law Commission Consultation: Review of the Arbitration Act 1996
Submitted on 2022-12-03 17:48:11

About you

What is your name?

Name:
GUIDO CARDUCCI

What is the name of your organisation?

Enter the name of your organisation:

I write in my personal capacity.

Are you responding to this consultation in a personal capacity or on behalf of your organisation?

Personal response

If other, please state::

What is your email address?

Email:
[REDACTED]

What is your telephone number?

Telephone number:
[REDACTED]

If you want the information that you provide in response to this consultation to be treated as confidential, please explain to us why you regard the information as confidential. As explained in our privacy notice, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

Please explain to us why you regard the information as confidential:

Consultation questions

Consultation Question 1: 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?

Disagree

Please share your views below.:

A general provision requesting confidentiality of arbitration proceedings and related information seems necessary.

Of course, there must be room for exceptions. There is no point, and no need, to pretend spelling out all (present and future) exceptions in a list in the revised Act. A general exception is necessary and sufficient. Undesirable would be a list necessarily non-exhaustive and likely to be outdated by new case-law and/or statutory developments.

As the Act applies to arbitration seated in the UK, a useful balanced simple provision could be:

"Arbitral proceedings and information submitted before and during the proceedings are confidential, unless the parties agree otherwise in writing or English law requires otherwise."

The wording "unless the parties agree otherwise in writing" is to include directly and indirectly (such as reference to arbitration rules excluding confidentiality) agreed exceptions to confidentiality.

Consultation Question 2: We provisionally conclude that the Arbitration Act 1996 should not impose a duty of independence on arbitrators. Do you agree?

Disagree

Please share your views below.:

One reads in 3.4 "independence is the idea that arbitrators have no connection to the arbitrating parties."

This assumption raises at least the following problems.

1) Independence is broader than an absence of "connection to the arbitrating parties". No arbitration legislation can accept a "dependent" arbitrator, be he/she so because of "connections" or other reasons.

2 A) Also, the assumption associated to "connection" is too vague and unpredictable: what "connections" ? of what kind (professional ? financial ? religious ? etc.) and at what time (before and/or at the time of and/or after the appointment ?).

2 B) In addition, and the assumption does not say, independence must be a requirement for arbitrators, from anyone, not only though primarily from the party/parties having appointed one (or more) arbitrator(s).

3) Therefore, independence should

- i) be understood as absence of any form of dependence, from anyone or anything (relevant in the circumstances) and beyond a verifiable "connection";
- ii) become a new statutory requirement in the revised Act, in addition to the existing impartiality requirement (Section 33). For better acceptance and credibility of arbitration both impartiality and independence deserve to be two distinct requirements.

At least for these reasons we are not persuaded by the conclusion that one reads under 3.40:

"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, but its effect on impartiality and apparent bias."

This final assertion would deserve to be extended and reformulated:

"What matters is that arbitrators be independent and impartial throughout the arbitration." irrespective of the existence and/or the disclosure of a "connection" and all the related uncertainties (of what kind ? / when ? etc.).

The point is requiring in the Act effective independence and impartiality throughout the arbitration, without making any existing and/or disclosed "connection" a too easy and subjective ground to deny impartiality (at present under Section 33) and independence (perhaps in the revised Act).

Equally not persuasive and confusing (the assumption being that "having met each other there is dependence") are par.3.41 and 3.42:

"We have heard repeatedly that in some areas of arbitral activity, complete independence is perhaps almost impossible to achieve, given the limited number of professionals, and the inevitable encounters with others as those professionals develop their expertise over the years."

"More generally, 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."

Actually, independence is a (necessary) state of mind, it is complementary to though separate from the required impartiality, and has nothing to do with whether the professionals have met each other over the years. Such meeting, per se, generates no dependence.

Consultation Question 3: 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. Do you agree?

Disagree

Please share your views below.:

Following the reasons summarised above the Arbitration Act 1996 should provide that :

arbitrators have a continuing duty to disclose any circumstances, upon their actual knowledge and what they ought to know after making reasonable inquiries, which might reasonably give rise to justifiable doubts as to their impartiality and independence .

Consultation Question 4: Should the Arbitration Act 1996 specify the state of knowledge required of an arbitrator's duty of disclosure, and why?

Yes

Please share your views below.:

As noted above:

arbitrators have a continuing duty to disclose any circumstances, upon their actual knowledge and what they ought to know after making reasonable inquiries, which might reasonably give rise to justifiable doubts as to their impartiality and independence .

Consultation Question 5: 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?

Not Answered

Please share your views below.:

As noted above:

arbitrators have a continuing duty to disclose any circumstances, upon their actual knowledge and what they ought to know after making reasonable inquiries, which might reasonably give rise to justifiable doubts as to their impartiality and independence .

Consultation Question 6:

Not Answered

Please share your views below.:

Just one note:

Following the exemple given in par.4.24, it should be reminded that article V.1(d) of the New York Convention is NOT article 36 of the UNCITRAL Model Law.

In short, only the former applies under the New York Convention.

Consultation Question 7:

Not Answered

Please share your views below.:

Consultation Question 8: Should arbitrators incur liability for resignation at all, and why?

Not Answered

Please share your views below.:

Consultation Question 9: Should arbitrators incur liability for resignation only if the resignation is proved to be unreasonable?

Not Answered

Please share your views below.:

Consultation Question 10: 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. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 11: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 12: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 13: We provisionally propose that the Arbitration Act 1996 should stipulate the threshold for success in any summary procedure. Do you agree?

Agree

Please share your views below.:

A reasonable threshold seems to be be: "manifestly without merit"

Consultation Question 14: 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. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 15: 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. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 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?

Not Answered

Please share your views below.:

Consultation Question 17: 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. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 18: We provisionally conclude that the provisions of the Arbitration Act 1996 should not apply generally to emergency arbitrators. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 19: 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?

Not Answered

Please share your views below.:

Consultation Question 20: Do you think that section 44(5) of the Arbitration Act 1996 should be repealed, and why?

Not Answered

Please share your views below.:

Consultation Question 21:

Not Answered

Please share your views below.:

Consultation Question 22:

Agree

Please share your views below.:

Consultation Question 23: 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?

Not Answered

Please share your views below.:

Consultation Question 24: We provisionally conclude that our proposed change to section 67 of the Arbitration Act 1996 would not require any similar change to section 103. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 25: 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. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 26: 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?

Not Answered

Please share your views below.:

Consultation Question 27: 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?

Not Answered

Please share your views below.:

Consultation Question 28: Do you think that section 7 of the Arbitration Act 1996 (separability of arbitration agreement) should be mandatory, and why?

Not Answered

Please share your views below.:

Consultation Question 29: 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?

Not Answered

Please share your views below.:

Consultation Question 30: 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?

Not Answered

Please share your views below.:

Consultation Question 31: 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?

Not Answered

Please share your views below.:

Consultation Question 32: Do you think that section 39 of the Arbitration Act 1996 should be amended to refer to "orders" (rather than "awards"), and why?

Not Answered

Please share your views below.:

Consultation Question 33: Do you think that section 39(1) of the Arbitration Act 1996 should be amended to refer to "remedies" (rather than "relief"), and why?

Not Answered

Please share your views below.:

Consultation Question 34: 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?

Not Answered

Please share your views below.:

Consultation Question 35: 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?

Not Answered

Please share your views below.:

Consultation Question 36: We provisionally propose that sections 85 to 87 of the Arbitration Act 1996 (on domestic arbitration agreements) should be repealed. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 37: Do you think that any of the suggestions discussed in Chapter 11 needs revisiting in full, and if so, why?

Please share your views below.:

Consultation Question 38: 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?

Please share your views below.:

Response ID ANON-PT57-RUB7-G

Submitted to Law Commission Consultation: Review of the Arbitration Act 1996
Submitted on 2022-12-15 19:24:01

About you

What is your name?

Name:

[REDACTED]

What is the name of your organisation?

Enter the name of your organisation:

Central Association of Agricultural Valuers (CAAV)

Are you responding to this consultation in a personal capacity or on behalf of your organisation?

Response on behalf of organisation

If other, please state::

What is your email address?

Email:

[REDACTED]

What is your telephone number?

Telephone number:

[REDACTED]

If you want the information that you provide in response to this consultation to be treated as confidential, please explain to us why you regard the information as confidential. As explained in our privacy notice, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

Please explain to us why you regard the information as confidential:

Consultation questions

Consultation Question 1: 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?

Agree

Please share your views below.:

It is also for the parties.

Consultation Question 2: We provisionally conclude that the Arbitration Act 1996 should not impose a duty of independence on arbitrators. Do you agree?

Agree

Please share your views below.:

The requirement for impartiality and the approach to disclosure appear to address the issues

Consultation Question 3: 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. Do you agree?

Agree

Please share your views below.:

This is important and should in practice drive earlier disclosure given the potential consequences for all of later disclosure.

Consultation Question 4: Should the Arbitration Act 1996 specify the state of knowledge required of an arbitrator's duty of disclosure, and why?

No

Please share your views below.:

On balance, we accept that with the range of work and situations covered by the Act, it is better for the courts rather than the Act to deal with this.

Consultation Question 5: 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?

Other

Please share your views below.:

This illustrates the difficulty of specifying the required state of knowledge as each seems likely to be relatively indeterminate in reality.

Consultation Question 6:

More broadly justified

Please share your views below.:

The wide reach of the Act requires a more open textured approach.

Consultation Question 7:

Agree

Please share your views below.:

Consultation Question 8: Should arbitrators incur liability for resignation at all, and why?

Not Answered

Please share your views below.:

Consultation Question 9: Should arbitrators incur liability for resignation only if the resignation is proved to be unreasonable?

Yes

Please share your views below.:

Consultation Question 10: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 11: 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. Do you agree?

Agree

Please share your views below.:

Our understanding is that would affirm more clearly powers already possessed.

Consultation Question 12: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 13: We provisionally propose that the Arbitration Act 1996 should stipulate the threshold for success in any summary procedure. Do you agree?

Agree

Please share your views below.:

Consultation Question 14: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 15: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 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?

Yes

Please share your views below.:

That scope of powers may be of assistance

Consultation Question 17: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 18: We provisionally conclude that the provisions of the Arbitration Act 1996 should not apply generally to emergency arbitrators. Do you agree?

Not Answered

Please share your views below.:

We have no experience of emergency arbitrators

Consultation Question 19: 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?

Not Answered

Please share your views below.:

We have no experience of emergency arbitrators

Consultation Question 20: Do you think that section 44(5) of the Arbitration Act 1996 should be repealed, and why?

No

Please share your views below.:

We have not seen the status quo as troubling

Consultation Question 21:

Not Answered

Please share your views below.:

Consultation Question 22:

Agree

Please share your views below.:

Consultation Question 23: 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?

Yes

Please share your views below.:

Consultation Question 24: We provisionally conclude that our proposed change to section 67 of the Arbitration Act 1996 would not require any similar change to section 103. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 25: 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. Do you agree?

Agree

Please share your views below.:

The court should have discretion available for extreme cases.

Consultation Question 26: 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?

Agree

Please share your views below.:

Again, the freedom to respond to situations.

Consultation Question 27: 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?

Other

Please share your views below.:

While in general terms we would support this, there may be an argument for more latitude where arbitration is the statutorily required means of dispute resolution.

Consultation Question 28: Do you think that section 7 of the Arbitration Act 1996 (separability of arbitration agreement) should be mandatory, and why?

Yes

Please share your views below.:

This preserves the mechanism

Consultation Question 29: 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?

Agree

Please share your views below.:

Consultation Question 30: 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?

Yes

Please share your views below.:

Consultation Question 31: 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?

Other

Please share your views below.:

We are not clear that these need to be stated at risk of inadvertently precluding something else that might become appropriate. The current broad powers seem to cover the matter.

Consultation Question 32: Do you think that section 39 of the Arbitration Act 1996 should be amended to refer to “orders” (rather than “awards”), and why?

Not Answered

Please share your views below.:

Consultation Question 33: Do you think that section 39(1) of the Arbitration Act 1996 should be amended to refer to “remedies” (rather than “relief”), and why?

Not Answered

Please share your views below.:

Consultation Question 34: 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?

Agree

Please share your views below.:

Consultation Question 35: 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?

Agree

Please share your views below.:

Consultation Question 36: We provisionally propose that sections 85 to 87 of the Arbitration Act 1996 (on domestic arbitration agreements) should be repealed. Do you agree?

Not Answered

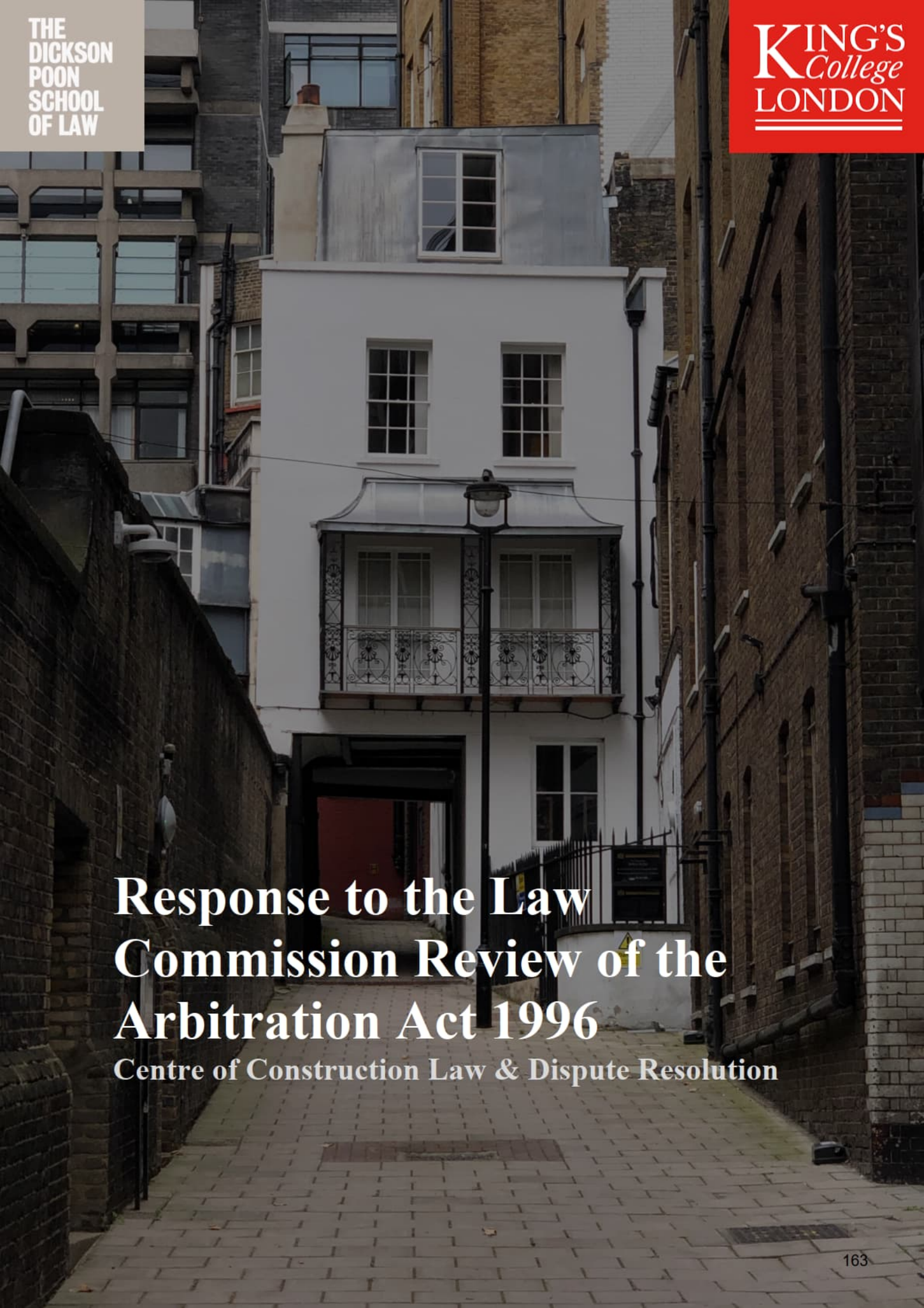
Please share your views below.:

Consultation Question 37: Do you think that any of the suggestions discussed in Chapter 11 needs revisiting in full, and if so, why?

Please share your views below.:

Consultation Question 38: 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?

Please share your views below.:



**Response to the Law
Commission Review of the
Arbitration Act 1996**
Centre of Construction Law & Dispute Resolution

Published by the Centre of Construction Law & Dispute Resolution, King's College London

Published December 2022

Copyright © Professor Renato Nazzini and Aleksander Kalisz, King's College London

Available as a PDF on kcl.ac.uk/construction-law

Professor Renato Nazzini and Aleksander Kalisz of the Centre of Construction Law & Dispute Resolution at King's College London assert the moral right to be identified as the authors of this work.

All rights reserved. The authors hope that this Report encourages further research and analysis on the reform of the Arbitration Act 1996. Accordingly, it is permitted to reproduce and copy this Report, provided that it is done accurately, without alterations and in a non-misleading context, and that the authorship and copyright are clearly acknowledged.

This publication is prepared for the general information. It is not, and does not attempt to be, comprehensive in nature. Due to the general nature of its content, it should not be regarded as legal advice.

For further information, please contact us at ccldr@kcl.ac.uk

Authors

Professor Renato Nazzini
Aleksander Kalisz

Taskforce

Professor John Uff KC
Professor Phillip Capper
Sir Vivian Ramsey KC
Shy Jackson
Laura Lintott

Table of Contents

<i>Centre of Construction Law & Dispute Resolution</i>	6
<i>Introduction</i>	6
<i>Executive summary</i>	7
<i>Confidentiality</i>	10
Consultation Question 1.	10
<i>Arbitrator independence and disclosure</i>	12
Consultation Question 2.	12
Consultation Question 3.	13
Consultation Question 4.	14
Consultation Question 5.	14
<i>Discrimination</i>	15
Consultation Question 6.	15
Consultation Question 7.	15
<i>Arbitrator immunity</i>	16
Consultation Question 8.	16
Consultation Question 9.	17
Consultation Question 10.	17
<i>Summary disposal</i>	17
Consultation Question 11.	17
Consultation Question 12.	19
Consultation Question 13.	19
Consultation Question 14.	20
<i>Section 44 (court powers exercisable in support of arbitral proceedings)</i>	20
Consultation Question 15.	20
Consultation Question 16.	20
Consultation Question 17.	20
Consultation Question 18.	20
Consultation Question 19.	21
Consultation Question 20.	21
Consultation Question 21.	21
<i>Challenging jurisdiction under section 67</i>	22
Consultation Question 22.	22
Consultation Question 23.	22
Consultation Question 24.	23
Consultation Question 25.	23

Consultation Question 26.	23
<i>Appeal on a point of law</i>	23
Consultation Question 27.	23
<i>Minor reforms</i>	25
Consultation Question 28.	25
Consultation Question 29.	25
Consultation Question 30.	25
Consultation Question 31.	26
Consultation Question 32.	26
Consultation Question 33.	27
Consultation Question 34.	27
Consultation Question 35.	27
Consultation Question 36.	27
<i>Other stakeholder suggestions not short-listed for review</i>	27
Consultation Question 37.	27
Consultation Question 38.	27

Centre of Construction Law & Dispute Resolution

The Centre of Construction Law & Dispute Resolution (the ‘Centre’ or ‘CCLDR’) was founded in 1987 by Professor John Uff KC CBE, who was its first Director and the Nash Professor of Engineering Law. The current Director is Professor Renato Nazzini FCI Arb. The main activities of the Centre are:

- The MSc programme, taught since 1988 in London
- Conferences and public lectures on all aspects of construction law
- Research and publications on all aspects of construction law

The Centre is part of The Dickson Poon School of Law at King’s College London, which is consistently ranked among the top law schools internationally.

Introduction

In September 2022, the Law Commission of England & Wales published a consultation paper relating to its ‘Review of the Arbitration Act 1996’. The paper asked 38 consultation questions exploring various areas of possible reform, ranging from confidentiality to appeals on a point of law. The CCLDR responds to the consultation through this paper. The intention is to provide the Law Commission with a construction arbitration perspective on the review of the Arbitration Act. To this end, the Centre has constituted a Taskforce of leading experts in arbitration and construction law who have been closely associated with the Centre.

Construction disputes have several characteristics that distinguish them from other types of commercial dispute resolution.

First, as explained by May LJ in *Pegram Shopfitters Ltd v Tally Wiejl (UK) Ltd*,¹ construction contracts are inherently susceptible to disputes. Construction disputes tend to be considerable in number and a common phenomenon in the lifecycle of a construction project. There are many reasons for this contentious environment, ranging from *force majeure* events to the fact that every construction project is unique – always a new, untested ‘prototype’ – and its participants cannot foresee all its risks in advance.

Secondly, construction disputes involve significant complexity and intricacy caused by factual technicalities and the sheer volume of evidence that, for particularly larger projects, often spans many years of data in great detail. Therefore, construction disputes particularly benefit from clear rules on the taking of evidence.

Thirdly, since construction projects are inherently collaborative in nature, requiring the input of many disciplines, construction disputes tend to involve multiple interested parties, the relationship between which is typically governed by independent contracts. The involvement of international parties, particularly in larger cross-border projects, further complicates this relationship as does the widespread use of bonds and other forms of security or complex funding arrangements by bodies such as world banks.

¹ [2003] EWCA Civ 1750.

Fourthly, as a result of the above characteristics, construction disputes necessitate an expedited, efficient and, insofar as possible, amicable resolution of disputes. At the heart of construction dispute resolution is the desire to progress with the projects without significant interruption. Therefore, construction disputes are frequently multi-tiered, involving various methods of ADR such as mediation, expert determination and dispute adjudication boards. This pursuit of expedited dispute resolution gave rise to some endemic features of the system, such as statutory adjudication enshrined in the Housing Grants, Construction and Regeneration Act 1996 ('HGCRA 1996'). Arbitration and litigation tend to be viewed as last-tier fora.

Finally, construction disputes are affected by the influence of standard forms on construction contracts, specific arbitration rules such as the CIMAR or the ICE Arbitration Procedure and sector-specific legislation such as the aforementioned HGCRA 1996.

Statistical data demonstrates that construction disputes account for a considerable share of arbitrations administered by many arbitral institutions. For instance, construction disputes repeatedly account for the largest proportion of cases registered by the International Chamber of Commerce. Taking a global perspective, the recent 'BCLP Arbitration Survey 2022: The reform of the Arbitration Act 1996' ('BCLP Survey') indicated that London (including anywhere else in England, Wales or Northern Ireland) remains the most popular seat of arbitrations among its 116 international questionnaire respondents.

Executive summary

Confidentiality. We agree that the Arbitration Act should not codify confidentiality, but we note potential complexities of the current common law principles. English law does not clarify whether confidentiality stems by virtue of the arbitration being seated in England or the law applicable to the arbitration agreement being English law. If the latter, following *Enka v Chubb*,² the arbitration agreement may be governed by domestic laws of other States. These laws may not provide for confidentiality. This is one of the reasons why, in response to the last consultation question, we invite the Law Commission to revisit the rules in *Enka*.

Arbitrator independence and disclosure. We agree with the Law Commission that the Act should not impose a duty of independence on arbitrators. In disputes concerning specific sectors, such as construction, an outright prohibition of any dependence could create an impossible standard for specialist arbitrators to meet. In any case, it seems likely that arbitrators' lack of independence would in almost all cases give rise to justifiable doubts as to impartiality. On the other hand, we agree with the Law Commission that arbitrators should have a continuing duty to disclose any circumstances which might reasonably give rise to justifiable doubts as to their impartiality. Several jurisdictions recognise such a duty already.

Discrimination. We disagree with the Law Commission's proposal that an appointment of an arbitrator should not be susceptible to challenge on the basis of the arbitrator's protected characteristics. While the intention behind the proposal is laudable, it would introduce difficulties in enforcing such an obligation. The main obstacle is that characteristics that are and are not protected by the Equality Act 2010 tend to be intertwined. Although the Law Commission envisages exceptions to the general rule, the uncertainty inherent in the proposed

² [2020] UKSC 38.

test would lead to undesirable arguments and, possibly, litigation concerning the circumstances in which discrimination is permitted. We are, instead, strongly in favour of non-legislative measures to ensure that any form of discrimination is eliminated in construction arbitration (and, of course, more generally).

Arbitrator immunity. We agree that the Arbitration Act should allow arbitrators to incur liability for resignation in some circumstances. However, such liability should only be incurred where the arbitrator resigned ‘without any reasonable justification’.

Summary disposal. We agree that the Arbitration Act should expressly empower tribunals to dispose of claims or issues summarily. Although this power already exists in many arbitration rules, codification would assist not only where rules are silent or in cases of *ad hoc* arbitration, but also when arbitrators exercise their powers under the applicable rules, by making it clear that to do so is allowed by the procedural law.

Section 44 (court powers exercisable in support of arbitral proceedings). We disagree 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. There is no harm in the courts having overlapping powers under both provisions.

We agree that section 44 could expressly recognise that the courts can make orders against third parties.

In relation to section 44(5), we consider that it serves the useful purpose of limiting the court’s intervention when the parties have agreed upon a different mechanism that provides for the same relief that the court could grant. Courts should only intervene if it is appropriate to do so. We propose amending section 44(5) to say that ‘If the arbitral tribunal, any arbitral or other institution or person vested by the parties with power in that regard has the power to act effectively, the court shall act only if it deems appropriate to do so’.

In relation to section 44(3), we propose deleting the ‘preserving evidence or assets’ wording from the subsection, making it clear that, even if there is urgency, the court should still be entitled to make any order relating to the matters listed in section 44(2).

Finally, we agree that emergency arbitrators should be empowered to issue peremptory orders for non-compliance with their decisions. However, we propose that the amended Arbitration Act could initially empower the emergency arbitrator to issue such a peremptory order, but, once the tribunal is fully constituted, vest this authority in the arbitral tribunal. Furthermore, we consider that this mechanism can coexist with an amended section 44(4), allowing an application to be made by permission of the emergency arbitrator or the tribunal after the latter is constituted.

Challenging jurisdiction under section 67. We agree with the Law Commission’s proposal, although note that an appellant may have a more limited scope to review the award than an applicant in a rehearing. In some circumstances, this may lead to unfairness as the appellant’s case may be that it was never bound by any arbitration agreement. Further, section 32 contains an anomaly as it is also available after the tribunal rules on its own jurisdiction. Section 32 should only apply before the tribunal renders an award on jurisdiction and result in a hearing.

Appeal on a point of law. We propose to retain section 69 but amend it so that it operates as an opt-in provision. Several arguments support reform: (i) whether section 69 was excluded by the parties or not may be unclear. In such cases the default position should be no appeal, (ii) issues of law and fact tend to be difficult to distinguish in construction arbitration, where matters of complex technical assessment, delay or quantum are, more often than not, an inextricable web of legal and factual issues, (iii) few jurisdictions contain an appeal akin to section 69, (iv) most internationally used arbitration rules opt out of section 69 (eg the ICC or LCIA Rules) and (v) finality of the award and party autonomy.

Therefore, the current provision cannot be justified as a default rule. Similarly, section 45 should also be amended so as to work as an opt-in provision.

Minor reforms. We agree with all proposals but would clarify that section 39 applies to both orders and awards. Therefore, it should afford the tribunal the widest possible discretion in granting relief through an award or an order.

Other stakeholder suggestions not short-listed for review. We invite the Law Commission to revisit the principles in *Enka v Chubb*³ relating to the law of the arbitration agreement. Current principles may pose difficulties not only to confidentiality but also to broader legal certainty of arbitration. The two possible avenues are: (i) to follow the Scottish and Swedish models where the law applicable to the arbitration agreement, in the absence of party agreement, is the law of the seat, or (ii) to follow Swiss law that proposes a more flexible approach to the validation principle.

Secondly, we invite the Law Commission to consider the impact of the GDPR on arbitration.

Finally, we believe that section 17 should be repealed due to the availability of a better appointment mechanism under section 18.

³ [2020] UKSC 38.

Confidentiality

Consultation Question 1.

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?

We agree and emphasise that codification of confidentiality should only come under consideration if leaving the issue to be governed and developed by the common law cannot be justified. So far, the case law on the issue has been coherent and without much ambiguity while allowing for sufficient flexibility. This balance between legal certainty and flexibility is essential to construction arbitrations that are virtually always confidential but with necessary exceptions, for example when the award needs to be enforced. In the experience of the Taskforce members, parties in arbitrations rarely express any concern about confidentiality under English law.

Although we propose not to codify confidentiality, we recognise the importance of the views of international parties and practitioners on the issue. The recent BCLP Survey showed that 83% of its 116 questionnaire respondents believed that the Arbitration Act should codify confidentiality or at least embed the general principle of confidentiality. We note that the majority of questionnaire respondents were based outside the UK, with 60% based in common law jurisdictions. This might indicate a general concern among international parties as to the legal certainty of confidentiality rules in UK-seated arbitrations, even if these principles appear clear to UK practitioners.

However, we remain of the view that confidentiality should not be codified for the following reasons.

First, in the experience of the members of the Taskforce, the lack of statutory provisions on confidentiality is rarely, or virtually never, cited by parties as a reason not to choose England, Wales or Northern Ireland as a seat.

Secondly, taking a comparative approach, by way of example, many key civil and common law jurisdictions where construction arbitrations are seated do not codify confidentiality, including France, Switzerland and Sweden, which are seats of choice in international arbitration:

- **France:** French law contains no confidentiality provision applicable to international arbitration. Parties must either apply arbitration rules that provide for it or enter into a separate agreement. The New Civil Procedure Code only applies confidentiality to tribunals' deliberations (Article 1479 CCP).
- **Switzerland:** There is no statutory confidentiality in Swiss law, although the Supreme Court has confirmed that proceedings are not open to the public.⁴
- **Germany:** The German Arbitration Act does not codify confidentiality either.

⁴ Decision of the Swiss Supreme Court of June 19, 2006 4P.74/2006/ast.

- **Sweden:** The Swedish Arbitration Act is also silent on the point.
- **USA:** The Federal Arbitration Act and the Revised Uniform Arbitration Act lack a confidentiality provision. Confidentiality in the US only exists in some States in relation to specific arbitrations, eg arbitrations concerning attorney fees in California.
- **Singapore:** Singaporean law implies confidentiality through common law, rather than the International Arbitration Act (*Myanma Yaung Chi Oo v Win Win Nu*⁵).

Thirdly, regardless of legislative provisions, confidentiality is a matter of party autonomy and may be provided for in the arbitration agreement or in the rules chosen by the parties. For example, certain arbitration rules provide for confidentiality including the LCIA, SCC and SIAC Arbitration Rules. By contrast, the ICC arbitration rules, often used in construction arbitration, do not provide for confidentiality and merely authorise the tribunal to make an order on confidentiality at the parties' request. Typically, in an ICC arbitration, confidentiality is addressed in the terms of reference or in procedural order no 1.

Fourthly, codification might be a burdensome exercise as there must always be exceptions, as recognised at common law. Mere difficulty in drafting should, of course, not be a conclusive argument against legislation if legislation is needed. However, as we explained above, we consider that legislation is not needed.

If legislation were needed, we do consider that it would be possible, albeit complex, to draft adequate provisions.

If the concern is not to abandon the common law on exceptions to confidentiality, any amendment could provide that 'any rules of law relating to exceptions to confidentiality are preserved', mirroring section 118 of the Criminal Justice Act 2003 in relation to certain common law hearsay rules. However, such a legislative technique must be exercised with care and is not frequent in English law.

Further, we note that some common law jurisdictions opted for the codification of the duty of confidentiality. For example, the Australian International Arbitration Act contains a detailed confidentiality provision. However, this legislation was a response to the decision in *Esso Australia Resources v Plowman*⁶ where the High Court held that an implied duty of confidentiality did not exist under Australian law. The Australian confidentiality provisions are notably complex, reflecting the legislator's intention to codify exceptions exhaustively.

By contrast, the Indian Arbitration & Conciliation Act 1996 (as amended in 2019), in section 42A, contains a much shorter confidentiality provision. It lists no specific exceptions but specifies that confidentiality applies '[n]otwithstanding anything contained in any other law from the time being in force (...)'. The Hong Kong Arbitration Ordinance, in section 18, also contains a brief confidentiality provision in which the exceptions to confidentiality are worded broadly and flexibly.

Some civil law jurisdictions where arbitrations are frequently seated codify confidentiality. The provisions contained in the UAE Federal Law No. 6 on Arbitration expressly apply to hearings

⁵ [2003] 2 SLR(R) 547

⁶ (1985) 183 CLR 10.

and awards in Articles 33 and 48 respectively without any mention of exceptions. Similarly, the Arbitration Law of the People’s Republic of China expressly preserves the confidentiality of arbitral hearings in Article 40, without listing any exceptions.

Therefore, foreign jurisdictions, including relevant common law jurisdictions, provide solutions and examples that may address the Law Commission’s concerns surrounding the codification of exceptions to confidentiality.

On balance, however, we consider that the complexity of drafting does weigh against codifying confidentiality, although it would not be, in and of itself, a sufficient reason not to do so.

Finally, we appreciate some potential complications associated with the current state of the law. For example, if confidentiality is an implied term in the arbitration agreement, in principle there might be an argument that it is governed by the law applicable to the arbitration agreement itself, rather than the law of the seat. Following *Enka v Chubb*,⁷ many England-seated arbitrations will be conducted on the basis of an arbitration agreement governed by the domestic laws of other States. This gives rise to uncertainty as to whether the English case law on confidentiality applies when the arbitration agreement is governed by English law or when the arbitration is seated in England or in both cases.

However, this issue might be better resolved not by codifying confidentiality, but by reviewing the *Enka* decision. As we explain below, the Law Commission could consider codifying the test for determining the law applicable to the arbitration agreement, hence resolving the issue surrounding confidentiality from a different angle. We discuss possible solutions to this issue in the last section below ‘Other stakeholder suggestions not short-listed for review’ as a response to consultation question 38.

Arbitrator independence and disclosure

Consultation Question 2.

We provisionally conclude that the Arbitration Act 1996 should not impose a duty of independence on arbitrators. Do you agree?

We agree. In disputes concerning specific sectors, such as construction, an outright prohibition of any dependence could create an impossible standard for specialist arbitrators to meet. In any case, it seems likely that arbitrators’ lack of independence would in almost all cases give rise to justifiable doubts as to impartiality. The case of *Cofely Ltd v Anthony Bingham and Knowles Ltd*,⁸ which the Law Commission discusses in relation to arbitrators’ liability for resignation, is a helpful example. The arbitrator in the case received 18% of his appointments and 25% of income from the defendant. Therefore, this case was at its heart about lack of independence. However, the dependence of the arbitrator’s practice on the defendant, and subsequent resistance to allegations, provided the Court with evidence of apparent bias. Therefore, the case supports the argument that, under English law, in appropriate cases, lack of independence evidences a lack of impartiality.

⁷ [2020] UKSC 38.

⁸ [2016] EWHC 240 (Comm).

We note that most leading seats of arbitration provide for independence and impartiality, including the UNCITRAL Model Law in Article 12: Singapore, Germany, France, Australia, Switzerland, Sweden, Hong Kong, People’s Republic of China. The US Federal Arbitration Act provides for neither impartiality nor independence, although the principles have emerged through case law. However, as explained above, we believe that the English law test for impartiality effectively captures circumstances in which lack of independence gives rise to justifiable doubts as to impartiality. In this way, by focusing on impartiality, English law better accounts for specialist arbitrations and provides more flexibility to the parties. Robust disclosure obligations provide the necessary safeguard against any relevant form of arbitrator actual or apparent bias.

Consultation Question 3.

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. Do you agree?

We agree. In the experience of the Taskforce, most arbitrators are cautious and, in most cases, already extensively disclose circumstances that could raise justifiable doubts as to their impartiality. However, such a continuing duty would allow the parties to make the final assessment as to arbitrators’ suitability, rather than allowing arbitrators to make the assessment themselves.

The continuing duty of disclosure is included in the UNCITRAL Model Law and is relatively common in other jurisdictions:

- **Germany:** ‘*A person who is approached in connection with a possible appointment as an arbitrator is to disclose any and all circumstances likely to give rise to doubts as to their impartiality or independence. Arbitrators are under obligation, also after they have been appointed and until the arbitral proceedings have come to an end, to disclose such circumstances to the parties without undue delay unless they have already so informed the parties previously*’ (section 1036(1), German Civil Code).
- **France:** ‘*(...) Before accepting a mandate, an arbitrator shall disclose any circumstance that may affect his or her independence or impartiality. He or she also shall disclose promptly any such circumstance that may arise after accepting the mandate (...)*’ (Article 1456, French Civil Code).
- **USA:** the Federal Arbitration Act contains no specific requirements regarding independence impartiality or disclosure. Failure to disclose a conflict of interest would not alone suffice to annul an award (*Republic of Argentina v AWG Group Ltd*⁹).
- **Singapore:** no continuous codified duty of disclosure in legislation, albeit the SIAC Arbitration Rules provide for it.
- **Australia:** An arbitrator is required to disclose any circumstances likely to give rise to justifiable doubt as to their impartiality or independence when they are approached in connection with possible appointment or at any time throughout the proceedings (Article

⁹ 894 F.3d 327, 334-35 (D.C. Cir. 2018).

12(1), UNCITRAL Model Law). A justifiable doubt only arises if there is a real danger of bias (section 18A(1), International Arbitration Act).

- **Switzerland:** arbitrators must disclose without delay any facts that could raise legitimate doubts as to their independence or impartiality until the end of the arbitration (Article 179(6) Federal Act on Private International Law).

Consultation Question 4.

Should the Arbitration Act 1996 specify the state of knowledge required of an arbitrator's duty of disclosure, and why?

Specifying the arbitrator's state of knowledge appears to be necessary for reasons of legal certainty. Introducing a new statutory duty of disclosure without specifying the state of knowledge required would introduce significant uncertainty and create problems in practice and, potentially, unnecessary arguments and litigation concerning alleged breaches of the new duty.

Such codification is all the more desirable given the potential uncertainty as to the scope of the duty of disclosure. The case *Newcastle United Football Company Limited v The Football Association Premier League Limited*¹⁰ suggests that there may exist discrepancies between the level of disclosure envisaged by the IBA Guidelines on Conflicts of Interest in International Arbitration and English law. The Court acknowledged that only two of the arbitrator's 12 previous appointments would have to be disclosed under the IBA Rules, as they took place more than three years from the date of appointment, but a higher standard is currently required in English law following *Halliburton Co v Chubb Bermuda Insurance Ltd*:¹¹ arbitrators must disclose circumstances that 'would or might lead the fair-minded and informed observer to conclude that there was a real possibility that the arbitrator was biased.' Therefore, the CCLDR believes that the appropriate test should be codified to avoid any possible confusion regarding disclosure.

Consultation Question 5.

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?

We prefer a test of 'reasonable inquiries'. A feature of the construction sector is that, in many jurisdictions, there is a relatively small number of leading construction companies, employers and consultants. Most construction arbitrators would, therefore, have acted for or against them in the past, or sat on tribunals in proceedings involving them, making a disclosure exercise difficult. Therefore, the reasonableness test should be flexible, taking into account the features of various sectors.

¹⁰ [2021] EWHC 349 (Comm).

¹¹ [2020] UKSC 48.

We also believe that the amended Arbitration Act should clarify that a breach of disclosure obligations does not automatically disqualify the arbitrator. Whether failure to disclose should lead to the removal of the arbitrator must depend on all the circumstances of the case.

Discrimination

Consultation Question 6.

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 by the House of Lords)?

We agree with the Supreme Court's approach in *Hashwani v Jivraj*.¹² The problem would only arise in very narrow circumstances in practice. If it does, the Arbitration Act should give effect to party agreement. As we discuss below in greater detail, it might be difficult or impossible to assess whether a certain characteristic in an arbitrator is or is not 'necessary', as the Court of Appeal held in *Hashwani*. Characteristics that can be viewed as necessary are often intertwined with characteristics that may not be viewed as necessary.

Consultation Question 7.

We provisionally propose that:

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.

Do you agree?

We disagree with this proposal due to the difficulties and challenges that enforcing such obligations would create. More importantly, such an application of the Equality Act 2010 might be legally incorrect. The Supreme Court observed in *Hashwani*, that it would be surprising to subject a person engaged in a one-off contract, such as an arbitrator, to 'the whole gamut of discrimination legislation'. In fact, the Court would not characterise the role of the arbitrator as 'employment under a contract personally to do work'.

Further, while the aim of prohibiting discrimination based on protected characteristics is a laudable one and one could in principle agree with the Law Commission, the proposals would be likely to cause problems in practice. For example, there could be circumstances where the required qualifications that do and do not constitute 'protected characteristics' under the Equality Act 2010 are intertwined. There are several English cases concerning a dispute arbitrated by Beth Din applying Jewish law (eg *Soleimany v Soleimany*¹³ or *Schwebel v*

¹² [2011] UKSC 40.

¹³ [1999] Q.B. 785.

*Schwebel*¹⁴). There, the central requirement for the arbitrator was knowledge of Jewish law (not a ‘protected characteristic’) but, under the Law Commission’s proposals, it could be argued that this requirement presupposes the arbitrator being of Jewish religion and typically male (faith and gender both being a ‘protected characteristic’).

Similarly, a significant number of arbitration clauses and arbitration rules have nationality requirements. Nationality is not listed as a protected characteristic under the Equality Act 2010 section 4, but it is included in the definition of ‘race’ (which is a protected characteristic) under section 9. This would trigger challenges since arbitration clauses frequently contain nationality requirements.

We appreciate a possible counterargument: the above protected characteristic requirements may be a ‘proportionate means of achieving a legitimate aim’ and hence be enforceable. If so, however, arbitral institutions in the first place (in institutional arbitration) and then the courts would have to decide whether the requirement is legitimate and proportionate or not. We believe this would lead to undesirable, case-by-case litigation where the courts must decide the circumstances in which discrimination is permitted. Further, in some cases, a particular requirement could always be a proportionate means of achieving a legitimate aim. For example, the Equality Act deems age as a protected characteristic. Since age often correlates with experience, parties can always make the argument that age discrimination is permitted.

Further, by connecting the definition of ‘protected characteristics’ with the Equality Act 2010, the reform would import the case law stemming from this Act. This is undesirable and would reduce legal certainty to parties in arbitration.

For the above reasons, the CCLDR proposes to tackle discrimination through strong measures outside legislation, including discrimination beyond the protected characteristics under the Equality Act 2010 (for example, discrimination against people of non-binary gender or from disadvantaged socio-economic backgrounds). For example, the Equal Representation in Arbitration Pledge has achieved significant success in increasing the number of women on arbitral panels without requiring legislation.

Arbitrator immunity

Consultation Question 8.

Should arbitrators incur liability for resignation at all, and why?

We agree. The Arbitration Act should disincentivise resignations by arbitrators without good reasons. After the acceptance of appointment, arbitrators should be bound to resolve the dispute as they offer their services on a commercial basis and in return for what may be regarded as substantial fees. The costs to the parties of having a determination of their rights delayed by an arbitrator’s resignation, and the need to find a replacement arbitrator, may be high and an arbitrator’s liability for such costs would mitigate the negative impact of her resignation to some extent.

¹⁴ [2010] EWHC 3280 (TCC).

Consultation Question 9.

Should arbitrators incur liability for resignation only if the resignation is proved to be unreasonable?

We agree that circumstances could exist where an arbitrator should incur liability for resignation. Equally, there may well be circumstances in which an arbitrator would be perfectly entitled to resign. We propose, therefore, that arbitrators should incur liability only if they resign 'without any reasonable justification'. We do not think it is necessary to identify what such justification would entail, but it could be for example due to poor health.

Consultation Question 10.

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. Do you agree?

We agree with the proposal.

Summary disposal

Consultation Question 11.

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. Do you agree?

We agree. Further, such a provision should be non-mandatory. We note that the BCLP Survey cited above revealed that 77% of questionnaire respondents replied that the Arbitration Act should include an express provision on summary disposal, which suggests that users of the system may favour this approach.

We also note that the following sets of rules provide for some form of summary disposal:

- **LCIA Arbitration Rules 2020**, Article 22: '*(viii) to determine that any claim, defence, counterclaim, cross-claim, defence to counterclaim or defence to cross-claim is manifestly outside the jurisdiction of the Arbitral Tribunal, or is inadmissible or manifestly without merit; and where appropriate to issue an order or award to that effect (an "Early Determination")*'
- **ICC Arbitration Rules 2021** are silent on summary disposal. However, the ICC 'Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration' says that any party may '*apply to the arbitral tribunal for the expeditious determination of one or more claims or defences, on grounds that such claims or defences are manifestly devoid of merit or fall manifestly outside the arbitral tribunal's jurisdiction.*'
- **SIAC Arbitration Rules 2016**, 'Rule 29 "*Early Dismissal of Claims and Defences*"':

29.1 *A party may apply to the Tribunal for the early dismissal of a claim or defence on the basis that:*

- a. *a claim or defence is manifestly without legal merit; or*
- b. *a claim or defence is manifestly outside the jurisdiction of the Tribunal.*

29.2 *An application for the early dismissal of a claim or defence under Rule 29.1 shall state in detail the facts and legal basis supporting the application. The party applying for early dismissal shall, at the same time as it files the application with the Tribunal, send a copy of the application to the other party, and shall notify the Tribunal that it has done so, specifying the mode of service employed and the date of service.*

29.3 *The Tribunal may, in its discretion, allow the application for the early dismissal of a claim or defence under Rule 29.1 to proceed. If the application is allowed to proceed, the Tribunal shall, after giving the parties the opportunity to be heard, decide whether to grant, in whole or in part, the application for early dismissal under Rule 29.1*

29.4 *If the application is allowed to proceed, the Tribunal shall make an order or Award on the application, with reasons, which may be in summary form. The order or Award shall be made within 60 days of the date of filing of the application, unless, in exceptional circumstances, the Registrar extends the time.'*

○ **SCC Arbitration Rules 2017, 'Article 39:**

(1) *A party may request that the Arbitral Tribunal decide one or more issues of fact or law by way of summary procedure, without necessarily undertaking every procedural step that might otherwise be adopted for the arbitration.*

(2) *A request for summary procedure may concern issues of jurisdiction, admissibility or the merits. It may include, for example, an assertion that:*

- (i) *an allegation of fact or law material to the outcome of the case is manifestly unsustainable;*
- (ii) *even if the facts alleged by the other party are assumed to be true, no award could be rendered in favour of that party under the applicable law; or*
- (iii) *any issue of fact or law material to the outcome of the case is, for any other reason, suitable to determination by way of summary procedure.*

(3) *The request shall specify the grounds relied on and the form of summary procedure proposed, and demonstrate that such procedure is efficient and appropriate in all the circumstances of the case.*

(4) *After providing the other party an opportunity to submit comments, the Arbitral Tribunal shall issue an order either dismissing the request or fixing the summary procedure in the form it deems appropriate.*

(5) *In determining whether to grant a request for summary procedure, the Arbitral Tribunal shall have regard to all relevant circumstances, including the extent to which the summary procedure contributes to a more efficient and expeditious resolution of the dispute.*

(6) *If the request for summary procedure is granted, the Arbitral Tribunal shall seek to make its order or award on the issues under consideration in an efficient and expeditious*

manner having regard to the circumstances of the case, while giving each party an equal and reasonable opportunity to present its case pursuant to Article 23(2).'

Further, we note that, following *Travis Coal Restructured Holdings v Essar Global Fund Limited*,¹⁵ summary disposal is already a power that tribunals may have if the parties have so provided in the arbitration agreement. In *Travis*:

- The arbitration agreement provided that '*[t]he arbitrators shall have the discretion to hear and determine at any stage of the arbitration any issue asserted by any party to be dispositive of any claim or counterclaim, in whole or in part, in accordance with such procedures as the arbitrators may deem appropriate, and the arbitrators may render an award on such issue.*'
- The court held that the arbitration agreement empowered the tribunal to deal with a fraud allegation by way of summary disposal.

Notwithstanding the *Travis* case, we believe that for the above arbitration rules providing for summary disposal to operate effectively when the seat of the proceedings is in England, it would be desirable for the Arbitration Act to provide statutory backing to the arbitrators' powers. Furthermore, such powers would be available when rules are silent – such as the ICC Rules – and in *ad hoc* arbitrations.

Consultation Question 12.

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. Do you agree?

We agree. Indeed, if such a power is granted to the tribunal in the Arbitration Act, the only way in which it could be exercised is in consultation with the parties but always at the discretion of the tribunal. In particular, the tribunal should always retain the discretion not to exercise the power, for example when to do so would expose the award to a refusal of enforcement in a foreign jurisdiction when enforcement may be likely (eg the country of domicile of one of the parties).

Further, the tribunal should always have a choice as to whether to dispose summarily of any claim, defence or issue by order or award. The exercise of this choice will depend on the nature of the issue that is summarily dismissed and the reason for the summary dismissal.

Consultation Question 13.

We provisionally propose that the Arbitration Act 1996 should stipulate the threshold for success in any summary procedure. Do you agree?

We agree.

¹⁵ [2014] EWHC 2510 (Comm).

Consultation Question 14.

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. Do you agree?

We agree and add that summary disposal should clearly also apply to claims that are manifestly outside the jurisdiction of the tribunal. It should also apply to any issue of fact or law so as to allow the tribunal to summarily dispose of any issues. The definitions of 'claim' and 'defence' can be unclear and complex in an international context.

Section 44 (court powers exercisable in support of arbitral proceedings)

Consultation Question 15.

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. Do you agree?

We disagree. While there can be an element of overlap between sections 43 and 44, there is no harm in the courts having some overlapping powers under the two sections.

Consultation Question 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?

In the experience of the Taskforce members, this is already clear. However, it does no harm to clarify this in legislation, although it is not needed.

Consultation Question 17.

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. Do you agree?

We agree. Third parties should have the full right of appeal as they have not entered into an arbitration agreement and hence restricted their access to courts.

Consultation Question 18.

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

We agree, subject to the discussion below.

Consultation Question 19.

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?

We agree. We see no reason why the court should administer any such scheme. Parties choose a scheme of emergency arbitrators when they adopt institutional rules that so provide. Parties in *ad hoc* arbitrations consciously elected not to use arbitration rules and we believe that the Arbitration Act should not impose such a procedure on them. If the emergency arbitrator procedure is unavailable, the parties can still rely on courts to issue interim measures under section 44.

Consultation Question 20.

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

We agree that, in principle, the powers of the courts should be preserved as much as possible and the mere fact that an emergency arbitrator procedure is available should not prevent the courts from acting. However, we consider that section 44(5) serves the useful purpose of limiting the court's intervention when the parties have agreed upon a different mechanism that provides for the same relief that the court could grant. Therefore, we propose amending section 44(5) as follows: 'If the arbitral tribunal, any arbitral or other institution or person vested by the parties with power in that regard has the power to act effectively, the court shall act only if it deems appropriate to do so'. In this way, the power of the court to intervene is still constrained but there is a more flexible safety valve.

We would also raise the following question. Section 44(3) suggests that the court cannot make all orders under section 44(2), but only those relating to the preservation of evidence or assets, although the case law has construed 'assets' quite widely. While it makes sense that, if the case is one of urgency, the conditions of the agreement of the parties or permission of the tribunal should not apply, it is not clear why, in an urgent case, the court should not have all the powers that it would otherwise have. We propose deleting 'preserving evidence or assets' wording from the subsection, making it clear that, even if there is urgency, the court has the power to make any order relating to the matters listed in section 44(2).

Consultation Question 21.

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.

Option 1 appears to be a reasonable and effective solution. A peremptory order is the typical approach of arbitrators addressing non-compliance with an order, including those granting applications for interim measures. The CCLDR views decisions of emergency arbitrators as

orders of the arbitral tribunal. The authority of both stems from the arbitration agreement. However, after rendering its decision, the emergency arbitrator drops out of the picture. Therefore, a practical issue could emerge since the emergency arbitrator would or could be unable to issue a peremptory order after rendering a decision. We propose, therefore, that the Arbitration Act could empower the emergency arbitrator to issue such a peremptory order, but, once the tribunal is fully constituted, give this authority to the arbitral tribunal.

Furthermore, Options 1 and 2 are not mutually exclusive. Option 2 could be adopted too, by making it clear that an application can be made under section 44(4) by permission of the emergency arbitrator or the tribunal after the latter is constituted.

Challenging jurisdiction under section 67

Consultation Question 22.

We provisionally propose that:

1. where a party has participated in arbitral proceedings, and has objected to the jurisdiction of the arbitral tribunal; and
 2. 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.

Do you agree?

We agree in principle with the proposal. We note, however, that an appeal will give the appellant a more limited scope to review the decision of the tribunal. While this may be entirely justifiable when the very validity or effectiveness of the arbitration agreement is not at issue, for example when the challenge relates to the constitution of the tribunal, there is a valid argument that if a party objects that it never agreed to arbitration, then its right to challenge the decision of the tribunal that the tribunal has jurisdiction should be unfettered. It would be difficult, however, to provide for two different regimes depending on the nature of the challenge. On balance, therefore, we agree with the Law Commission's proposals given that arbitration is no longer an 'exception' to the jurisdiction of the courts but a dispute resolution mechanism functionally equivalent, in all respects, to court proceedings.

There is a question as to non-participating parties. Should their section 67 application be a rehearing or an appeal? In principle, their position is not different from a party who does participate in the proceedings but raises an objection to the jurisdiction of the tribunal. In both cases, the objection may go to the very root of the power of the tribunal to rule on any of the claims or counterclaims or issues in the case. It is not clear why a participating party should have a more limited opportunity to challenge the jurisdiction of the tribunal than a non-participating party.

Consultation Question 23.

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?

Currently, section 32 is also available after the tribunal has ruled on jurisdiction. This is an anomaly. Section 32 should be amended to clarify that it only applies before the tribunal has rendered any award on jurisdiction. If this is the case, section 32 should result in a hearing on jurisdiction. It could never be an appeal as there would be nothing to appeal.

Consultation Question 24.

We provisionally conclude that our proposed change to section 67 of the Arbitration Act 1996 would not require any similar change to section 103. Do you agree?

Consultation Question 25.

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. Do you agree?

Consultation Question 26.

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?

We agree with all the recommendations above.

Appeal on a point of law

Consultation Question 27.

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?

We disagree. We believe that section 69 should be retained but as an opt-in provision. Although the issue is finely balanced, we recognise several arguments in favour of amendment:

- **Whether section 69 was excluded by the parties or not may be unclear. In such cases, the default position should be no appeal.** Section 69, in its current form as a default mechanism that must be expressly excluded, could be viewed as inconsistent with party autonomy to select arbitration as the only forum to resolve disputes. Whether section 69 has been excluded or not may be a disputed issue and give rise to a considerable degree of uncertainty: see *National Iranian Oil Co v Crescent Petroleum Co International Ltd*.¹⁶ In these cases, it is consistent with the parties' choice of arbitration that the default position should be that there is no appeal on points of law.
- **Issues of law and fact tend to be difficult to distinguish in construction arbitration, where matters of complex technical assessment, delay or quantum are, more often than not, an inextricable web of legal and factual issues.** We recognise that this is a complication that all appeals grapple with, be it in litigation or arbitration. However,

¹⁶ [2022] EWHC 1645 (Comm).

international parties selecting London (or anywhere else in England, Wales or Northern Ireland) as the seat and English law to govern their contracts expect the award to be truly final. They should be allowed to appeal it on points of law only if they so expressly choose.

- **Few jurisdictions contain an appeal akin to section 69.** The UNCITRAL Model Law on Commercial Arbitration excludes such recourse. Singaporean law only permits appeals, on an opt-out basis, for domestic arbitrations. New Zealand law takes a similar approach in relation to domestic arbitrations and permits appeals, on an opt-in basis, to international arbitrations. The US, Hong Kong and Australia equally do not provide for appeals in international arbitration and do so only in relation to some domestic arbitrations.
- **Most internationally used arbitration rules opt out of section 69 (eg the ICC or LCIA Rules).** Arbitration rules cater to arbitrations seated in various jurisdictions. Therefore, the default opt-out from appeals should not be viewed as a criticism of section 69 specifically. Other arbitration rules do not (GAFTA, FOSFA or LMAA) reflecting a conscious choice to keep the appeal on points of law that is deemed useful in specific sectors to which these rules cater. Should section 69 be amended to operate as an opt-in provision, any institution whose rules reflect such a conscious choice would simply have to refer to section 69 specifically, if they do not do so already.
- **Finality of the award and party autonomy.** If the parties (i) have selected England and Wales or Northern Ireland as the seat of their arbitration; (ii) have selected English law as the law governing the contract; and (iii) have not selected a set of rules that opts in or out of section 69, it is highly unlikely that they would not check all possible remedies against their award. If they wish to retain section 69, they can, therefore, simply opt in.

We recognise that there is a view that section 69 should be retained in its current form. The BCLP Arbitration Survey 2022 found that 67% of questionnaire respondents preferred to retain section 69. The Taskforce considers that this is not an argument against the proposed amendment because, if the parties so choose, they can always ‘opt into’ section 69. If and to the extent appeals on points of law are seen as desirable, in certain sectors or by certain parties, this additional avenue of recourse under the Arbitration Act is retained, albeit as an opt-in provision.

For the same reasons, we believe that section 45 should be amended to operate as an opt-in provision.

If section 69 and section 45 are amended to operate as opt-in provisions, a further issue that arises for consideration is whether the agreement of the parties should suffice to give a party the right to appeal under section 69 or to apply under section 45 or whether further safeguards should apply, that is, leave of the court under section 69 and permission of the tribunal and leave of the court under section 45. Currently, if the parties agree to the application or appeal, no further safeguards apply. However, it may be considered that at least the leave of the court – if not the permission of the tribunal under section 45 – could be retained as a way of ensuring that unmeritorious applications and appeals are weeded out without the need for a full determination on the merits.

Minor reforms

Consultation Question 28.

Do you think that section 7 of the Arbitration Act 1996 (separability of arbitration agreement) should be mandatory, and why?

We believe the arguments are finely balanced. Separability is a key rule to ensure the effectiveness of arbitration and that arbitration gives parties an efficient and functionally equivalent alternative to court litigation. On the other hand, if the parties, in their contractual autonomy, decide that the validity, existence and effectiveness of their arbitration agreement should depend on the validity, existence and effectiveness of the main contract, why should they be prevented to do so? Although such circumstances rarely occur in practice, they are not non-existent.

On balance, however, we believe that separability should be mandatory to avoid potential arguments that any given contract should be construed in a way that excludes the separability rule.

We note that, currently, separability applies when English law governs the arbitration agreement. Following the *Enka* case, there may be many arbitrations seated in England, Wales or Northern Ireland where English law does not govern the arbitration agreement and separability does not, therefore, apply. We suggest below that *Enka* should be revisited.

Consultation Question 29.

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?

We agree and would also suggest amending section 9 to expressly clarify that tribunals are permitted to continue the proceedings while a section 9 application is pending.

Consultation Question 30.

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?

We believe that section 45 should be amended to operate as an opt-in provision. If so, there would be an argument that the leave of the court, but not the permission of the tribunal, should be retained. The issue is further discussed above.

Section 32 is anomalous in allowing the courts, even without party agreement, to rule on jurisdiction before the tribunal has done so. We agree that the section may serve some useful purpose in terms of saving time and costs if a significant jurisdictional issue exists which is likely to go to court pursuant to a section 67 application. However, given that the section deprives a party of at least the opportunity of having the jurisdictional issue resolved by the

tribunal, we would favour retaining the court’s permission, in addition to tribunal permission, if the parties do not agree.

Consultation Question 31.

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?

Such matters are typically within the ambit of section 34 and, in the experience of the Taskforce members, cause no issues in practice. There would be no harm in providing expressly that the hearings may be held remotely, by video or teleconference but one should resist the temptation of legislating for everything that is allowed to clarify that it is indeed allowed. This would make for even longer statutes than they are today. In fact, as concluded by the ICCA Report ‘Does a Right to a Physical Hearing Exist in International Arbitration?’, most analysed *leges arbitri* did not provide for the right to an in-person hearing. However, the Report finds that ‘[t]here is no reported case in which an award has been vacated solely on the basis of a hearing being held remotely, nor is there any reported decision of an arbitrator being disqualified for such conduct’.¹⁷

Consultation Question 32.

Do you think that section 39 of the Arbitration Act 1996 should be amended to refer to “orders” (rather than “awards”), and why?

We note that, upon the drafting of the Act, this language was used intentionally although it gave rise to subsequent confusion. Section 39 was intended as arbitration’s alternative to statutory adjudication under the HGCRA 1996. The purpose was to minimise the multiplicity of proceedings (i.e., the need to bring a claim in adjudication) and give the parties the possibility of resolving disputes expeditiously under a single arbitral process.

A preliminary decision can be either an award or an order, depending on its content. In *ZCCM v Kansanshi Holdings*,¹⁸ it was held that a decision is more likely to be an award if it finally disposes of an arbitrated matter. If so, a provisional decision under section 39 does indeed appear to be inherently an order. On the other hand, it would be preferable to give the tribunal discretion as to the form, order or award. After all, in practice, some provisional decisions or interim measures are sometimes issued in the form of awards.

For the above reasons, we propose that section 39 should refer to the arbitrators’ ‘power to make provisional awards or orders’. We also propose to amend section 39(1) to say: ‘The parties are free to agree that the tribunal shall have power to order on a provisional basis, in a provisional award or order, any relief which it would have power to grant in a final award.’ Such amendments would enable the tribunal to choose, at its discretion, whether it is appropriate to grant relief in a provisional award or order, depending on the circumstances of each individual case.

¹⁷ ICCA Report ‘Does a Right to a Physical Hearing Exist in International Arbitration?’ (2022).

¹⁸ [2019] EWHC 1285 (Comm).

Consultation Question 33.

Do you think that section 39(1) of the Arbitration Act 1996 should be amended to refer to “remedies” (rather than “relief”), and why?

We agree. This would make section 39 consistent with section 48.

Consultation Question 34.

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?

Consultation Question 35.

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?

Consultation Question 36.

We provisionally propose that sections 85 to 87 of the Arbitration Act 1996 (on domestic arbitration agreements) should be repealed. Do you agree?

We agree with the above proposals.

Other stakeholder suggestions not short-listed for review**Consultation Question 37.**

Do you think that any of the suggestions discussed in Chapter 11 needs revisiting in full, and if so, why

Consultation Question 38.

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?

i. The law applicable to the arbitration agreement

First, as mentioned above, we believe that the Law Commission should explore whether *Enka v Chubb* should be overruled by way of amending the Act. As the Supreme Court itself recognised in that case, the law most closely connected with the arbitration agreement is the law of the seat. It would make much sense, therefore, if that law applied to the arbitration

agreement by default.¹⁹ Parties would always be free to choose another law, but they should do so expressly in relation to the arbitration agreement itself. This would have a number of obvious advantages:

- The law governing the arbitration agreement would be the same as the law governing the procedure, achieving a better fit between the law governing the agreement that sets out the rights and obligations of the parties in relation to the arbitration and the procedural law.
- In an arbitration seated in England, Wales or Northern Ireland, the law governing the separability of the arbitration agreement would be more likely to be English law.
- In an arbitration seated in England, Wales or Northern Ireland, the law applying to confidentiality would be more likely to be English law even if the view were to be taken that the law governing confidentiality is the law of the arbitration agreement (as confidentiality is an implied term of such an agreement) rather than the law of the seat.
- The law of the arbitration agreement would follow the neutral dispute resolution forum rather than the law governing the substantive relationship unless the parties agree otherwise.
- The principle of separability would apply to all arbitrations seated in England and Wales or Northern Ireland, unless the parties expressly chose a different law to govern the arbitration agreement.
- The law of the arbitration agreement would be the law of the court that has the power to review the jurisdiction of the tribunal.

We envisage two alternative avenues:

Alternative 1: follow the approach adopted in Scotland and Sweden where the law of the seat is expressly implied as the law of the arbitration agreement, subject to express agreement to the contrary. The Swedish Arbitration Act in section 48 states: *‘Where an arbitration agreement has an international connection, the agreement shall be governed by the law agreed upon by the parties. Where the parties have not reached such an agreement, the arbitration agreement shall be governed by the law of the country in which, by virtue of the agreement, the proceedings have taken place or shall take place.’*

Similarly, Article 6 of the Arbitration (Scotland) Act 2010, provides that *‘[w]here (a) the parties to an arbitration agreement agree that an arbitration under that agreement is to be seated in Scotland, but (b) the arbitration agreement does not specify the law which is to govern it, then, unless the parties otherwise agree, the arbitration agreement is to be governed by Scots law.’*

Alternative 2: follow the flexible Swiss approach to the validation principle. Article 178(2) of the Swiss PILA states: *‘As regards its substance, an arbitration agreement is valid if it conforms either to the law chosen by the parties, to the law governing the subject-matter of the dispute, in particular the law governing the main contract, or to Swiss law.’*

¹⁹ See R Nazzini ‘The Law Applicable to the Arbitration Agreement: Towards Transnational Principles’ (2016) 65 ICLQ 681-703.

ii. GDPR in arbitration

Secondly, the Law Commission could revise the issue of data protection in arbitration. Issues such as the application of the GDPR give rise to practical difficulties. Following Brexit, the UK is no longer bound by EU law so the Act could be amended to clarify to what extent, if any, the GDPR applies in relation to arbitrations to which the Act applies.

iii. Section 17

Thirdly, we believe that section 17 should be repealed so that, if a party refuses to appoint an arbitrator in the circumstances envisaged by that section, the non-defaulting party may apply to the court under section 18. The court's intervention would be more in line with international practice and avoid any 'due process' or 'equality of arms' argument by the defaulting party at the enforcement stage outside the United Kingdom.

* * *

**RESPONSE OF THE CLLS ARBITRATION COMMITTEE IN RESPONSE TO THE
LAW COMMISSIONS CONSULTATION PAPER ON THE REVIEW OF THE ARBITRATION ACT 1996 (THE “ACT”)**

In its consultation paper (number 257) the Law Commission asked for views on its proposals and for replies to its questions. This submission reflects the views of the Arbitration Committee of the City of London Law Society (CLLS). The CLLS represents approximately 17,000 City lawyers through individual and corporate membership, including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multijurisdictional legal issues. The CLLS responds to a variety of consultations on issues of importance to its members through its 19 specialist committees. The CLLS Arbitration Committee is made up of senior and specialist lawyers who have a particular focus on issues relating to arbitration and settlement of cases, and in supporting the role of London as one of the leading centres for arbitration in the world.

Given its role, in preparing this submission, the Arbitration Committee has been guided by two principles.

First, the international users of the arbitration system have many choices when it comes to deciding where to seat their arbitrations. This Committee wants London to be an obvious choice. In making that choice, international users will look at many factors, but one of the most important is the legislative framework that supports the use of arbitration. In England, this means that international users will look closely at the Act. They may not be English trained or common law lawyers. Therefore, we believe that the amended Act needs, wherever possible, to be clear and easily understood by international users and that steps should be taken to avoid undue complexity. The amended Act must also deal with issues that are of concern to users, such as confidentiality, impartiality and the role of the courts (especially the availability of appeals). The Act should wherever possible be self-standing : it should avoid relying on references to other legislation or principles of common law. We come back to this point below, for example where we look at the proposals as regards preventing discrimination.

Second, users of arbitration pay for using the system. They pay for the arbitrators, any arbitral institution, and counsel litigating issues related to arbitration in the English courts can be expensive, even with the “loser pays” principle. The Act should, therefore, seek to avoid complexity, or procedures, that lead to undue cost. We reflect our concern to identify “cost -v- benefit” in appropriate places in our response below.

There are many issues which the Committee has discussed and on which it is giving further thought. In the hope that this work will be helpful to the Commission, we shall supplement this response with the outcomes of those further reflections as soon as possible and no later than end of January 2023.

CONSULTATION QUESTION		DECISION
1.	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?	The committee considers that not addressing confidentiality explicitly would be a mistake; it is a prime reason for international parties choosing to arbitrate under English curial law and a major attraction for London when compared to a number of competing seats. We do not consider it tenable that the Act should remain silent on such an important element of arbitration in London. We consider that the Act should contain at least a statement of principle as to arbitrations being confidential under English law subject to exceptions as listed in the Act. As regards any concern for greater transparency in international arbitration, the parties may opt out as they wish, and the investor/state position is appropriately addressed through the Mauritius Convention/UNCITRAL Rules on Transparency.
2.	We provisionally conclude that the Arbitration Act 1996 should not impose a duty of independence on arbitrators. Do you agree?	The Committee agrees with the proposal.
3.	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. Do you agree?	The Committee agrees with the proposal.
4.	Should the Arbitration Act 1996 specify the state of knowledge required of an arbitrator's duty of disclosure, and why?	The Committee agrees with the proposal for the reasons set out in the paper.

5.	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?	In the opinion of the Committee, if the Act 1996 were to specify the state of knowledge required of an arbitrator's duty of disclosure, the duty should be based upon what they ought to know after making reasonable enquiries for the reasons set out in the paper.
----	---	---

<p>6.</p>	<p>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 <i>Hashwani v Jivraj</i>) or if it can be more broadly justified (as suggested by the House of Lords)?</p>	<p>The CLLS Arbitration Committee acknowledges the importance in arbitration and more generally of ensuring respect for diversity and equality and supports the important initiatives referred to by the Law Commission in para. 4.4 of the Consultation Paper.</p> <p>However, we have approached the question of whether the Act should prohibit discrimination by adopting the language of the Equality Act 2010 from the perspective of international users of arbitration (including but not limited to States in connection with their international law obligations and as commercial actors). As a consequence, the CLLS Arbitration Committee has some reservations concerning the Law Commission's proposal, as described below.</p> <p>The CLLS Arbitration Committee's collective experience</p> <p>We preface these reservations with the observation that, in the experience of the CLLS Arbitration Committee, there are few if any arbitration agreements between commercial parties that contain offensively discriminatory provisions. In the experience of the CLLS Arbitration Committee, arbitration agreements and arbitral institutional rules contain restrictions as to nationality and, on occasion, characteristics that require an arbitrator to have a certain number of years' experience in a particular jurisdiction or in a particular market or type of work.</p> <p>If the broader experience is that parties choosing to arbitrate in England and Wales more regularly include egregious discriminatory or prejudicial provisions in their arbitration agreements, then the balance may tip in favour of the Law Commission's proposal.</p> <p>The CLLS Arbitration Committee's reservations</p> <ol style="list-style-type: none">1. Risks concerning enforceability of the award outside the jurisdiction of the arbitration <p>The primary concern of the CLLS Arbitration Committee is that the failure to give effect to conditions concerning the characteristics of the arbitrators contained in the arbitration agreement leaves the final award vulnerable to an objection to its recognition and enforcement. The Consultation Paper does address this risk but ultimately concludes that it is more important that the law in England and Wales takes a stance against discrimination. The CLLS Arbitration Committee's view is that the risk that an award is not recognised and enforced is understated in the Consultation Paper and the balance tips in favour of minimising risks to enforceability, given the primary aim of arbitration as a method of dispute resolution is to result in a binding and enforceable award.</p>
-----------	--	--

	<p>The enforceability of an award under the New York Convention is of paramount importance to international parties when choosing to arbitrate their disputes. Any additional provision in the Act that brings a risk to the enforceability of the award may therefore provide a convincing reason to seat the arbitration elsewhere. In particular, if a provision of the arbitration agreement is considered to be unenforceable (either by the tribunal or by the English court) but the arbitration agreement itself is enforceable, the parties will be compelled to arbitrate their dispute knowing that there is ultimately a risk that a court asked to recognise and enforce an award may decline to do so. The alternative, if an arbitration agreement contains a discriminatory requirement as to protected characteristics, is that the entire arbitration agreement is found to be unenforceable, and the parties' clear intent to arbitrate is frustrated.</p> <p>2. Legitimate concerns about the characteristics of the arbitrator, in particular, nationality</p> <p>International parties regularly choose arbitration for its neutrality. They contract out of the jurisdiction of the national courts for the very reason that they want a neutral – or non-national - tribunal. For this reason, international institutional arbitration rules often contain provisions on nationality. Requirements as to, or restrictions on, the nationality of an arbitrator follow from the concern that an arbitrator who bears the nationality of one of the disputing parties may not, or may not be perceived to be, neutral. Concerns about neutrality are particularly observed in the context of state parties, both in investor-State arbitrations and when States or State-owned entities are participating in international commercial arbitration. In the context of arbitrations involving a State, and where public resources are ultimately at stake, it is often important that the arbitral process can be shown to the public as being credible, . Showing that a tribunal is neutral in terms of its nationality.</p> <p>Parties may also require that an arbitrator possess the knowledge and experience of a specialist market in a particular jurisdiction, which criteria could be interpreted as impliedly imposing a nationality and age requirement.</p> <p>The ability to choose an impartial arbitrator with the characteristics or qualities best suited to resolving the dispute and satisfying parties concerns as to neutrality is an aspect of the principle of party autonomy that underpins international arbitration.</p> <p>If the Law Commission's proposal is taken up in the Act, such legitimate criteria, agreed between the parties, may be vulnerable to assessment by the court. In particular, the proposal – as described in question 7 below – would mean that an agreement concerning an arbitrator's protected characteristic is unenforceable, <i>unless</i></p>
--	---

		<p>it can be shown that it satisfies a particular test (whether that test is "necessary" or "broadly justifiable"). In such circumstances, parties may be inclined to choose another seat, rather than take the risk that the requirement of a protected characteristic can be challenged. Further, if a non-discrimination provision is included in the Act, it should recognise that it is legitimate for nationality to be considered as a relevant criterion when selecting arbitrators.</p> <p>3. A reference to domestic equality legislation may act as a deterrent to parties from arbitrating in London</p> <p>International parties may be unfamiliar with the Equality Act and the inclusion of domestic legislation as a reference point may be confusing for international parties and give the impression that the framework provided by the Act is not intended or is less suitable for international disputes. Accordingly, such parties may be inclined to choose another seat of arbitration, to the disadvantage of London as an internationally recognised centre of arbitration.</p> <p>Finally, the CLLS Arbitration Committee also recognises the need for greater progress in increasing all types of diversity amongst arbitral appointments. However, based on our collective experience in the area of international commercial arbitration and investor-state arbitration, restrictions in the parties' arbitration agreement are not a contributing factor to slower than desirable progress in improving the diversity of arbitral appointments. Accordingly, it is unclear that the downsides of the proposal, in particular the risks to the enforceability of the award, can be justified by the policy reasons which are given to support its introduction.</p> <p>Enforceable if "necessary" or if "broadly justifiable"</p> <p>In the event that the Law Commission were to introduce its proposal into the Act, the "broadly justified" test is to be preferred (we understand "broadly justified" to mean that the requirement of a protected characteristic is "a proportionate means of achieving a legitimate aim"), as it provides at least some scope for parties to select the arbitrator they think is best suited to determine the disputes that the parties anticipate may arise in the course of their relationship. The test of whether a protected characteristic is "necessary" places the threshold too high and it would be very difficult to satisfy this test where the agreement as to the protected characteristic concerns nationality in order to achieve neutrality and the perception of neutrality.</p>
--	--	--

7.	<p>We provisionally propose that:</p> <p>(1) the appointment of an arbitrator should not be susceptible to challenge on the basis of the arbitrator's protected characteristic(s); and</p> <p>(2) any agreement between the parties in relation to the arbitrator's protected characteristic(s) should be unenforceable;</p> <p>unless in the context of that arbitration, requiring the arbitrator to have that protected characteristic is a proportionate means of achieving a legitimate aim.</p> <p>"Protected characteristics" would be those identified in section 4 of the Equality Act 2010.</p> <p>Do you agree?</p>	<p>Please see answer to question 6, above. While the question of discrimination is an important one, the CLLS Arbitration Committee's view is that this matter should not be addressed in the Act as proposed.</p>
8.	<p>Should arbitrators incur liability for resignation at all, and why?</p>	<p>Yes, they should, if there are no reasonable grounds for resignation.</p>
9.	<p>Should arbitrators incur liability for resignation only if the resignation is proved to be unreasonable?</p>	<p>Yes, arbitrators should incur liability if the resignation is "manifestly unreasonable". The scope of any proposed liability would need to be carefully defined.</p>

<p>10.</p>	<p>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. Do you agree?</p>	<p>The CLLS Arbitration Committee does not agree. The Court hearing any application should decide who pays the costs given the outcome of the application and offering an indemnity would be inconsistent with this approach. For example, the Court may decide to require an arbitrator to compensate the parties for the costs of court proceedings to appoint a new arbitrator following their "manifestly unreasonable" resignation.</p>
<p>11.</p>	<p>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. Do you agree?</p>	<p>The CLLS Arbitration Committee agrees with an opt-out option. The Committee considers that the Law Commission's proposal deserves some comment. As a preliminary observation, the Committee considers that, in practice, the current provisions of the Act are broad enough to permit an arbitral tribunal to adopt a summary procedure to decide an issue (eg, a claim or defence), in terms compatible with the Law Commission's proposal. Despite this, the Committee considers that the proposed amendment is beneficial. Arbitral tribunals, mindful of a potential setting aside or a risk of non-enforceability of an award, tread very carefully when it comes to procedural issues.¹ In this vein, many arbitral tribunals may not feel comfortable adopting procedures or mechanisms that may dispose of an issue (or a whole case) at an early stage if not expressly set out in legislation or, where applicable, institutional rules. Accordingly, the proposal, which the Committee understands will be on an opt-out rather than opt-in basis (i.e. will apply automatically to all English-seated arbitrations unless parties expressly opt-out of the provision), if adopted, is likely to encourage arbitral tribunals to dispose of unmeritorious issues early in the proceedings upon an application of a party. The early disposal of unmeritorious issues, in turn, is likely to reduce the length and attendant cost of international arbitration, thus dealing with the two main criticisms levelled against this method of dispute resolution.</p> <p>Against this backdrop, the Committee considers that the proposal, if adopted, is likely to enhance the standing of London as an arbitral seat.</p>

¹ Some voices refer to this risk averse stance to as "due process paranoia".

12.	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. Do you agree?	The Committee agrees with the proposal.
13.	We provisionally propose that the Arbitration Act 1996 should stipulate the threshold for success in any summary procedure. Do you agree?	The Committee agrees with the proposal.

<p>14.</p>	<p>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. Do you agree?</p>	<p>The Committee agrees with the proposal, with comments. The Committee agrees with the Law Commission that there should be a test. The Committee further agrees with the Law Commission that a “no real prospect of success” test instead of “manifestly without merit” test (a higher test than the test of “no real prospect of success”), is preferable, for the following reasons:</p> <ol style="list-style-type: none">1. There is a significant body of English case law in respect of the “no real prospect of success” test. By contrast, the “manifestly without merit” test is alien to English law.2. A key benefit arising from this body of case law relates to predictability, a factor often considered by parties and their advisers when selecting a seat in an arbitration agreement (be that an arbitration clause or a submission agreement).3. In addition, after a dispute has arisen, the relevant case law is likely to provide, at the very least, points of reference for the debate of the parties and the tribunal’s decision.4. What is more, a decision on an early disposal may be subject to review by the English Court. This could be the case in relation to decisions on jurisdictional issues under s 67 of the Act or on the merits under s 69 of the Act (if not contracted out). In those circumstances, the Committee considers that it would be more efficient for an English judge to deal with a well-known test in the jurisdiction rather than an alien one.5. Lastly, the “manifestly without merit” test, due to its open nature, does not provide more guidance than the “no real prospect of success” test and therefore requires a significant inquiry on the part of an arbitral tribunal. Thus, on pure textual analysis, it cannot be said that the “manifestly without merit” test is superior.
------------	--	--

15.	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. Do you agree?	The Committee agrees with the proposal.
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?	The Committee agrees with the proposal for the reasons set out in the paper.
17.	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. Do you agree?	The Committee agrees with the proposal.
18.	We provisionally conclude that the provisions of the Arbitration Act 1996 should not apply generally to emergency arbitrators. Do you agree?	The Committee agrees that the provisions of the Arbitration Act should not generally apply to emergency arbitrators and specific provisions for Emergency Arbitration should be dealt with in the relevant institutions' rules and not in the Act.

19.	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?	Yes. The Committee agrees with the proposal.
20.	Do you think that section 44(5) of the Arbitration Act 1996 should be repealed, and why?	The Committee agrees with the proposal for reasons set out in the paper.
21.	<p>Which of the following ways of accommodating the orders of any emergency arbitrator do you prefer, and why?</p> <p>(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.</p> <p>(2) An amendment which allows an emergency arbitrator to give permission for an application under section 44(4) of the Arbitration Act 1996.</p> <p>If you prefer a different option, please let us know.</p>	The Committee agrees with option 2. However, this is one area on which the CLLS expects to comment further.

<p>22.</p>	<p>We provisionally propose that:</p> <p>(1) where a party has participated in arbitral proceedings, and has objected to the jurisdiction of the arbitral tribunal; and</p> <p>(2) the tribunal has ruled on its jurisdiction in an award,</p> <p>then any subsequent challenge under section 67 of the Arbitration Act 1996 should be by way of an appeal and not a rehearing.</p> <p>Do you agree?</p>	<p>The Committee agrees with the proposal, for the reasons set out in the paper. However, the Committee notes that this was a difficult decision, with a minority of members strongly of the view that de novo review should be retained, and some members in the majority expressing their agreement to the Law Commission's proposal with some hesitation.</p> <p>The minority view is that de novo review provides a critical protection to parties who have not consented to arbitration, it is the standard of review in other leading jurisdictions such as Singapore, the system is not widely abused and inefficient, and any such abuse and inefficiency could in any event adequately be dealt with by the court's existing case management powers.</p> <p>The majority view however, which is ultimately the Committee's view, is that an appeals mechanism would be more attractive to users of arbitration than a full rehearing. It would streamline the process for jurisdictional challenges and render it less open to abuse (some members were firmly of the view that parties do abuse the ability to request de novo review), whilst at the same time maintaining adequate safeguards for genuine jurisdictional challenges. It was felt that such an approach would give London a competitive advantage over other leading seats. However, some members of the majority noted that they had arrived at this position with some difficulty and were sympathetic to the points raised by the minority.</p>
<p>23.</p>	<p>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?</p>	<p>The Committee agrees with the proposal, for the reasons set out in the paper.</p>
<p>24.</p>	<p>We provisionally conclude that our proposed change to section 67 of the Arbitration Act 1996 would not require any similar change to section 103. Do you agree?</p>	<p>Yes. The Committee agrees.</p>

25.	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. Do you agree?	Yes. The Committee agrees.
26.	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?	Yes. The Committee agrees.
27.	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?	Yes. The Committee agrees to keep the status quo.

28.	Do you think that section 7 of the Arbitration Act 1996 (separability of arbitration agreement) should be mandatory, and why?	<p>The Committee agrees that section 7 of the Act should be mandatory. If section 7 remains non-mandatory, the important principle of the separability of the arbitration agreement from the contract in which it is contained may be weakened as a result of the unintended consequences that have arisen from the Supreme Court's ("UKSC") decision in <i>Enka v Chubb</i>. The Committee considers that separability is considered a cardinal principle of arbitration across the world. Any weakening of that principle will lead to uncertainty and an increase in satellite litigation, all of which detracts from London's position as a leading seat for arbitration.</p> <p>The decision in <i>Enka</i> is troubling in the following two respects, because the UKSC held that (i) an express choice of the law governing the underlying contract will generally apply to its arbitration agreement, and (ii) a choice of foreign law for the arbitration agreement constitutes an agreement under section 4(5) of the Act to disapply all non-mandatory sections of the Act (which would include section 7), insofar as those sections address matters that are substantive as opposed to procedural. The UKSC specifically held in <i>Enka</i> that the principle of separability in section 7 is substantive and would therefore be affected where a foreign law governs the arbitration agreement.</p> <p>The result of these developments is that it allows parties to revive arguments that the invalidity of the main contract (e.g. because of fraud or illegality) also invalidates the arbitration agreement contained within that contract, and that the arbitrators therefore lack jurisdiction. This argument would be available to a party that can demonstrate that the foreign law governing the arbitration agreement does not recognise the principle of separability. Many parties choose London as the seat of arbitrations where their contract is governed by foreign law. The Committee is concerned that as the law governing the arbitration agreement in these cases will now be that same foreign law, arguments impugning the arbitration agreement may be raised in a number of cases.</p> <p>Until <i>Enka</i>, this issue was subject to the decision of the House of Lords in <i>Fiona Trust v Privalov</i>, to the effect that the separable arbitration agreement survives allegations that render the underlying contract invalid, save in exceptional circumstances (e.g. where a signature on the main contract has been forged and the arbitration agreement itself is said to be directly vitiated). <i>Fiona Trust</i> was considered a landmark decision and hailed by many commentators across the world. <i>Enka</i> takes English arbitration law back some 20 years, in respect of foreign law governed contracts containing arbitration clauses and will likely lead to an increase in jurisdictional challenges based on creative arguments under foreign law.</p>
-----	---	--

		<p>The Committee considers that this would be a retrograde step and would leave London as an outlier amongst the most prominent seats for international arbitration. The Committee believes that the best way to address this issue would be for a default rule to be inserted into the Act, to the effect that absent an express agreement as to the law governing the arbitration agreement, the law of the seat (English law) shall apply. However, if the Law Commission decides not to pursue that important reform, at a minimum, section 7 should become mandatory, thereby ensuring that the principle of separability applies to all London-seated arbitrations.</p> <p>However, this is one area on which the CLLS expects to comment further.</p>
29.	<p>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?</p>	<p>The Committee agrees with the proposal.</p>
30.	<p>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?</p>	<p>The Committee agrees with the proposal.</p>

31.	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?	We do not think that express reference should be made. Any provisions could become quickly outdated; Arbitrators, parties and the institutions are better placed to address these issues.
32.	Do you think that section 39 of the Arbitration Act 1996 should be amended to refer to “orders” (rather than “awards”), and why?	The Committee agrees but it should be “awards or orders” to cover both. However, this is one area on which the CLLS expects to comment further.
33.	Do you think that section 39(1) of the Arbitration Act 1996 should be amended to refer to “remedies” (rather than “relief”), and why?	Yes, in order to achieve consistency.
34.	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?	The Committee agrees with the proposal.

35.	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?	The Committee agrees with the proposal.
36.	We provisionally propose that sections 85 to 87 of the Arbitration Act 1996 (on domestic arbitration agreements) should be repealed. Do you agree?	The Committee agrees with the proposal.

<p>37.</p>	<p>Do you think that any of the suggestions discussed in Chapter 11 needs revisiting in full, and if so, why?</p>	<p>Yes, we believe that the law governing the arbitration agreement requires revisiting in full. Further, we agree with the suggestion in paragraph 11.8 of the consultation paper that the Act should be amended to expressly provide for a default rule that the law governing the arbitration agreement should be the law of the seat, unless the parties have expressly agreed otherwise.</p> <p>We do not agree with the implication in paragraphs 11.8 to 11.12 of the consultation paper that the decision of the majority of the Supreme Court in <i>Enka v Chubb</i> is sufficiently clear. To the contrary, the decision leaves room for argument as to the law which governs the arbitration agreement. For example, we expect disputes to arise as to whether the parties have impliedly selected the law applicable to the contract, for the purposes of the first rule established in <i>Enka</i>.</p> <p>In any event and regardless of whether or not the Supreme Court's decision in <i>Enka</i> is clear, the consequences of that decision as regards the law governing the arbitration are of concern. The Supreme Court's decision as to the nature of the test for determining the law of the arbitration agreement and its interpretation of Article 4(5) of the Act allows parties to raise creative foreign law arguments which would disrupt the arbitration. For example, arguments as to the scope of the arbitration clause, its separability and issues of arbitrability. Where parties specify that their arbitration shall be seated in London, they expect that English law will apply to these issues. However, following <i>Enka</i>, there can be argument, and accordingly uncertainty, as to the applicable law.</p> <p>There is therefore currently a lack of clarity in this area of the law. Accordingly, and regardless of whether the decision in <i>Enka v Chubb</i> is right or wrong, the inclusion in the Act of a clear default rule as described above would enhance legal certainty and clarity.</p> <p>Our preference is for the default rule to be for the law governing the arbitration agreement to be the law of the seat, since it makes more sense for the law governing the arbitration to be the law of the seat rather than, for example, the law chosen by the parties to govern their substantive rights and obligations. Such approach would also align with, for example, the approach taken in Art 16.4 LCIA Arbitration Rules 2020.</p>
------------	---	---

38.	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?	We will write separately with ideas for further topics or issues or potential areas of reform as soon as possible and no later than at the end of January 2023.
-----	---	---

Response ID ANON-PT57-RUK8-T

Submitted to Law Commission Consultation: Review of the Arbitration Act 1996
Submitted on 2022-12-13 07:16:11

About you

What is your name?

Name:

Yiu Kei CHAN (Y.K. CHAN)

What is the name of your organisation?

Enter the name of your organisation:

YK Shipping Consultancy Ltd, Hong Kong

Are you responding to this consultation in a personal capacity or on behalf of your organisation?

Personal response

If other, please state::

What is your email address?

Email:

[REDACTED]

What is your telephone number?

Telephone number:

[REDACTED]

If you want the information that you provide in response to this consultation to be treated as confidential, please explain to us why you regard the information as confidential. As explained in our privacy notice, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

Please explain to us why you regard the information as confidential:

Consultation questions

Consultation Question 1: 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?

Disagree

Please share your views below.:

I consider that the Court should not be bothered on this issue. With the confidentiality expressed in the Act, the parties will be sure given the comfort of their cases be kept in confidence. The confidentiality could be lift with both parties' consent, by court order, in the public interest and etc. as determined by the Court.

Consultation Question 2: We provisionally conclude that the Arbitration Act 1996 should not impose a duty of independence on arbitrators. Do you agree?

Agree

Please share your views below.:

In the present environment, everyone has interaction with others in the course of business, social activities or may sit on the same panels/board/committees in government and/or professional associations/charitable bodies. The issue on the arbitrators' independency may be raised for sake of argument or as delaying tactics. Impartiality is more important as it must be seen as such in the eyes of parties, counsels and members of the tribunal.

Consultation Question 3: 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. Do you agree?

Agree

Please share your views below.:

I think the impartiality is concerned with conflict of arbitrators' interest with the parties. It is the usual practice in arbitration that the arbitrators should disclose any justifiable doubts on any conflict of interest.

Consultation Question 4: Should the Arbitration Act 1996 specify the state of knowledge required of an arbitrator's duty of disclosure, and why?

Yes

Please share your views below.:

In view of global or local Merger and Acquisition (M&A) prevailing in lawyer firms in recent years, it seems difficult, if not impossible, for lawyers (serving as arbitrators) to have a throughout conflict check with their group. It is desirable to limit the arbitrator's duty of disclosure within their extent of knowledge. In any event, they should disclose when they come to their knowledge that justifiable doubts are arisen in respect of their impartiality.

Consultation Question 5: 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?

Actual knowledge

Please share your views below.:

same comment as the above Question 4.

Consultation Question 6:

More broadly justified

Please share your views below.:

The requirement of acting as arbitrators should be strictly complied with in the arbitration agreement which should not be subject to any challenge.

Consultation Question 7:

Disagree

Please share your views below.:

same comment as in above Question 6.

Consultation Question 8: Should arbitrators incur liability for resignation at all, and why?

No liability for resignation

Please share your views below.:

Arbitrators should not bear any liability for their resignation so long as the resignation is not arising from their purposely non-disclosure of conflict of interest.

Consultation Question 9: Should arbitrators incur liability for resignation only if the resignation is proved to be unreasonable?

Yes

Please share your views below.:

Re ARI v WXJ [2022] EWHC 1543 (Comm), the arbitrator should not resign from the appointment after his acceptance. It appears unreasonable and will cause unnecessary time and cost to the parties.

Consultation Question 10: 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. Do you agree?

Agree

Please share your views below.:

So long as the arbitrators act in good faith. Otherwise the arbitrators will face unnecessary legal cost for the court proceedings.

Consultation Question 11: 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. Do you agree?

Agree

Please share your views below.:

It will minimize the arbitration costs and expedite the proceedings.

Consultation Question 12: 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. Do you agree?

Agree

Please share your views below.:

The arbitral tribunal is the master of the proceedings. Naturally, the summary procedure should be a matter for it.

Consultation Question 13: We provisionally propose that the Arbitration Act 1996 should stipulate the threshold for success in any summary procedure. Do you agree?

Agree

Please share your views below.:

With the threshold for success expressly stipulated in the Act, it will avoid any further dispute between the parties subsequently by court proceedings. No appeal is desirable to be mentioned.

Consultation Question 14: 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. Do you agree?

Agree

Please share your views below.:

Comment as above Question 13.

Consultation Question 15: 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. Do you agree?

Agree

Please share your views below.:

It can reduce the time and effort required for taking evidence from the witnesses.

Consultation Question 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?

Yes

Please share your views below.:

I understand that the court always has the power to subpoena people to come to court proceedings even if it does not say so in section 44 of the Act. It is fine to be amended to include the third parties in the court's orders. As section 44 of the Act is for court power, would it be possible to make the arbitral tribunal replace the Court to have such authority / powers to do so and the order to be extended to the third parties. Thence, the third parties must comply with such order - otherwise they will be subject to penalty from the court.

Consultation Question 17: 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. Do you agree?

Disagree

Please share your views below.:

The arbitration is related to the parties concerned only. However, if the third parties are joined to the arbitration, the court's consent to an appeal should also apply to them.

Consultation Question 18: We provisionally conclude that the provisions of the Arbitration Act 1996 should not apply generally to emergency arbitrators. Do you agree?

Disagree

Please share your views below.:

Most (if not all) of arbitral institutions have a rule relating to the emergency arbitrators. The Arbitration Act should have the like provision to recognize the appointment of the emergency arbitrator and support his/her award. Otherwise it makes the institutional rules not valid in law for enforceability.

Consultation Question 19: 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?

Disagree

Please share your views below.:

same comment as the above Question 18.

Consultation Question 20: Do you think that section 44(5) of the Arbitration Act 1996 should be repealed, and why?

Yes

Please share your views below.:

When the arbitral tribunal cannot proceed further due to lack of power, the court will be sought for assistance. It seems section 44(5) is superfluous. However, it is fine to leave the section as is since it has lasted for 25 years.

Consultation Question 21:

Peremptory order

Please share your views below.:

As emergency arbitrator is empowered to give an order, he/she should also be given authority to conduct in a normal way as the formally formed arbitral tribunal.

Consultation Question 22:

Agree

Please share your views below.:

The tribunal will not change its own ruling. There is no point for a rehearing. The challenge should be by way of an appeal.

Consultation Question 23: 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?

Yes

Please share your views below.:

Same comment is as the above Question 22.

Consultation Question 24: We provisionally conclude that our proposed change to section 67 of the Arbitration Act 1996 would not require any similar change to section 103. Do you agree?

Agree

Please share your views below.:

Section 103 is concerned on the refusal of recognition and enforcement of an award under New York convention. I do not think that there is any relevance on any change to section 67.

Consultation Question 25: 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. Do you agree?

Agree

Please share your views below.:

I think that it is entirely at the Court's discretion to do so.

Consultation Question 26: 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?

Agree

Please share your views below.:

I agree that the arbitral tribunal should have such authority to make an award of costs as it is a part of the award on its decision.

Consultation Question 27: 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?

Agree

Please share your views below.:

Section 69 appears quite substantial.

Consultation Question 28: Do you think that section 7 of the Arbitration Act 1996 (separability of arbitration agreement) should be mandatory, and why?

Other

Please share your views below.:

Would it be considered to address in section 7 about the situation determined in the recent case - DHL Project & Chartering Ltd v Gemini Ocean Shipping Co Ltd (the "Newcastle Express") on the separability of arbitration agreement which does not exist when there is no agreement concluded?

Consultation Question 29: 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?

Disagree

Please share your views below.:

If so, it will cause unnecessary delay for such simple decision unless the court's ruling is beyond the normal expectation in law.

Consultation Question 30: 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?

No

Please share your views below.:

What if no agreement is obtained from the other party and the tribunal? Does it mean that the party cannot go ahead the application? If so, there is no justice at all. However, if the application is determined unreasonable, the applicants will be subject to court's penalty.

Consultation Question 31: 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?

Yes

Please share your views below.:

It is to avoid unreasonable challenge to the virtual hearing and electronic documentation which are not spelt out admissible in the law.

Consultation Question 32: Do you think that section 39 of the Arbitration Act 1996 should be amended to refer to "orders" (rather than "awards"), and why?

Yes

Please share your views below.:

All are referred to as "orders" in the text. "Awards" are referred to those in formal format for enforcement locally and in other jurisdictions.

Consultation Question 33: Do you think that section 39(1) of the Arbitration Act 1996 should be amended to refer to "remedies" (rather than "relief"), and why?

Yes

Please share your views below.:

The term of "remedies" is more understandable to the public while "relief" may be only known to legal practitioners.

Consultation Question 34: 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?

Agree

Please share your views below.:

The day to run must counter from the date of the result known by the party. Would you consider "clear" days to avoid any argument on counting?

Consultation Question 35: 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?

Agree

Please share your views below.:

It is clear and also spell out the requirements to give the leave to appeal.

Consultation Question 36: We provisionally propose that sections 85 to 87 of the Arbitration Act 1996 (on domestic arbitration agreements) should be repealed. Do you agree?

Agree

Please share your views below.:

There is no need to distinguish domestic and international arbitrations. Domestic arbitration proceedings should be same as those in international arbitration. I understand that domestic arbitration award can be enforced outside UK, and NY convention to apply.

Consultation Question 37: Do you think that any of the suggestions discussed in Chapter 11 needs revisiting in full, and if so, why?

Please share your views below.:

I think so as there are quite a number of issues coming out in recent years. It is desirable to update the Act.

Consultation Question 38: 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?

Please share your views below.:

I wonder if it is necessary to distinguish mandatory and non-mandatory provisions in the section 4 of the Act. If so, would you consider to have certain wordings in the sections concerned to identify their mandatory nature, so as to avoid cross-reference. It looks more user-friendly in particular for overseas practitioners.

Submission in response to the Law Commission's review of the Arbitration Act 1996

Introduction

The Chartered Institute of Arbitrators (Ciarb) is an international centre of excellence for the practice and professional standards of alternative dispute resolution. With its headquarters located in London, Ciarb represents, unites, and supports its members across the world.

Ciarb's policy is to interact with and contribute to the developments in the dispute resolution arena to the benefit of its 18,000 strong global membership. We therefore submit this Response to the English Arbitration Act 1996 Review Reform, conducted by the Law Commission of England and Wales.

Background

The English Arbitration Act is a uniquely successful piece of legislation. Adopted in 1996, it has offered a comprehensive legal foundation for domestic and international arbitrations and has become the main driving force behind London becoming one of the most successful and popular of all international arbitration hubs globally. The development of dispute resolution and arbitration practice locally and internationally has prompted a discussion on whether the Act could benefit from the modification of some of its provisions.

Shortly after the Act's 25th anniversary in 2021, the Law Commission ("the Commission") issued its Consultation Paper 257 "Review of the Arbitration Act 1996" evaluating the Act's effectiveness and fitness for purpose in the coming decades. The paper analyses several provisions of the Act and offers proposals for some changes based on in-depth technical, legal, and practical analysis. Since the start of the review, the Commission has welcomed and participated in discussions on the review with other stakeholders in the industry, including practitioners, international dispute resolution institutions and organisations. Ciarb has actively contributed to and organised many of those discussions, such as the review of the Reform by the Alternative Dispute Resolution All-Party Parliamentary Group (ADR APPG) and a Public Consultation event with the Commission at Ciarb's headquarters.

Ciarb now submits this, its recommendations on the proposals presented by the Commission in the review. This submission was prepared in consultation with and in consideration of views provided by the following individuals: Ben Giaretta, Louis Flannery KC, David Steward, Toby Landau KC, Wendy Miles KC, Marion Smith KC, Jonathan Wood, Duncan Bagshaw, Clare Ambrose, Ali Malek KC, Professor Stavros Brekoulakis, Christopher Harris KC, Paul Bonner Hughes, Professor Julian Lew KC, Professor Emilia Onyema, James Clanchy, Audley Sheppard, Carlos Carvalho, Sir Bernard Eder, Andrew Miller KC, and Rt. Hon. Lord Jonathan Mance. This submission should in no way be

construed as reflecting, agreeing, or disagreeing with any of the personal views expressed by the above individuals and is entirely the views of Ciarb alone.

Item 1. Summary Disposal

Summary disposal. Perhaps provide expressly (in section 34(2)) that procedural matters include whether, after giving the parties a reasonable opportunity to put their case, to proceed summarily to an order or award on any issue.

Summary disposal of issues which lack merit

In the Commission's view, it might be reasonable to adopt an express, non-mandatory provision allowing summary disposal procedures. Even though such procedures are not currently prohibited, an express provision might make arbitrators less reluctant to resort to it.

Recommendation: Support proposal

Summary disposal can be used effectively to save considerable time and cost for parties. As was noted by commentators, the implied authority to do this is available via section 33 of the Act. However, arbitrators have been reluctant to use this power. This could be attributed to due process paranoia, or it could be a general lack of familiarity with summary disposal procedural mechanisms. An express provision in section 34(2) may well give confidence to arbitrators to adopt such procedures in suitable cases, to the benefit of the parties.

The resulting express provision should be non-mandatory and should be drafted to maintain the fundamental principle of party autonomy in the law of England, Wales, and Northern Ireland. Summary disposal should be available only upon the request of one of the parties and should not be within the discretion of the arbitrator. Summary disposal should also be limited to the substantive claims in the dispute. Parties should retain the power to exclude summary disposal via preliminary agreement.

Item 2. Emergency Arbitrators

Emergency arbitrators. Give them status, perhaps by including them in the definition of arbitrator or tribunal (in section 82(1)). Consider how section 44 (court powers in support of arbitral proceedings) might be exercised where emergency arbitration procedures are also available.

Emergency Arbitrators

The provisional conclusion of the Commission is that the provisions of the Act should not apply generally to emergency arbitrators. As an example, it believes that section 16 (procedure for appointment of arbitrators) is not suited to the appointment of emergency arbitrators. However, the question remains as to what happens if an emergency arbitrator issues an interim order which a party ignores and how the Act could address this.

Recommendation: Support the first option proposed by the Commission.

Emergency arbitration is a development stemming from the practices of arbitral institutions and is used as an alternative for seeking interim measures from courts. It can be a vital option for parties

in disputes seated either in jurisdictions where interim measures are not available from the courts, or in jurisdictions where the parties (for whatever reason) do not want to make an application to the courts. This should be an effective remedy. There is also a concern about whether, under the interpretations of the law of England, Wales, and Northern Ireland, it is necessary to specify in the Act that agreeing to institutional rules which allow for emergency arbitration does not prevent parties from also seeking the assistance of the courts. We believe that, of the options presented, this is best addressed through an express empowerment of the court to order compliance with a peremptory order of an emergency arbitrator. This would forestall any attempts by parties to argue to the contrary and would be in line with other sections of the Act which give the same empowerment concerning orders of a regularly constituted tribunal.

Should this option be taken, and emergency arbitrators be given status in the Act, it would also be necessary to clarify whether awards in emergency arbitration are enforceable under section 66 or whether they are peremptory orders as defined in section 42: we favour the latter, since this would be consistent with the interim measures of a tribunal and would avoid the application of the provisions of the Act and caselaw applicable to awards (which could have unwanted consequences, undermining the effectiveness of emergency arbitration).

Item 3. Court Powers Exercisable in Support of Arbitral Proceedings

Provide that section 44 can be used against third parties. Allow affected third parties a right to petition the Court of Appeal.

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

The Commission asks whether an explicit provision confirming the powers of the courts to make orders under section 44 against third parties is needed. The paper offers several other proposals regarding measures such as emergency arbitrators and the relevant provisions of the Act.

Recommendation: Support the proposal that 44(2)(a) be slightly amended to confirm that it relates to the taking of the evidence of witnesses by deposition only, and no other amendments.

The Commission provisionally proposes 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. They note that third parties have not agreed to arbitration or to limit their recourse to courts. However, the Commission has also noted that it believes that section 44 already empowers the courts to make orders against third parties and that it would not be desirable to try and codify the limitations on this power due to the distinctive nature of each dispute and the overlapping rules and requirements that could be at play. For the same reason, we would not support an express right to full appeal for those third parties. We suggest that is for the courts to determine on a case-by-case basis whether a third party is first bound by the arbitral agreement, which can be the case despite the party not being an express party to the agreement, and thus it is for the courts to determine whether a full right of appeal is applicable to that third party.

Item 4. Section 67 (challenging the award: substantive jurisdiction)

Options might include the following. (i) Provide that, where the applicant took part in the arbitral proceedings, any challenge to a previous decision by the tribunal as to its jurisdiction is by way

of review of the tribunal's decision, rather than a re-hearing. (ii) Provide the same remedies under section 67 as are available under sections 68 and 69. (iii) Provide that section 31 (the tribunal to rule on its jurisdiction) and section 32 (the court to rule on the tribunal's jurisdiction) are mutually exclusive alternatives.

Jurisdictional challenges against arbitral awards (section 67)

The Commission considers whether in circumstances where a party had participated in proceedings and questioned Tribunal's jurisdiction under section 30 and then challenged the arbitrator's finding of jurisdiction under section 67, a full rehearing or an appeal would be best suited to deal with the challenge. The initial proposal is that an appeal is a viable option and that the final arbiter of jurisdiction should be the courts (i.e. a review rather than a full rehearing).

Recommendation: Cautiously support the proposal.

The suggestion by the Commission to amend section 67 to express a right of appeal on an arbitrator's finding of jurisdiction in an award, rather than a right of full rehearing as is the current practice, is the most multifaceted of the suggestions in its review. On the one hand, in its current state the interpretation of the section is that, after an award has been issued either on the merits of a dispute or on jurisdiction separately, the losing party may present its case on jurisdiction to the courts de novo. The arguments in support of maintaining this system are numerous.

It has been argued that, as the right to rehearing is limited to findings on jurisdiction and since jurisdiction is the fundamental source of a tribunal's power to resolve disputes in arbitration, the safeguards for ensuring that tribunals make legally sound determinations on this issue should be broader than with any other aspect of a dispute. Even so, it has been asserted that courts are not required to give de novo reviews and there is a suggestion that the court can exercise their case management powers to limit the extent of the evidence that would be presented in a section 67 re-hearing. There is also a suggestion that limiting the right to an appeal only would shift the authority to give the final word on jurisdictional findings away from the courts and toward the arbitrator.

Furthermore, there is a concern that altering the application of section 67 would create a mechanism for reviewing jurisdictional findings that conflicts with the mechanism in section 103. Section 67 applies to arbitrations seated in England, Wales, and Northern Ireland and so such applications are made to the courts as the referee within a dispute and as the authority affirming the legitimacy of awards made at their seat. Section 103 deals with awards made in foreign jurisdictions and which parties wish to enforce in England, Wales, and Northern Ireland. To limit the right to a jurisdictional review to an appeal in locally seated arbitrations via section 67 would potentially leave the right of a full rehearing open to parties enforcing foreign awards under section 103.

Additionally, there is concern that without a right of full rehearing, parties would be stuck with the evidentiary scope established by an arbitral tribunal, even if it were inappropriately narrow. In such cases, the courts' hands might be tied if restricted to that same evidence. Similarly, it would limit courts' ability to ensure the doctrine of *kompetenz-kompetenz* as applied in the Act via section 30 was done so in accordance with the law of England, Wales, and Northern Ireland. Further, since the proposal suggests that amendments apply only to parties who participated in the arbitration and made jurisdictional objections to the tribunal, this would imply a different approach for parties who

failed to participate in the arbitration. If non-participating parties were allowed a full re-hearing on awards of jurisdiction, then this could even operate to encourage non-participation and a “wait-and-see” strategy where parties could hedge the odds of a tribunal declining jurisdiction on a prima facie review of the available evidence, but, failing that, nothing would be lost as a full de novo hearing is on offer.

On the other hand, arguments in favour of the proposal are equally numerous. One problem that the proposal would address is the burden of time and cost involved in a full rehearing in the courts. The prevailing party in arbitration can be subject to a lengthy and extensive repeat of their arguments, one where the losing party has the opportunity to adjust their arguments, amend their submissions, and produce new evidence. The proposal would thus preempt a second problem where parties are able to treat an arbitral hearing on jurisdiction as a “dress rehearsal” for their case to the courts on a section 67 application and be rewarded by getting two bites at the cherry. Thirdly, once in the courts, judges who are unfamiliar with the dispute may be overwhelmed with the volume of evidence needed to make a judgment. It would inevitably require considerable additional time than presentation to the arbitral tribunal. This creates burdens on the courts.

And while some argue that a right to full re-hearing is in line with practice in certain jurisdictions, it has also been argued that in most jurisdictions, such mechanisms are more limited and jurisdictional laws, including the UNCITRAL Model Law, err on the side of strengthening the *kompetenz-kompetenz* of arbitrators. It is indeed a fundamental principle of commercial arbitration that parties are in that forum by their own consent. Parties have also had the opportunity to select their arbitrator and it is assumed that they have done so because they have confidence in that person to understand the law and to properly analyse the information put in front of them. This is especially true of participating parties. Parties in arbitration have selected their forum and must not be allowed to avoid the consequences by returning to the courts if the outcome turns out not to be to their liking.

On balance, there does not seem to be any objection to the proposal that cannot be dealt with effectively if the amendments are made thoughtfully and with full consideration of how the interplay with other relevant sections of the Act could be affected. Since the current right under section 67 is rarely used in its current form, the likely effect of the proposal will be to further reduce the number of applications, rather than open a door for frivolous attempts or for second bites at the cherry. The burden on courts and parties in the rare cases where section 67 is currently applied is immense. The proposal would reduce this burden while still allowing parties the right to a court review of the tribunal’s findings on jurisdiction. It also maintains the courts’ position as the final arbiter of jurisdiction in arbitration under the Act.

As to the interplay with section 103, the proposed amendment should take the relationship between the two into account while also recognizing that enforcing foreign awards entails distinct issues from refereeing disputes seated in the courts’ local jurisdiction. However, inadvertent creation of a two-tiered enforcement framework could be detrimental to the reputation and desirability of England, Wales, and Northern Ireland as a seat. This is a delicate balancing act, and any reform of section 67 should not upend this.

As to synchronizing the remedies available in section 67 with those in sections 68 and 69, we fully support this proposal as it avoids the inconsistent outcomes with adverse findings under 68 and 69 which can be seen in several cases. There does not seem to be a rational reason that 67 should be different.

As to section 32, we do not believe the approach in section 67 would need to be duplicated in this section since these applications deal with requests to the court to determine the tribunal's jurisdiction. These requests would arise before a tribunal has decided this issue or rendered an award. Such applications already require the permission of the tribunal and courts and so there is no need to limit the scope of the application to an appeal.

Item 5. Section 69 (appeals on a point of law)

Is there a need to revisit the language of this section?

Appeals on a point of law (section 69)

In the Commission's view, the wording of section 69 offers a satisfactory compromise between the importance of the finality of arbitral awards and the necessity to correct errors of law and it is "applied consistently and in common to everyone".

Recommendation: There is no need to revisit the wording of section 69.

We believe that the Act is the only national arbitration legislation to allow an automatic right to appeal ("opt-out") on a point of law in both international and domestic arbitration. This is a key differentiating feature of the Act among other jurisdictions internationally and the main contrasting feature to the UNCITRAL Model Law. Much has been said about the competitiveness of the Act in terms of making England, Wales, and Northern Ireland and attractive seat in international arbitration. Surveys done by universities and law firms have repeatedly indicated that this feature is particularly attractive to many parties and practitioners.

Few parties outside of some industries (such as the shipping industry) avail themselves of the unique right of appeal that section 69 provides, indicating that the drafting is sufficiently succinct to avoid abuse of the right. The argument that section 69 should be redrafted to increase the finality of awards appears to be insufficiently supported by evidence and potentially seeks to address a problem that does not exist. The risks associated with attempting to change the language would appear to outweigh the benefit of such an exercise. Further, shipping parties, as one of the largest groups of users of the right, have uniformly expressed a desire to retain the language as being a valued feature that ensures London's place as leading seat for shipping disputes.

Item 6. Duty of confidentiality

Should it be stated expressly that arbitrations are private and confidential? Some jurisdictions attempt a fulsome statutory code on arbitral confidentiality. What about transparency? Is there a middle ground: unless the parties otherwise agree, arbitration proceedings are private and confidential as a general principle; such principle may be departed from with lawful reason?

Confidentiality

The Act does not offer a provision on confidentiality in arbitration, however, in the Commission's view, a proposed codified provision on the matter might not be appropriate since not all types of arbitration can and should be confidential.

Recommendation: Support inclusion of provision on confidentiality on an opt-out basis.

Confidentiality is one of the distinctive features of the arbitral forum and one of the primary reasons parties choose to arbitrate their disputes. To strengthen the ability of parties to utilise arbitration as a means of legitimate private dispute resolution, an affirmative statement of the assumption of confidentiality is highly desirable. The assurance of confidential proceedings provides parties increased confidence to make honest efforts to present their case in full in arbitration. The suggestion that the relevant standard of confidentiality be developed in case law is not convincing. This risks numerous interpretations and an inconsistent application of law to something that is a key feature of the arbitration mechanism. We recognise the difficulties of drafting wording that adequately captures the manifold aspects of confidentiality (and the exceptions to confidentiality in particular), but we consider that broad wording that is further developed through caselaw should be workable, and we note that several arbitral institutions, such as the LCIA, already have confidentiality provisions in their rules.

It has been suggested that with the move of state governments via the investor state arbitration forum to a system of default transparency that a reservation be made that confidentiality language would not apply to disputes involving public interests or state actors. It is noted that the UK government declined to sign the UNCITRAL Transparency Convention, as have all but 5 other states. Therefore, it is unlikely that such a carve out would be desirable to governments and would be unlikely to pass in legislation. Thus, an opt-out mechanism is preferred as this would allow for an assumption of confidentiality in commercial disputes while allowing states to expressly decline to assert sovereignty in cases where the public interest in transparency outweighed the interest in confidentiality. This would also allow commercial parties the option to opt-out of assumed confidentiality by party agreement where they so choose.

Item 7. Duties of independence and disclosure

Perhaps codify that an arbitrator has a continuing duty to disclose any circumstance which might reasonably give rise to justifiable doubts as to their impartiality. Should there also be a duty of independence? Or do the duties of disclosure and impartiality do the trick?

Independence of arbitrators and disclosure

The Commission concludes that it is important to emphasize impartiality and arbitrators' continuing duty to disclose any circumstances which might result in justifiable doubts as to their impartiality (see *Halliburton v Chubb*). The current determination of the Commission is that a specific provision on the duty of arbitrators' independence should not be included.

Recommendation: Support the inclusion of language affirming the ongoing duty of disclosure of arbitrators and inclusion of language on impartiality.

Halliburton v Chubb was an important case in clearly affirming the ongoing duty of disclosure owed by each arbitrator. This was an area where the common law analysis had become unduly complicated and lacking in clarity. However, the scope of the ongoing duty still appears to be unsettled by the case. Further, while the affirmation by the court of the existence of an ongoing duty helped to strengthen the common law in this area, the outcome of the case seemed to contradict the finding of a breach of that duty. This left many questions still open for debate and there have been significant criticisms that the outcome was not in line with practice in many other

jurisdictions. Thus, express language in the Act affirming what is already accepted in common law and providing for a bright line consequence of the violation of this duty is needed.

An express provision could also answer the question of the scope of the ongoing duty. This could be accomplished by including language in the Act that an arbitrator has a “continuing duty to disclose any circumstances which might give rise to justifiable doubts as to an arbitrator’s impartiality.” Such language is widely accepted in international arbitral practice as establishing an objective standard, as opposed to a subjective standard whereby the burden falls entirely to the arbitrator to establish the appropriate scope of disclosure. This would relieve that burden while also assuring parties of recourse if the arbitrator fails to meet the disclosure standard.

The purpose of such a duty is to remove any risk of an arbitrator acting with bias towards a party and to assure that they act with impartiality. There is also independence, of course, which involves an arbitrator’s connections to the parties and interest in the outcome of the dispute. We believe that impartiality is the most critical aspect and should be affirmatively stated. The risk with including language of independence is that practitioners from international jurisdictions, and particularly civil jurisdictions, interpret a requirement of independence to fall much more broadly than a common law interpretation. This could potentially lead to unnecessary challenges to international awards, both foreign and seated under the Act, on the basis of lack of independence by an arbitrator. The existence of rigorous international standards of best practice in this area provide sufficient opportunity for parties to make an educated agreement within the dispute as to the scope of independence they desire from their arbitrator without implicating the impartiality requirement. Therefore, impartiality language would be necessary while independence language would not be critical.

Item 8. Discrimination

Perhaps provide that an appointment cannot be challenged on the basis of a protected characteristic, and a contrary agreement is not enforceable, unless it is an occupational requirement, applied as a proportionate means of achieving a legitimate aim.

Discrimination

The review paper proposes the term “protected characteristics”, defined in the Equality Act 2010, be used in the context of challenges to arbitrator appointments and enforceability of an arbitration agreement. These characteristics are age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation. Thus, any challenge on the basis of such characteristics would not be possible, while any arbitration agreement regarding one of such characteristics would be unenforceable. This is without prejudice to situations where such characteristics are essential for legitimate purposes of a particular case.

Recommendation: Support the proposal.

It has become clear in recent years that arbitration as an industry has remained insulated from the positive societal moves towards diversity and inclusion at all levels. Arbitrators still tend to be overwhelmingly male and, in the international context, Caucasian males from the northern hemisphere, whether as a result of conscious or unconscious bias. This creates significant ethical and legal questions as to whether a legislative Act that is known to allow (or at least, does not

actively oppose) practices that have a discriminatory effect can be perceived as fully legitimate. There is no doubt that creating a legal obligation against active discrimination on the basis of protected characteristics is the moral thing to do. However, the wording used to address this via the Act needs to be carefully considered in light of case law and the fundamental principle of party autonomy in arbitration.

The suggested language that the appointment of an arbitrator should not be susceptible to challenge on the basis of the arbitrator's protected characteristics seems to be a way of affirming the place of protected characteristics in arbitration practice but does not directly address the main problem that currently exists. The core of the issue of diversity in arbitration occurs at the time of selection of a neutral and not at the point of challenge to an appointment. It appears that the suggested language that *"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,"* seeks to address the problem more directly. However, what constitutes a "legitimate aim" is unclear and is likely to open the door to actions in the courts seeking clarification. This, in our view, is potentially an unseen benefit as it gives courts the opportunity to affirm the societal value of diversity and inclusion and apply it directly to arbitration in a public form.

Item 9. Technology

Ensure that the Act is compatible with new technology. Perhaps state expressly (in section 34(2)) that procedural and evidential matters include whether to adopt environmentally sustainable practices like remote hearings and electronic documents.

Modern technology

The Commission asks consultees whether the Act might expressly empower an arbitral tribunal to order remote hearings and the use of electronic documentation.

Recommendation: Support inclusion but not as a requirement.

The digital transformation of the legal sector in the UK has been a major focus and area of investment by government in recent years. It would be appropriate to include language on technology to synchronize arbitration as a part of that effort. Indeed, the support for the use of advancing technology in arbitration would be an effective endorsement of modernization of the industry and would proactively support monitoring of future developments in this area that could become relevant, such as the use of artificial intelligence. It could also play into the ongoing attractiveness of England, Wales, and Northern Ireland as a seat in coming decades.

Item 10. Section 29 (immunity of arbitrator)

Provide that immunity extends to the costs of arbitration claims in court; and that immunity is retained following resignation, perhaps unless the resignation is shown to be unreasonable.

Immunity of arbitrators

According to the Commission, the Act should lend more support to the immunity of arbitrators, particularly when it comes to their liability for the costs of court applications. It also requests comments on whether liability for resignation should also be considered.

Recommendation: Support the inclusion of language strengthening of arbitrator immunity.

The suggestion of inclusion of language on arbitrator immunity is an important one. Increasingly, parties use perceived gaps in arbitrator immunity under national legislation to tactically pressure arbitrators within an arbitration or to attempt nullification of adverse awards on frivolous grounds of arbitrator impropriety. Affirming a strong regime of arbitrator immunity will help maintain the ability of an arbitrator to act impartially within an arbitration. It will also eliminate frivolous challenges to awards or situations where arbitrators and institutions are sued for declining appointments because parties refused to affirm immunity, as happened to Ciarb in a recent case dismissed on appeal to the Supreme Court (see *Sangamneheri v The Chartered Institute of Arbitrators & Ors* [2022] EWHC 886 (Comm) (12 April 2022)). It will also allow arbitrators protection to step down from appointments where they believe they cannot fulfill their duties and curtail the possibility of parties undermining the reputation of an arbitrator as a means of retaliation for an adverse award.

To the specific situation of liability for stepping down from a role, the included language should allow this but should also provide that this immunity is not unlimited. Including term “unreasonable” is one option but one that could be subject to wide interpretation. Other options could be, as in other jurisdictions, that arbitrators incur liability when they act with “gross negligence,” which would include situations where they step down causing the parties injury. In this situation, claims against an arbitrator would be analogous to a tort claim and evaluated in light of their duty to the parties, which could be a more precise analysis.

Item 11. Possible minor amendments

(a) Tidy up the language of section 39? Perhaps change the heading to ‘power to make provisional orders’ (rather than ‘awards’). State that the tribunal can grant any remedy (rather than ‘relief’) which it could grant in a final award – and cross-refer to section 48.

(b) Is there a need to update the language of costs? Perhaps provide in section 61(1) that the tribunal can make orders or awards (plural) on costs. And in section 61(2) state the general principle that the costs of the successful party should be paid by the unsuccessful party, taking into account the parties’ relative success, and their conduct, unless it appears to the tribunal proper in the circumstances to depart from that general principle. State in section 63(5) that recoverable costs are those which are reasonable and proportionate.

(c) Section 70(3) (time period to challenge award): add that, if there has been a request under section 57 for a correction or additional award material to the application or appeal, any application or appeal must be brought within 28 days of the date when the applicant or appellant was notified of the result of that process.

(d) Delete section 70(8) (allowing an appeal on terms against a decision to allow an appeal on terms).

(e) Delete sections 85 to 88 (domestic arbitration agreements).

Section 39 (power to make provisional awards)

The Commission notes that section 39 is headed “power to make provisional awards”, but the text of section 39 refers, not to awards, but to orders. They ask consultees whether the heading of section 39 should be amended for consistency to refer to orders, rather than awards.

Recommendation: Support proposal.

The suggested heading change is a sensible one since it would ensure ease of use of the Act and better reflect the substantive content of the section. This would eliminate some confusion while leaving the operation of the language untouched.

Section 70 (challenge or appeal: supplementary provisions)

The Commission provisionally proposes 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.

Recommendation: Support proposal.

The proposal of the Commission ensures that courts can determine that a party did not miss their opportunity under section 70(3) because they were availing themselves of the right provided in section 70(2). The two provisions should not be a mutually exclusive choice and this common-sense suggestion provides clarity on when the clock would start on section 70(3).

Sections 85 to 87 (domestic arbitration agreements)

The Commission notes that sections 85 to 87 have never been brought into force. It provisionally concludes that there is no merit in treating domestic arbitrations differently. It proposes that these sections be repealed.

Recommendation: Do not support proposal.

We do not agree with the Commission’s assertion that there is no obvious merit in treating domestic arbitrations differently from international arbitrations and so would not prima facie support the proposal. The difference in practice for domestic and international arbitrations is not a direct comparison to the difference between domestically seated international arbitrations and foreign arbitrations and thus the absence of grounds for treating them differently has not been sufficiently explored in our view. Therefore, we would not support the proposal to delete these sections outright. Rather, we would prefer to maintain the provisions until further law and practice are developed on this point. In a sense, it is likely to be better to have it and not need it than to need it and not have it at this juncture.

Further possible minor amendments from preliminary review paper

Section 7 (separability of arbitration agreement)

The Commission asks consultees whether section 7 should be made mandatory.

Recommendation: Support a modification of proposal.

The proposal seems to stem from the Commission's view that if an arbitrator finds that both the underlying contract and the arbitration agreement are invalid, then the award itself expressing the finding on the underlying contract is invalid. Unless parties agree otherwise, a finding that the arbitration agreement is invalid is a finding of a lack of jurisdiction to hear the merits of the dispute on the underlying contract. If the arbitration agreement is invalid, then the arbitrator need not examine the validity of the underlying contract. The problem would arise when, in the absence of a party agreement removing separability, the arbitrator makes a finding that that arbitration agreement is invalid but then proceeds to also make a declaration on the validity of the underlying agreement. If parties have agreed to remove separability, then an award with both findings would be valid. Thus, rather than removing parties' ability to make such agreements, we would support a modification stating that in the event the parties do not agree otherwise, the award is separable and that in this default situation a finding of invalidity of the arbitration agreement operates to remove jurisdiction from the arbitrator.

Appeals from section 9 (stay of legal proceedings)

The Commission provisionally proposes 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.

Recommendation: Support proposal.

Since this is a matter of a clear and unintentional drafting error, it would only be sensible to take the opportunity to correct this, which also prevents appellants who might tactically waste party and court time and costs asserting this in an effort to prevent an appeal.

Sections 32 and 45 (court determination of preliminary matters)

The Commission asks 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.

Recommendation: Support proposal.

Since courts automatically retain discretion that this cannot be waived, there seems to be no reason to include this in the language of the Act. Since the language regarding the court can be removed without affect, we would support this removal in the interests of simplicity and clarity

Topics not included in review

Choice of law applicable to the arbitration agreement:

In 2020 the Supreme Court examined the issue of determining the law applicable to arbitration agreements in the cases of *Enka v Chubb* and *Kabab–ji v Kout Foods*. These cases sought to provide some clarity on the interpretation of how the law applicable to analysing the validity and effectiveness of an arbitration agreement is determined in the absence of an express provision for disputes seated in England, Wales, and Northern Ireland. This issue has been a source of

confusion since before the *Sulamerica* case and the recent case law has not provided a clear formula. This issue is not unique to disputes seated in England, Wales, and Northern Ireland. Some jurisdictions, including Scotland, have chosen to include language in their governing arbitration law mandating that for disputes seated in that jurisdiction, in the absence of an express provision, the governing law of the arbitration agreement is the law of the seat (see the Arbitration (Scotland) Act 2010, section 6).

The judgements in *Enka and Kabab–ji* may have provided another chapter in the saga of this topic, but, in our view, have not settled the matter. Currently, the only means parties have of protecting against having to battle this issue in the courts is to include express provisions in their dispute resolution agreements, a practice that was rarely considered in the past. We believe this area is ripe for legislative cure. The common law that has developed here, though understandable as to why the courts have treated it as they have, has still not provided the clarity that parties and practitioners seek. We recommend an express provision in the Act, probably along the lines of the Arbitration (Scotland) Act 2010.

Recommendation: Provide analysis and proposed language in this area as part of the final review.

Climate change and other Environment, Social and Governance (ESG) disputes:

The Commission briefly mentions climate change in their review but does not elaborate on the potential connection between climate change goals and the Act. The UK government has affirmed its adoption of climate change mitigation principles through its adoption of several international instruments, including the Paris Agreement. In order for states to meet their obligations under the international climate regime, a significant amount of investment will be required. Much of this investment capital will be at the local level direct to industry and will involve new streams of foreign investment, both imported and exported. These investments are very likely to give rise to disputes which will be resolved under the current investment dispute resolution framework and will require the use of investor–state arbitration or commercial arbitration as applied to public–private partnership agreements.

Cases where there is a question of the proper law to apply to the merits of a dispute are on the rise. Challenges to award enforcement on the basis that arbitral tribunals applied substantive law that was neither foreseen by the parties nor justified in the interpretations of the underlying treaty or commercial contract are also on the rise. Currently, sections 68 (locally seated and domestic arbitration) and 103 (foreign seated arbitration) do not restrain the courts from reviewing a decision on the grounds of excess of mandate for failure to apply proper law. The result is that courts have little appetite or ability to invalidate awards even when the arbitral tribunal failed to apply mandatory law invoked by the underlying agreement or treaty or where they exceeded their mandate by applying law with tenuous connection to the dispute.

Climate benchmarks and obligations are now mandatory obligations on state governments. In disputes involving state parties, these obligations will have a vital role to play as to whether states are both able to incorporate legislation to meet these mandates and as to whether consequences for failing to comply with them will be possible. Without such an international dispute framework, especially in disputes arising directly from investments made in green technology, climate impact mitigation, or assisting an industry to become more sustainable, may be impossible. Therefore, the ability for courts to review of awards under section 68 and section 103 on the grounds of excess

of mandate for failure to apply governing climate change laws may promote implementation of climate protection agreements, such as the Paris Agreement commitments. The same applies to international frameworks also developing around social and governance standards and the UN's sustainable development goals.

Recommendation: Examine the possible language or guidance on sections 68 and 103 so that neither section is to operate to prevent courts from invalidating arbitral awards for excess of mandate or failure to apply the proper mandatory law.

Mediation and hybrid ADR procedures

We wish to bring to attention the increasingly common global practice of using mediation and arbitration in tandem. There are many ways of doing this and it can be of huge benefit to parties in relation to time, direct costs, opportunity costs, environmental costs, and the much lower level of enforcement required where settlements have been reached between the parties by consensus. Ciarb, therefore, wishes to ensure that England, Wales, and Northern Ireland maintains a leading position in promoting effective practice in dispute resolution legislation, procedure, and culture, specifically in enabling and encouraging the complementary use of arbitration and mediation wherever appropriate and possible.

While there are a wide variety of views among our members about how proactively arbitrators should promote the use of mediation within a dispute, there seems to be some consensus that it is appropriate for arbitrators to use their discretion and professional judgement to facilitate meetings with all parties and representatives present to assist the parties in resolving some, if not all the issues. Such meetings are generally referred to as "settlement conferences."

While we do not foresee the issue of guidance on hybrid med-arb or mixed mode ADR being addressed specifically via the Act, we note that legislation to this effect which covers alternative dispute resolution and its overlapping use with arbitration is possible. Indeed, the coming into force of the Singapore Mediation Convention on international recognition and enforcement of mediated settlements and the signals from government that the UK could accede to this convention, combined with recent consultations on mandatory mediation, indicates that mandatory legislation on commercial mediation could be forthcoming.

The increasing nuance and formalisation of practice in other jurisdictions in this area highlights the need both to be explicit about what is being referred to and to ensure for the sake of arbitrators, mediators and above all arbitration users, for boundaries, guidelines and ethics of mixed-mode use of private dispute resolution processes to continually be made clear. Ciarb provides guidelines for mediation in arbitration which are publicly available, and we commend them to parties, advisors, and arbitrators. Further detail can be found in the Ciarb guidelines. <https://www.ciarb.org/media/16823/ciarb-professional-practice-guideline-on-the-use-of-mediation-in-arbitration-2021.pdf>

There continues to be broad consensus in common law contexts globally that acting as a mediator, where mediation is defined as "*a process where the third party facilitates a process which includes separate private sessions with the different parties, during which confidential information may be divulged under the explicit, or implicit, understanding that this confidential information will not be shared with the other party, and that it is conducted with the aim of the parties reaching a mutually agreed outcome,*" is not an appropriate role for an arbitrator. In the

event of the parties wishing to use such a process, the mediation and any subsequent arbitration must be conducted by different individuals with the relevant skills in the two different processes. However, it is noted that there is considerable international divergence in terminology and understanding of what is meant by “mediation” and/or “settlement conference.”

As an example, the German Arbitration Rules (DIS) compel the arbitrator to attempt actively to facilitate amicable settlement, which recently led to a lively discussion among those arbitrating and mediating in Asia about whether this highlighted a difference in civil and common law practice (with a perception there of civil law practice as being less adversarial), or whether the issue stemmed from a difference in assumptions as to what constituted mediation; in other words, if all parties and advisors are kept together, and no confidential information exchanged, then has the arbitrator conducted a “mediation” or a “settlement conference?”

Recommendation: Consider adding forward looking language recognising the use of alternative dispute resolution mechanisms within arbitration and further consider adding a statement that nothing in the Act shall be seen as prohibiting such practices.

Ciarb representatives

Board of Trustees

- Jonathan Wood FCIArb, Great Britain, Chair
- Marion Smith QC FCIArb
- Amb. (r) David Huebner C.Arb FCIArb, Americas, Honorary Treasurer
- Arran Dowling-Hussey FCIArb, Ireland
- Paul Barrett C.Arb FCIArb, East Asia
- Lucy Greenwood C.Arb FCIArb, Great Britain
- Andrew Miller QC FCIArb, Great Britain
- Dr David Kariuki Muigua C.Arb FCIArb, Africa
- Theophile Margellos MCIArb, Europe
- Caroline Kenny QC C.Arb FCIArb, Australasia
- Prof. Dr Mohamed Abdel Wahab MCIArb, Middle East

Jane Gunn, 2022 Ciarb President (ex-officio member)

Catherine Dixon, Director General

Isabel Phillips, Director of ADR and Mediation Development

Mercy McBrayer, Head of Arbitration Professional Practice

Kateryna Honcharenko, Arbitration Professional Practice Manager

Dec 2022

PROFESSOR GRAHAM FRANK CHASE (GFC)
REPRESENTATIONS TO THE
HOUSE OF COMMONS (HofC)
ALL PARTY PARLIAMENTARY GROUP (APPG)
FOR ALTERNATIVE DISPUTE RESOLUTION (ADR)
AND THE LAW COMMISSION (LC) REVIEW
OF THE
ARBITRATION ACT 1996 (AA96)
DECEMBER 2022

1. INTRODUCTION AND THE ROLE OF PROPERTY LAND & CONSTRUCTION
IN ADR

1.1 The Role of Land, Property & Construction in the UK economy

1.1.1 Real estate (property) is a significant part of the UK economy and has a domestic net worth estimated to be in excess of £6 trillion making it the largest in Europe.

1.1.2 UK Real estate represents some 13% of UK GDP but when land and construction activity is added, depending on the method of measurement, is estimated to be in excess of 20%.

1.1.3 The sophisticated nature of the UK real estate market coupled with its inherent stability attracts significant foreign investment into the UK through this market sector who own an estimated 250,000 individual properties at a value in the region of £100 billion.

1.2 The Role in ADR in the UK Land, Property & construction industry

1.2.1 Commercial and residential property relies heavily on an efficient and effective ADR framework.

1.2.2 ADR covers all aspects of UK real estate private litigation including land, development, and construction contractual disputes together with a substantial number of rent review and valuation disputes, particularly in the commercial property sector.

1.2.3 There are also a number of statutory based ADR areas including Agricultural holdings, private rented housing, Pubs Code Adjudication and Coronavirus Trent disputes.

1.2.4 The Royal institution of Chartered Surveyors is a leading professional body which appointments dispute resolvers across all sectors of ADR both in the UK and overseas jurisdictions of:

1.2.4.1 Arbitration

1.2.4.2 Independent Expert

1.2.4.3 Adjudication

1.2.4.4 Mediation

Dec 2022

- 1.2.5 RICS members as trained dispute resolvers include the following sectors: :
 - 1.2.5.1 Development
 - 1.2.5.2 Commercial property
 - 1.2.5.3 Residential Property
 - 1.2.5.4 Agriculture
 - 1.2.5.5 Construction
 - 1.2.5.6 Real Estate contracts
 - 1.2.5.7 Planning issues
- 1.2.6 The AA96 has been a mainstay of Arbitration in the UK domestic real estate market. It is understood and trusted by all parties to disputes in this important market sector.
- 1.2.7 The importance of the AA96 from an England and Wales domestic perspective must not be underestimated. Although it is appreciated that England and Wales as a global seat of arbitration is important and generates significant income caution must be exercised not to overlook the strength of the domestic based market which relies on the AA96 to reflects local ADR protocols and a statutory code.
- 1.2.8 The AA96 is a key factor in promoting the strength of the England & Wales property market because of the part it plays in ADR and ensuring this sector is efficient with an ability to settle disputes, quickly, fairly and without undue delay and cost

2. THE LC REVIEW OF THE AA96 AND THE OBSERVATIONS AND RECOMMENDATIONS OF GFC TO THE CONSULTATION PROCESS

2.1 CONFIDENTIALITY

- 2.1.1 In ADR the issue of confidentiality is paramount to the concept of having disputes determined outside of the public court system, both in the UK and internationally.
- 2.1.2 Confidentiality is sometimes erroneously confused or merged with the issue of transparency. Transparency is different in the two areas of the public arena (the courts) and private processes (ADR). In the public arena transparency is the openness and availability of information to the public at large so as to ensure responsibility and accountability are correctly adopted and applied. To this is added the concept of precedent in public arena decision making and the impact that has on how disputes and decisions are determined.
- 2.1.3 In the private processes of ADR, transparency is just as important to ensure a fair resolution on an impartial basis without unnecessary delay or expense (Ref Para 1 of Part 1 AA96), but such transparency is that required within the framework of the ADR structure and the confines of those involved with that dispute and is therefore different to the wider requirements for transparency in the public arena.
- 2.1.4 Therefore, the requirement for transparency in the public arena must not be confused with the importance of confidentiality in private processes or act as an impediment to confidence in, and the reliability of, ADR.

Dec 2022

- 2.1.5 Certain statutory arbitrations have moved away from confidentiality to transparency. The publication of Awards in the public arena and other information about the process and progress of an arbitral dispute required to be disclosed to 3rd parties in statutory based arbitrations has given rise to the law of unexpected consequences in terms of the perception of UK arbitral independence and confidentiality.
- 2.1.6 One example is that of Pubs Code Adjudicator Awards where the process and administration of the dispute is shared with the CI Arb and PCA as third parties impacting on the principles of confidentiality but promoted on the basis of transparency and openness of the decisions to assist in precedence and conformity of decision making. There is also the imposition of timescales placed on the parties and the Arbitrator as decision maker, detracting from the concept of an arbitral dispute belonging to the parties and now governed by others. The publication of Awards (suitably redacted) on a web site for access by the public is promoted for the purposes of transparency but dissolves the confidential nature of ADR as prescribed by the Arbitration Act 1996 and indeed the UNCITRAL Rules.
- 2.1.7 This adopts an approach representing transparency in the public arena and away from the principle of confidentiality. It therefore gives rise to the perception that Arbitrations in the UK are moving away from being private with the dispute publicly available and controlled by third parties. Such perception is not helpful in the promotion of England and Wales as a seat for Arbitration where parties require confidentiality and the support of the AA96 which protects the dispute process as belonging to the parties unless they cannot agree when the Arbitrator then has the power to move matters forward against such non agreement. That is not to say that Statutory Arbitrations should not have specific requirements and indeed the AA96 at sections 94 to 98 and in Schedule 3 have extensive coverage of Statutory arbitrations. The issue raised here in respect of confidentiality is therefore one of perception but where such perception may have implications in attracting arbitral disputes to the seat of England & Wales in competition to the other seats currently in the ascendancy such as Singapore and Hong Kong amongst others.
- 2.1.8 GFC is also concerned that some Arbitral Rules issued by various bodies either conflict with the provisions of the AA96 or do not follow the principles of the AA96 provisions. One of the problems arising is that these Rules are either poorly worded, do not lend themselves to application against a range of dispute types and are often not updated to accommodate changes in the law or practices.
- 2.1.9 In the market areas of land, property and construction, confidentiality is an overriding requirement of the parties to disputes. Although on occasions advisers to the parties may find confidentiality of interest and assistance under some circumstances,

Dec 2022

especially when attempting to apply precedence, this is rarely a requirement of the parties who regard their involvement and the outcome as confidential.

2.1.10 Therefore, although GFC agrees with the LCs recommendation that "The Act should not include provisions dealing with confidentiality" there is a need to consider how the AA96 should reinforce the importance of confidentiality of ADR when undertaken under the provisions of the AA96

GFC Recommendation on Confidentiality:

- 1) GFC agrees that the AA96 should not include provisions dealing with confidentiality, but that confidentiality should be reinforced as an underlying principle of ADR in the jurisdiction of England and Wales.
- 2) GFC suggests the separation and profile of "Statutory based dispute resolution" should be more specifically defined when departing from AA96 provisions reflecting on public arena transparency in contrast to private ADR confidentiality and believe this can be covered appropriately at a high level.
- 3) GFC recommends that bodies that publish arbitral rules that deviate or amend provisions of the AA96 be required to explain to parties, who wish to consider their adoption, what these differences are and the reasons for them.
- 4) GFC agrees that the law of confidentiality is best developed by the courts.

2.2 INDEPENDENCE & DISCLOSURE

- 2.2.1 GFC agrees with the LC that there is a fundamental difference between impartiality and independence
- 2.2.2 RICS, some time ago, introduced the concepts of "involvement" and "conflicts of interest" and a traffic light system with examples of when an involvement may lead to a conflict of interest.
- 2.2.3 GFC also emphasises the importance of perception in considering when a conflict of interest arises.
- 2.2.4 RICS & CI Arb requires its Dispute Resolvers to disclose circumstances that might reasonably give rise to justifiable doubts as to their impartiality before any appointment is made and which is passed on to the parties seeking an appointment as appropriate.
- 2.2.5 RICS & CI Arb provides training on this issue as well as requires disclosure.

GFC Recommendation on Independence and disclosure

- 1) GFC agrees with the LC that there should be no new express duty of independence.
- 2) GFC agrees with the LC that the common law should be codified but ensuring that litigious parties, wishing to manipulate the process of appointments or seeking to slow down or preventing decision making are not provided with such an opportunity that undermines ADR as a reliable process

Dec 2022

2.3 DISCRIMINATION

2.3.1 GFC agrees with the LC to adopt the language of the Equality Act 2010

GFC Recommendation on Discrimination

- 1) Adopt LC's proposals

2.4 ARBITRATOR IMMUNITY

2.4.1 GFC agrees with the LC recommendation to strengthen arbitrator immunity to preclude liability for costs in support of the important criteria attached to Awards of their finality and avoid satellite litigation.

2.4.2 The risk of party manipulation of the arbitral process must be legislated against to avoid undermining arbitration as an effective ADR option. GFC therefore agrees with the LC 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.

2.4.3 GFC is aware of the damage done to the credibility and attractiveness of other seats of arbitration where penal arrangements against the arbitrator are imposed or available.

GFC Recommendation on Discrimination

- 1) Adopt LC's proposals

2.5 SUMMARY DISPOSAL

2.5.1 GFC agrees with the assessment and findings of the LC under this issue with the following supportive and additional comments:

2.5.1.1 GFC agrees with the LC's recommendation that there should be a non-mandatory provision which gives arbitrators the power to adopt procedures to decide issues which have no real prospect of success and no other compelling reason to continue to a full hearing.

2.5.1.2 GFC agrees with witness statements by deposition only

2.5.1.3 GFC is neutral on the issue of amendments for emergency arbitrations but recognises the reasoning for the LC proposals

2.5.1.4 GFC feels the appeal of Awards must be carefully and strictly defined so as to respect the process of ADR and confidentiality as referred to above.

2.5.1.5 GFC is of the opinion the section 44(5) can be retained as its removal does not damage nor is it in conflict with the general provisions of sections 44(3) and 44(4). However, its removal may remove an important power available to the courts to ensure arbitral proceedings can continue if a moribund situation arises through a lack of powers available to the parties

Dec 2022

GFC Recommendation on Summary Disposal

- 1) Adopt LC's proposals but with caution on the repeal of Section 44(5)

2.6 CHALLENGING JURISDICTION UNDER SECTION 67

- 2.6.1 GFC agrees strongly that challenges under S67 of the AA96 should be by way of an Appeal and not by way of a rehearing. This approach will reinforce the status of the Arbitral Tribunal, strengthen the finality of Awards, and ensure jurisdiction is seen as an issue on which the arbitrator is qualified to determine.
- 2.6.2 GFC agrees with the LC that amendments are necessary to clarify the remedies available to the court and to confirm that a Tribunal when determining jurisdiction can issue a costs order whether it finds it has jurisdiction or not.

GFC Recommendation on Challenging Jurisdiction under section 67

- 1) Adopt LC's proposals to amend section 67 whereby challenges are by way of an appeal and not a rehearing.
- 2) Make amendments so the Tribunal has the power to order costs when determining its jurisdiction.

2.7 APPEAL ON POINT OF LAW

- 2.7.1 GFC agrees with the LC that the existing arrangements under section 69 are satisfactory and should not be unsettled.

GFC Recommendation on Discrimination

- 1) Adopt LC's advice not to alter the current provisions

2.8 MINOR & OTHER CONSIDERATIONS

- 2.8.1 GFC would prefer section 7 and separability to be non-mandatory.
- 2.8.2 GFC agrees with the LC that there appears to be a drafting error at section 9 and that this should be corrected to permit an appeal.
- 2.8.3 Section 32 often arises, and section 45 arises on some occasions in property disputes. The current wording has been found to be satisfactory to date and therefore GFC would prefer that these provisions are not reduced apart from simplification of language if that is felt appropriate.
- 2.8.4 GFC agrees with the LC that technology is sufficiently accommodated in the AA96 as currently drafted.
- 2.8.5 GFC does not recommend the use of descriptions such as provisional awards or interim awards. All awards should be

Dec 2022

regarded as final on the issues they determine and should be confirmed as such. Consequently, agrees with the LC's recommendation that reference to Orders in section 39 should be adopted and "provisional awards" expunged.

2.8.6 GFC agrees with the LC's recommendation to codify the law on amendments to section 70 so that there is clarity on the status and implications of a material correction.

2.8.7 There has been the suggestion that consideration should be given to granting an arbitrator the express power to order a stay of the arbitral proceedings for the parties to mediate. GFC agrees that mediation is an important tool in litigation but has the following observations on this suggestion:

2.8.7.1 It is GFC's experience that most parties in ADR have undertaken extensive negotiations but not always. GFC is in favour of mediation as a step in litigation as promoted through the UK court system.

2.8.7.2 Arbitration, by contrast, is private with an important plank being the principles set out at sections 1(a) & 1(b) of the Arbitration Act 1996 that the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense and on the understanding that the parties should be free to agree how their disputes are resolved subject only to such safeguards as are necessary in the public interest.

2.8.7.3 Against this background the suggestion of adding mediation as an express power is to promote an additional step which will result in delay and add to the parties' costs. This in turn will undermine the important principles of Sections 1(a) & 1(b) of the AA96. It is GFC's opinion that the imposition of an express power to order mediation in the context of private consensual ADR is both inappropriate and in conflict with the principles of paragraph 1 of the Act. Consequently, GFC does not support the grant of express powers for the arbitrator to order mediation in ADR and under the provisions of the AA96.

Professor Graham Frank Chase FRI CS FCI Arb C.Arb FRSA FInstCPD(Hon)

12th December 2022

Response ID ANON-PT57-RURH-H

Submitted to Law Commission Consultation: Review of the Arbitration Act 1996
Submitted on 2022-12-09 14:34:08

About you

What is your name?

Name:
Cyril Chern

What is the name of your organisation?

Enter the name of your organisation:
4 New Square Chambers

Are you responding to this consultation in a personal capacity or on behalf of your organisation?

Personal response

If other, please state::

What is your email address?

Email:
[REDACTED]

What is your telephone number?

Telephone number:
[REDACTED]

If you want the information that you provide in response to this consultation to be treated as confidential, please explain to us why you regard the information as confidential. As explained in our privacy notice, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

Please explain to us why you regard the information as confidential:

Consultation questions

Consultation Question 1: 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?

Agree

Please share your views below.:

Consultation Question 2: We provisionally conclude that the Arbitration Act 1996 should not impose a duty of independence on arbitrators. Do you agree?

Agree

Please share your views below.:

Consultation Question 3: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 4: Should the Arbitration Act 1996 specify the state of knowledge required of an arbitrator's duty of disclosure, and why?

No

Please share your views below.:

Consultation Question 5: 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?

Actual knowledge

Please share your views below.:

Consultation Question 6:

Only if necessary

Please share your views below.:

Consultation Question 7:

Agree

Please share your views below.:

Consultation Question 8: Should arbitrators incur liability for resignation at all, and why?

No liability for resignation

Please share your views below.:

Consultation Question 9: Should arbitrators incur liability for resignation only if the resignation is proved to be unreasonable?

No

Please share your views below.:

Consultation Question 10: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 11: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 12: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 13: We provisionally propose that the Arbitration Act 1996 should stipulate the threshold for success in any summary procedure. Do you agree?

Disagree

Please share your views below.:

Consultation Question 14: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 15: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 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?

No

Please share your views below.:

3rd parties not being part of tge underlying contract should not be made subject to any arbitration award

Consultation Question 17: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 18: We provisionally conclude that the provisions of the Arbitration Act 1996 should not apply generally to emergency arbitrators. Do you agree?

Disagree

Please share your views below.:

Consultation Question 19: 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?

Agree

Please share your views below.:

Consultation Question 20: Do you think that section 44(5) of the Arbitration Act 1996 should be repealed, and why?

No

Please share your views below.:

It serves a purpose and bridges the gap where an arbitrator cannot act

Consultation Question 21:

Permission under section 44

Please share your views below.:

Consultation Question 22:

Agree

Please share your views below.:

Consultation Question 23: 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?

Yes

Please share your views below.:

It prevents delay

Consultation Question 24: We provisionally conclude that our proposed change to section 67 of the Arbitration Act 1996 would not require any similar change to section 103. Do you agree?

Agree

Please share your views below.:

Consultation Question 25: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 26: 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?

Agree

Please share your views below.:

Consultation Question 27: 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?

Agree

Please share your views below.:

Consultation Question 28: Do you think that section 7 of the Arbitration Act 1996 (separability of arbitration agreement) should be mandatory, and why?

Yes

Please share your views below.:

Consultation Question 29: 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?

Agree

Please share your views below.:

Consultation Question 30: 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?

Yes

Please share your views below.:

It speeds the process

Consultation Question 31: 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?

Yes

Please share your views below.:

Prevents delay and gives the arbitrator better control

Consultation Question 32: Do you think that section 39 of the Arbitration Act 1996 should be amended to refer to "orders" (rather than "awards"), and why?

Yes

Please share your views below.:

I see no overwhelming reason for this proposed change

Consultation Question 33: Do you think that section 39(1) of the Arbitration Act 1996 should be amended to refer to "remedies" (rather than "relief"), and why?

Yes

Please share your views below.:

This phrasing is more contemporary and understandable

Consultation Question 34: 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?

Agree

Please share your views below.:

Consultation Question 35: 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?

Agree

Please share your views below.:

Consultation Question 36: We provisionally propose that sections 85 to 87 of the Arbitration Act 1996 (on domestic arbitration agreements) should be repealed. Do you agree?

Agree

Please share your views below.:

Consultation Question 37: Do you think that any of the suggestions discussed in Chapter 11 needs revisiting in full, and if so, why?

Please share your views below.:

No

Consultation Question 38: 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?

Please share your views below.:

No

Response ID ANON-PT57-RUKS-N

Submitted to Law Commission Consultation: Review of the Arbitration Act 1996
Submitted on 2022-12-15 13:36:35

About you

What is your name?

Name:

[REDACTED]

What is the name of your organisation?

Enter the name of your organisation:

Claimspace Limited.

We are an arbitral institution providing a completely online service resolving low value injury, credit hire and financial services claims by using arbitration.

We are a member of ACSO (Association of Consumer Support Organisations) and have provided that organisation with an outline of our views as our contribution to that group. You may therefore see some very occasional duplication of argument in their submissions to ours.

Are you responding to this consultation in a personal capacity or on behalf of your organisation?

Response on behalf of organisation

If other, please state::

[REDACTED]

What is your email address?

Email:

[REDACTED]

What is your telephone number?

Telephone number:

[REDACTED]

If you want the information that you provide in response to this consultation to be treated as confidential, please explain to us why you regard the information as confidential. As explained in our privacy notice, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

Please explain to us why you regard the information as confidential:

Consultation questions

Consultation Question 1: 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?

Agree

Please share your views below.:

We agree that issues relating to confidentiality should be left as they are because this is a complex case specific subject. However, bearing in mind the interests and abilities of consumers who are increasingly accessing arbitration as a low cost method of resolving lower value disputes (possibly without legal representation) there does need to be an obligation on the arbitrator or arbitral institution to provide a summary of the extent to which confidentiality applies and when it is acceptable to venture outside of this. For example disclosure to a prospective motor insurer of the outcome of an arbitrated disputed claim for damages for personal injury or for the purpose of preventing a crime or physical harm to a child or vulnerable person. We fully support the argument that if confidentiality is agreed between the parties then 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.

Consultation Question 2: We provisionally conclude that the Arbitration Act 1996 should not impose a duty of independence on arbitrators. Do you agree?

Agree

Please share your views below.:

Claimspace believes that the principles of independence that are applicable can be flexible. Section 33 deals with impartiality. It is possible to be independent but biased, so the most important aspect is impartiality.

Claimspace provides an online service for resolving low value disputes using arbitration in full compliance with the 1996 Act. We believe that it is important for "consumers" to be able to access effective alternative dispute resolution services at reasonable cost and without the absolute need for users to be represented by lawyers. Our users are largely people who have little in the way of legal knowledge and we do regard ourselves as offering a "consumer arbitration" service. We believe that the 1996 Act requires reform to address the issues that are relevant when a consumer arbitration takes place. For the purpose of debating whether there need to be protections for consumers we will not seek in this response to attempt to define the word "consumer". There are plenty of definitions available already that can be adapted such as those used in the Consumer Protection Act and the Consumer Credit Act. When it comes to a consumer arbitration process (however defined) section 33 on its own is not sufficient and a full explanation of how a lack of independence has arisen should be provided. We support the suggested reform in the summary document at paragraph 1.30 but believe it should be extended in consumer cases to cover a duty to disclose any risk of a conflict of interest arising (which can happen now without impacting impartiality). It is extremely difficult for a lay person to understand the difference between being partial and having a lack of independence. If arbitration is to become a means by which low value disputes can be resolved with certainty, when mediation remains far too expensive, issues of this nature should be removed from the arbitration regime.

Consultation Question 3: 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. Do you agree?

Agree

Please share your views below.:

We agree and refer to our answer at question 2.

Consultation Question 4: Should the Arbitration Act 1996 specify the state of knowledge required of an arbitrator's duty of disclosure, and why?

Yes

Please share your views below.:

In our view, the arbitrator should disclose what he actually knows (per Halliburton -v- Chubb) and make reasonable enquiries about any possible conflict of interest in the same way that a barrister or solicitor should.

Consultation Question 5: 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?

What they ought to know

Please share your views below.:

In all other professional engagements in relation to contentious (ignoring the traditional strict legal definition) such as acting as a barrister or solicitor, there is a duty to make reasonable enquiries about the risk of a conflict of interest arising. There is every good reason why members of the public who wish to access arbitration services should be able to expect the same level of protection.

Consultation Question 6:

Only if necessary

Please share your views below.:

On the whole we are surprised to find that straight forward issues about whether there can or cannot be discrimination quite surprising. In any other sphere of working bias towards appointing men is simply not acceptable. Agreements that say that an arbitrator must be a "commercial man" have no place in a modern, progressive and tolerant society. Discrimination law already recognises that in some instances there is a need to select an arbitrator based on particular protected characteristics as discussed by the Court of Appeal in Hashwani v Jivraj. That in our view should be where the issue rests if it is necessary.

Consultation Question 7:

Agree

Please share your views below.:

On the whole we are surprised to find that straight forward issues about whether there can or cannot be discrimination quite surprising. In any other sphere of working bias towards appointing men is simply not acceptable. Agreements that say that an arbitrator must be a "commercial man" have no place in a modern, progressive and tolerant society.

Consultation Question 8: Should arbitrators incur liability for resignation at all, and why?

Liability for resignation

Please share your views below.:

We believe that there should be no liability for resignation if for "no fault" reasons but it should be compulsory for an arbitrator to carry insurance for this in the event that the arbitrator is at fault. It would be manifestly unfair to make an arbitrator liable for the cost of an abandoned arbitration due to his or her diagnosis of terminal illness for example.

For example, if an arbitrator has to resign due to a failure to check for and give notice of a potential conflict of interest then liability must rest with the arbitrator.

No arbitrator should be placed above the law and normal commercial terms relating to a professional engagement must stand. This is particularly relevant in relation to consumer arbitrations.

Consultation Question 9: Should arbitrators incur liability for resignation only if the resignation is proved to be unreasonable?

Yes

Please share your views below.:

Please see answer to question 8 above.

Consultation Question 10: 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. Do you agree?

Agree

Please share your views below.:

If the arbitrator is at fault he or she should not be able to escape the consequences of that. We support the idea of a reasonableness test.

Consultation Question 11: 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. Do you agree?

Agree

Please share your views below.:

We agree with the analysis set out at paragraphs 1.44 to 1.54 of the summary document but within this section we see references to "the tribunal" which is confusing for lay users and impedes access by lay people. The law relating to arbitration should be simple to understand. References to "tribunal" should be changed to "arbitrator or arbitrators".

Consultation Question 12: 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. Do you agree?

Agree

Please share your views below.:

We strongly agree with this but there should be some framework within the Act to support the exercise of discretion based on the facts of the case. To do so otherwise, would make it difficult to hold the arbitrator to account when an untenable decision is made.

Consultation Question 13: We provisionally propose that the Arbitration Act 1996 should stipulate the threshold for success in any summary procedure. Do you agree?

Agree

Please share your views below.:

We would support this and the Act should refer to "no real prospect of success".

Consultation Question 14: 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. Do you agree?

Agree

Please share your views below.:

We follow the statement in the main consultation document at paragraph 6.36.

Consultation Question 15: 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. Do you agree?

Agree

Please share your views below.:

We share the view expressed in paragraph 7.12 of the main consultation document. To give effect to that standpoint, changes in the law relating to evidence that have been made post 1996 need to be incorporated into the new Act.

Consultation Question 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?

Yes

Please share your views below.:

We share the view expressed in paragraph 7.12 of the main consultation document.

Consultation Question 17: 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. Do you agree?

Agree

Please share your views below.:

We share the view expressed in paragraph 7.38 of the main consultation document.

Consultation Question 18: We provisionally conclude that the provisions of the Arbitration Act 1996 should not apply generally to emergency arbitrators. Do you agree?

Disagree

Please share your views below.:

Apart from modifying the provisions about appointment in section 16 we believe that the Act should apply to all arbitrators regardless of their appointment. many of the measures that are in the Act or should be a new Act are there to protect the parties and there is no reason or justification for a twin track approach governing the arbitrator's duties and obligations based on the way that he or she was appointed.

Consultation Question 19: 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?

Agree

Please share your views below.:

This would amount to an enhanced level of interference by the courts that would start to undermine the parties' freedom to resolve disputes in a manner of their choosing.

Consultation Question 20: Do you think that section 44(5) of the Arbitration Act 1996 should be repealed, and why?

Yes

Please share your views below.:

We share the view expressed in paragraph 7.86 of the main consultation document.

Consultation Question 21:

Other

Please share your views below.:

We express to view on this aspect as it has little or no application in relation to the type of arbitration service that we offer.

Consultation Question 22:

Agree

Please share your views below.:

This would avoid the double hearing problem referred to in the consultation document, subject to rights under sections 32 and 72 being retained.

Consultation Question 23: 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?

Yes

Please share your views below.:

We support this for the sake of consistency in the operation of the Act.

Consultation Question 24: We provisionally conclude that our proposed change to section 67 of the Arbitration Act 1996 would not require any similar change to section 103. Do you agree?

Agree

Please share your views below.:

We share the view expressed in paragraphs 8.54 to 8.56 of the main consultation document.

Consultation Question 25: 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. Do you agree?

Agree

Please share your views below.:

The remedy of setting aside may not provide finality for the parties. When the court has also ruled against the arbitrator(s) having jurisdiction there the court should have the power to declare that the award has no effect.

Consultation Question 26: 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?

Agree

Please share your views below.:

If a party commences arbitral proceedings wrongly and has to incur expense in going to the arbitrator(s) to argue that point and they are successful it is manifestly unfair that the successful party should be deprived of its costs.

Consultation Question 27: 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?

Agree

Please share your views below.:

Section 69 should not be repealed. It is this provision that protects relatively inexperienced parties from poor delivery of service by arbitrators in lower value disputes. Section 69 does of course remain non-mandatory and is not included in Schedule 1 of the Act.

From our own perspective where we are managing up to 15 arbitrations taking place in a working day, section 69 works exceptionally well and we include its availability in our standard form arbitration agreement. We are aware that without it, insurers and law firms dealing with low value personal injury cases would not use the facilities that we offer.

It should remain as an option but one which we believe consumer groups will continue to support.

Consultation Question 28: Do you think that section 7 of the Arbitration Act 1996 (separability of arbitration agreement) should be mandatory, and why?

Yes

Please share your views below.:

We are strong supporters of the continuation of this provision remaining in the Act. Paragraph 1.96 of the summary document describes in practical terms why this is desirable.

Consultation Question 29: 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?

Agree

Please share your views below.:

It was held, obiter, in *Inco -v- First Choice* (2000) that a drafting error in the amendment by the Act of 1996 to the Senior Courts Act of 1981 has accidentally precluded this important right.

Consultation Question 30: 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?

Other

Please share your views below.:

We have no particular view or indeed experience in relation to this point, bearing in mind the type of arbitration service that we offer.

Consultation Question 31: 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?

No

Please share your views below.:

We most definitely would advise against this. Once the legislation starts to become prescriptive about which tech supported items of evidence can and cannot be considered, some other items - perhaps based on future technological developments which we are not aware of at this time - will end up being the subject of argument as to their exclusion. Remote hearings and electronic documentation form the basis of everything that we do and no user has ever considered making the point that these things cannot be deployed. By some far sighted miracle the Act of 1996 appears to have been drafted in a way that has allowed arbitration to keep pace with new technology. We would like to keep it that way.

Consultation Question 32: Do you think that section 39 of the Arbitration Act 1996 should be amended to refer to "orders" (rather than "awards"), and why?

No

Please share your views below.:

There is already too much confusion about what this should or should not look like. We think that the point should be left untouched so as to avoid all manner of unforeseen circumstances arising.

Consultation Question 33: Do you think that section 39(1) of the Arbitration Act 1996 should be amended to refer to "remedies" (rather than "relief"), and why?

No

Please share your views below.:

We think that the Act as drafted is not causing any difficulty. If any change should be made, it should be the headings (which have no legislative effect) that are brought into line with the legislation in section 39(1) and not the other way around.

Consultation Question 34: 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 appellants was notified of the result of that request. Do you agree?

Agree

Please share your views below.:

To do justice to the intention behind the operation of section 57. It cannot be acceptable (and never is in court proceedings) for a party to be barred from compliance with such a request simply because they were not told about it and time for compliance will have passed.

Consultation Question 35: 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?

Agree

Please share your views below.:

We fully support the analysis set out in paragraph 10.63 of the main consultation document.

Consultation Question 36: We provisionally propose that sections 85 to 87 of the Arbitration Act 1996 (on domestic arbitration agreements) should be repealed. Do you agree?

Agree

Please share your views below.:

These sections appear to have been introduced to cover an eventuality that has not actually materialised over a 25 year period. We believe that the provisions should now be removed from the legislation.

Consultation Question 37: Do you think that any of the suggestions discussed in Chapter 11 needs revisiting in full, and if so, why?

Please share your views below.:

Third party funding should be disclosed to ensure equality of arms.

The use of artificial intelligence for dispute resolution does have a future but it is not a form of arbitration. Arbitration involves a decision being made by a person or persons appointed to resolve a dispute. There are regulations and legislation dealing with the conduct of that person. There may be more legislation of the same type soon. How is the AI to be regulated? How do we deal with its misconduct? How do we insure it? Such questions are inappropriate. I have seen AI supported mediation working but the effect is to offer a solution to the parties in the dispute that is not of their own making and that is counter productive. Likewise, an AI based arbitration system would depend on its programming and calibration to ensure its impartiality. In the end we will all conclude that just as they do not have feelings, robots cannot exercise impartial judgment other than that of its maker.

Consultation Question 38: 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?

Please share your views below.:

It is important that the availability of arbitration is extended to the type of party that does not get involved in multi million pound disputes. For "consumers" to be able to take advantage of the benefits of arbitration instead of going to court, the language used in the Act needs to change. Is there any reason to continue using the word "seat" and "tribunal" when "place" and "arbitrator" will suffice. Can a simple non-legislative guide be maintained so that lay people can make more use of arbitration?

Response ID ANON-PT57-RUBC-V

Submitted to Law Commission Consultation: Review of the Arbitration Act 1996
Submitted on 2022-12-15 23:58:34

About you

What is your name?

Name:
James Clanchy

What is the name of your organisation?

Enter the name of your organisation:

Are you responding to this consultation in a personal capacity or on behalf of your organisation?

Personal response

If other, please state::

What is your email address?

Email:
[REDACTED]

What is your telephone number?

Telephone number:
[REDACTED]

If you want the information that you provide in response to this consultation to be treated as confidential, please explain to us why you regard the information as confidential. As explained in our privacy notice, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

Please explain to us why you regard the information as confidential:

Consultation questions

Consultation Question 1: 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?

Agree

Please share your views below.:

There are justified concerns about arbitrations involving the government and public bodies being confidential. It has been suggested that the AA 1996 should address these concerns. In my view, other avenues should be used to lift confidentiality in such cases, including the courts. The Law Commission's preference is well reasoned and makes good sense.

Consultation Question 2: We provisionally conclude that the Arbitration Act 1996 should not impose a duty of independence on arbitrators. Do you agree?

Agree

Please share your views below.:

I have heard LCIA arbitrators and magic circle law firm partners express the view that, to demonstrate their independence and thereby win the confidence of the parties, an arbitrator should have no knowledge of the parties' business or be acquainted with anyone in their industry or trade.

During a debate on *Halliburton v Chubb*, a solicitor QC, arguing that arbitrators should not have specialist knowledge so as to ensure and demonstrate their independence, asserted that it was usual practice for the parties' lawyers to spend the first day of a hearing explaining to the tribunal how the parties' business worked. At an LCIA symposium, an arbitrator asserted that, being a lawyer, he would have no difficulty in understanding a charterparty, though he had not studied maritime law and had never actually seen a charterparty. His thesis was that independence was more important than expertise and that lawyer arbitrators would always have the parties' respect.

Such views run counter to the mix of expertise, impartiality, reliability and cost effectiveness that have made London the world's most successful seat for international commercial arbitration. A duty of independence can be included in arbitral rules, if users would like it, but it should not be added to the AA

1996. The DAC was right and the Law Commission is right.

Consultation Question 3: 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. Do you agree?

Other

Please share your views below.:

I agree in principle but have concerns about how the subtlety and nuances of the decision in *Halliburton v Chubb* could be codified. The duty of disclosure already exists in common law and it may be better to let it sit there.

Foreign arbitral practitioners, particularly those from civil law jurisdictions, like their codes and soft law but the English common law can produce the same end results while covering more bases and being more adaptable.

It is open to institutions, and other arbitral bodies, to set out their own standards of disclosure, as indeed they do. The Law Commission should seek to avoid importing standards, and relevant wording, from such institutions and bodies. There could be risks in effectively endorsing the institutions' interventions in *Halliburton v Chubb*, which informed, but did not underpin, the Supreme Court's decision.

Any codification should likewise be wary of the IBA Guidelines. These were compiled by an unrepresentative working group, which was primarily concerned with arbitrators who simultaneously practise as lawyers. [REDACTED]

Widening the pools of arbitrators, and opening arbitrators' eyes to perceptions of bias, might be better left to the common law and to the efforts of organisations which are representative of arbitration communities and close to their users.

Consultation Question 4: Should the Arbitration Act 1996 specify the state of knowledge required of an arbitrator's duty of disclosure, and why?

Other

Please share your views below.:

Again I am not convinced that this should be made the subject of legislation, rather than being left to the courts as Lady Arden suggested.

Consultation Question 5: 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?

What they ought to know

Please share your views below.:

Consultation Question 6:

More broadly justified

Please share your views below.:

Having got to know the Ismaili arbitration community in London, with its long and admirable traditions in private dispute resolution, I am convinced that the House of Lords' approach was right. There will be other communities whose practices should be upheld.

Consultation Question 7:

Agree

Please share your views below.:

This would be a stand-out reform and should be welcomed.

Consultation Question 8: Should arbitrators incur liability for resignation at all, and why?

No liability for resignation

Please share your views below.:

Consultation Question 9: Should arbitrators incur liability for resignation only if the resignation is proved to be unreasonable?

No

Please share your views below.:

By section 29, arbitrators are already liable for anything done in bad faith. That is the right test.

Consultation Question 10: 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. Do you agree?

Agree

Please share your views below.:

The suggestion that an arbitrator should pay the costs of an action to remove them is absurd. PII for arbitrators doesn't cover this risk. If such a costs order was made against me, I would have to declare bankruptcy. I welcome this proposal to legislate against this ghastly idea.

Consultation Question 11: 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. Do you agree?

Disagree

Please share your views below.:

Arbitration is a consensual method of dispute resolution, not dispute disposal. Summary procedures can be contained in rules or in ad hoc agreements but should have no place in the primary legislation.

Sections 33 and 47 already allow partial awards to be made quickly. Users of institutional arbitration are sometimes caught by surprise when they encounter tribunals in ad hoc arbitrations, who are prepared to deal with parts of a case within just a few weeks, deciding certain issues in a partial award fully and finally, not summarily.

Consultation Question 12: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 13: We provisionally propose that the Arbitration Act 1996 should stipulate the threshold for success in any summary procedure. Do you agree?

Disagree

Please share your views below.:

There is a risk that any such statutory threshold could confuse well-established principles in, for example, procedures to deal with claims for hire or freight under charterparties. In such cases, while a set-off may be dismissed in a partial award under section 47, a right to bring a counterclaim later in the arbitration may not be excluded. A 'manifestly without merit' test would not be appropriate in such a case but might become argued for.

Consultation Question 14: 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. Do you agree?

Disagree

Please share your views below.:

As noted in my comments above, this is not what arbitration is for.

An arbitration agreement confers a duty on an arbitral tribunal to hear both parties out, however bad their case might be. One of the reasons that they have opted for arbitration is precisely to ensure that their case will be heard properly.

Allowing summary procedure by statute (rather than in rules chosen by the parties) could be bad for the reputation of London as a seat for international arbitrations.

Consultation Question 15: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 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?

No

Please share your views below.:

The consultation paper clearly explains that section 44 already allows orders against third parties.

Consultation Question 17: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 18: We provisionally conclude that the provisions of the Arbitration Act 1996 should not apply generally to emergency arbitrators. Do you agree?

Agree

Please share your views below.:

Consultation Question 19: 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?

Agree

Please share your views below.:

Emergency Arbitrators have not been a success in this jurisdiction. [REDACTED] Institutions can have them and they be useful in arbitrations seated elsewhere. The English courts should focus on their own powers to assist and accelerate arbitrations.

Consultation Question 20: Do you think that section 44(5) of the Arbitration Act 1996 should be repealed, and why?

Yes

Please share your views below.:

The reasoning set out in the consultation paper is unimpeachable.

Consultation Question 21:

Permission under section 44

Please share your views below.:

Excellent idea, which would reinforce the supportive relationship between arbitration and court. Of course, it begs the question why a party wouldn't apply to court in the first place, which is the reason why emergency arbitrators are vanishingly rare.

Consultation Question 22:

Agree

Please share your views below.:

This is a tricky issue. Maybe an 'appeal plus'? There will be cases where the tribunal did not cover all the ground in the way a court might expect and/or need before reviewing the ruling on jurisdiction.

Consultation Question 23: 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?

Yes

Please share your views below.:

Consultation Question 24: We provisionally conclude that our proposed change to section 67 of the Arbitration Act 1996 would not require any similar change to section 103. Do you agree?

Agree

Please share your views below.:

Consultation Question 25: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 26: 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?

Agree

Please share your views below.:

It would be useful to have this power clearly confirmed in the statute and to put a stop to the philosophical discussions about it.

Consultation Question 27: 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?

Agree

Please share your views below.:

The limited right of appeal, combined with the possibility to opt-out of it, is one of the secrets of London's success as an arbitral seat.

There is no demand for any change in the sectors which make the most use of s 69, i.e. shipping and commodities.

The LCIA's opt-out has been a USP for the institution, attracting international arbitrations of the kind that might otherwise go to the ICC. It thereby adds to the diversity of offerings that makes London unique.

Section 69 should remain as is.

Consultation Question 28: Do you think that section 7 of the Arbitration Act 1996 (separability of arbitration agreement) should be mandatory, and why?

No

Please share your views below.:

I agree with the point of view set out in para 10.9.

Consultation Question 29: 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?

Agree

Please share your views below.:

Consultation Question 30: 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?

Yes

Please share your views below.:

Consultation Question 31: 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?

Yes

Please share your views below.:

There are still expectations in some places that hearings will always take place physically in a unicameral setting (everybody in the same room). It could be helpful to have statutory support for virtual hearings.

Consultation Question 32: Do you think that section 39 of the Arbitration Act 1996 should be amended to refer to "orders" (rather than "awards"), and why?

Yes

Please share your views below.:

Yes, provisional awards, like interim awards, should be avoided. An order can be provisional but an award should be final, even if it is partial. Or just an award.

Consultation Question 33: Do you think that section 39(1) of the Arbitration Act 1996 should be amended to refer to "remedies" (rather than "relief"), and why?

Yes

Please share your views below.:

Consultation Question 34: 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 appelland was notified of the result of that request. Do you agree?

Agree

Please share your views below.:

Consultation Question 35: 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?

Agree

Please share your views below.:

Consultation Question 36: We provisionally propose that sections 85 to 87 of the Arbitration Act 1996 (on domestic arbitration agreements) should be repealed. Do you agree?

Agree

Please share your views below.:

Consultation Question 37: Do you think that any of the suggestions discussed in Chapter 11 needs revisiting in full, and if so, why?

Please share your views below.:

I should like to put in a plea to revisit section 78(5) on reckoning periods of time.

The choice isn't between always or never counting weekends and public holidays (para 11.161). It's between 7 days (a full week) as the short period to be accommodated and 5 days (a working week).

Mischief is caused by weekends and holidays falling in a period of days on all of which it would normally be expected that the thing ordered to be done could be done. The CPR and other procedural rules make provision for such an occurrence in periods of 5 days, automatically extending them so that 5 working days are made available.

The Arbitration Act is out of step and curiously offers a party a period of 7 working days. This is counter-intuitive and doesn't work well when a tribunal is drawing up an order for directions in which some things are to be done in 21 days (3 weeks), 14 days (2 weeks), and 7 days (normally a week but not under the Act, which transforms it into a period of 9 days).

Arbitrators find themselves obliged to confirm that when they say 7 days, they mean an ordinary week, not the Arbitration Act's 9 days. This can sometimes be done by confirming the end date but not if that date can't yet be fixed because other directions must be followed first.

Section 78(5) must be the result of a drafting error. It catches people by surprise. Please have another look at it. Arbitrators will be grateful.

Consultation Question 38: 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?

Please share your views below.:




Law Commission Consultation Paper 257 – Review of the Arbitration Act 1996

A response on behalf of the Chancery Bar Association

A. Introduction

1. This is a response on behalf of the Chancery Bar Association to Law Commission Consultation Paper 257 – Review of the Arbitration Act 1996 (the ‘**Consultation Paper**’).
2. The Chancery Bar Association is a specialist bar association for barristers practising Chancery law. The Chancery field is very diverse, spanning finance, business, insolvency, property, intellectual property, trusts and estates, fraud, asset tracing, and specialist areas such as charities, pensions, and tax. Chancery practice also involves work for international clients before the English courts, as well as fully international work in courts and tribunals around the world.
3. Arbitration is an important feature of the work of many Association members. Arbitration has become fundamental to the resolution of international commercial disputes, in respect of which the United Kingdom remains a major centre for excellence. Moreover, since the UK’s exit from the European Union, which has created material difficulty and uncertainty in respect of the reciprocal recognition and enforcement of civil and commercial judgments between the UK and EU Member States, the importance of the arbitral process – including the ready enforcement of arbitral awards pursuant to the New York Convention – is only likely to grow.
4. In the commercial sphere, we agree wholeheartedly with the Commission that “*the Arbitration Act 1996 works well*”,¹ and that large-scale amendment to the Arbitration Act 1996 would be unnecessary and undesirable. As set out below, in very large measure we agree with the Commission’s recommendations as to the (limited) amendment required to the Act to keep it ‘best in class’.

¹ Consultation Paper, paragraph 1.36.

- 
5. However, the Association continues to advocate in particular for the introduction of legislation to facilitate trust arbitration. We address trust arbitration at our response to Consultation Question 38 below.

B. Response to Consultation Questions

Consultation Question 1: Confidentiality

6. The Commission’s analysis of the confidentiality of the arbitral process is at Chapter 2 of the Consultation Paper. Having undertaken a review of the approach to confidentiality in arbitrations within English law and the approach taken in some other jurisdictions (paragraphs 2.3 – 2.30), the Commission set out a possible proposal for codification at paragraph 2.32:

“One option might be to include in the Arbitration Act 1996 a provision stating explicitly that arbitrations are private and confidential, unless an exception applies. The provision could then set out a non-exhaustive list of exceptions, to include the principal exceptions to confidentiality which have already been identified in case law:

- (1) where there is consent;*
- (2) where the court so orders;*
- (3) where reasonably necessary for the protection of the legitimate interests, or the fulfilment of the legal duties, of an arbitral party;*
- (4) where required by the interests of justice; and*
- (5) where required by the public interest.”*

7. The Commission suggests that these provisions could be made mandatory,² and would have “*the merit of stating the default rule, and providing at least some guidance to users of the Act on the principal exceptions to confidentiality*”.³

² Consultation Paper, paragraph 2.36. The Commission argues that “*There seems little added value in the Arbitration Act 1996 offering an optional scheme of confidentiality when arbitral rules do that already. Any added value would instead be in the form of a codification of the law. And of course, the law is mandatory*”.

³ Consultation Paper, paragraph 2.35.



8. However, the Commission concluded that the above proposal would not be put forward for recommendation on the basis that:
- a. Confidentiality should not be the presumption in all types of arbitration⁴ since some types of arbitration favour transparency and in other areas, *“there is a trend towards transparency, at least in some respects, such as the publication of awards”*.⁵
 - b. The list of exceptions provided are not particularly *“useful guidance to users in terms of how they would apply in any particular case”*.⁶
 - c. The precise dividing line between transparency and confidentiality in the arbitration context is still a *“a matter of debate”* and is a line which *“will likely be drawn in different places depending on the context”* which *“militates against a one-size-fits-all approach”*.⁷
9. From the Chancery perspective, we recommend that the Commission reconsider the codification of confidentiality provisions, on the grounds that:
- a. Default confidentiality provisions are included in the arbitration legislation of a number of offshore jurisdictions.
 - b. *Pace* the Commission’s remarks (regarding the trend towards transparency in the arbitral process), in light of a recent re-emphasis by the Courts on the principles of transparency and open justice, the confidentiality of the arbitral process is increasingly important to practitioners and clients.
 - c. The codification of default confidentiality rules would provide clarity and certainty.

⁴ Consultation Paper, paragraph 2.40.

⁵ Consultation Paper, paragraph 2.40.

⁶ Consultation Paper, paragraph 2.42.

⁷ Consultation Paper, paragraph 2.43.



(a) *Default confidentiality provisions in other jurisdictions*

10. As is acknowledged by the Commission,⁸ there is no express provision for confidentiality within the Arbitration Act 1996, yet arbitrations are nevertheless normally considered confidential and private in England and Wales. The general position is that the confidentiality of the proceedings stems from an implied term within the arbitration agreement: see Toulson & Phipps on Confidentiality, 4th Edn at paragraph 22-026; *Dolling-Baker v Merrett* [1990] 1 WLR 1205, per Parker LJ at 1213 and *Emmott v Wilson* [2008] EWCA Civ 184 at [105].⁹


11. However, the obligation of confidentiality in the English arbitral context is nuanced in at least two ways:

- a. Not every piece of information will necessarily attract the same level of confidentiality protection, such that there may be greater reasons in favour of disclosing an arbitral award as opposed to, for instance, a statement of case filed within the proceedings.¹⁰ As Mance LJ noted in *Department of Economics, Policy and Development of the City of Moscow v Bankers Trust Co* [2004] EWCA Civ 314 at [40]: “*The factors militating in favour of publicity have to be weighed together with the desirability of preserving the confidentiality of the original arbitration and its subject-matter. There is a spectrum. At one end is the arbitration itself, and at the other an order following a reasoned judgment under s.68*”.

⁸ Consultation Paper, paragraph 2.7.

⁹ Lawrence Collins LJ held that “*case law over the last 20 years has established that there is an obligation, implied by law and arising out of the nature of arbitration, on both parties not to disclose or use for any other purpose any documents prepared for and used in the arbitration, or disclosed or produced in the course of the arbitration, or transcripts or notes of the evidence in the arbitration or the award, and not to disclose in any other way what evidence has been given by any witness in the arbitration*”.

¹⁰ See Toulson & Phipps on Confidentiality, 4th Edn at 22-026 – 22-029.

- 
- b. Second, the obligation of confidentiality is subject to numerous specific exceptions. As set out by Lawrence Collins LJ in *Emmott v Wilson*, *supra*:


“On the authorities as they now stand, the principal cases in which disclosure will be permissible are these: 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.”

12. The approach to arbitral confidentiality has therefore developed incrementally through the case law. Without a clear statutory codification, there is a certain amount of ambiguity in the precise contours of the confidentiality obligation, and of derogations from it.

13. The Commission rightly notes¹¹ that this approach is at odds with the position taken in other jurisdictions, which *do* provide a clear and explicit statutory framework, codifying both the general obligation of confidentiality and the circumstances in which parties and tribunals are permitted to disclose otherwise confidential information. This is particularly evident in offshore jurisdictions.¹²

¹¹ Consultation Paper, paragraph 2.25.

¹² An example being Bermuda: see the decision of the Supreme Court of Bermuda in *ACE Bermuda Insurance Ltd v Ford Motor Company* [2016] SC (Bda) 1 Civ which reiterated that arbitration proceedings in Bermuda are “*both private and confidential*” (at [25]) and which followed the approach taken in English law, including the comments in *Department of Economics, Policy and Development of the City of Moscow v Bankers Trust Co* (*supra*), see paragraphs 25 – 41. See also the Cayman Islands, the Arbitration Law 2012 provides, inter alia, at section 81(1) and 81(3) that “*An arbitral tribunal shall conduct the arbitral proceedings in private and confidentially*” and requires the “*arbitral tribunal and the parties ... [to] take reasonable steps to prevent unauthorized disclosure of confidential information by any third party involved in the conduct of the arbitration*”. Section 81(2) provides for various exceptions to permit disclosure by the arbitral tribunal or a party of confidential information and these are framed in much the same way as in The Bahamas and England more generally. For instance, an arbitral tribunal or party can disclose confidential information if it is authorized by the parties or “*can reasonably be considered as having been so authorized*” or is in the public interest, is “*necessary in the interests of justice*” or “*can reasonably be considered as being needed to protect a party’s lawful interests*”.



14. For instance, in The Bahamas¹³ there is an extensive legislative regime providing for the confidentiality of arbitrations in the Arbitration Act 2009, Part V. In summary:

a. Section 18 states the general starting point that:

“Subject to section 19 every arbitration agreement to which this section applies is deemed to provide that the parties and the arbitral tribunal must not disclose confidential information”

b. Section 19 then provides *“Limits on prohibition on disclosure”* and enables a party or an arbitral tribunal to disclose confidential information:

“(a) to a professional or other adviser of any of the parties;

(b) if both of the following matters apply –

(i) the disclosure is necessary –

(A) to ensure that a party has a full opportunity to present the party’s case;

(B) for the establishment or protection of a party’s legal rights in relation to a third party; or

(C) for the making and prosecution of an application to the Court under this Act; and

(ii) the disclosure is no more than what is reasonably required to serve any of the purposes referred to in subparagraph (i) (A) to (C);

(c) if the disclosure is in accordance with an order made, or a subpoena issued, by the Court;

(d) if both of the following matters apply –

(i) the disclosure is authorized or required by law (except this Act) or required by a competent regulatory body; and


(ii) the party who, or the arbitral tribunal that, makes the disclosure provides to the other party and the arbitral tribunal or, as the case may be, the parties, written details of the disclosure (including an explanation of the reasons for the disclosure); or

(e) if the disclosure is in accordance with an order made by –

(i) an arbitral tribunal under section 20; or

(ii) the Supreme Court under section 21.”

¹³ Provision for trust arbitrations is made pursuant to s. 91A and 91B of the Trustee Act 1998.

- 
- c. Section 20 gives the arbitral tribunal the further power to order disclosure in a situation which is not covered under section 19(a) to (d) whilst Section 21 permits the Supreme Court of The Bahamas to make an order on an appeal by a party, after an order under section 20 has been made by the arbitral tribunal refusing the disclosure request. The Court must be satisfied, inter alia, that the *“public interest in preserving the confidentiality of arbitral proceedings is outweighed by other considerations that render it desirable in the public interest for the confidential information to be disclosed”*.
 - d. Section 22 provides for court proceedings under the Arbitration Act 2009 to be conducted in public unless *“the Court makes an order that the whole or any part of the proceedings must be conducted in private”*.

15. Similarly, in Guernsey,¹⁴ section 8 of the Arbitration (Guernsey) Law, 2016 provides:

“(1) Unless the arbitration agreement otherwise provides, an arbitration is confidential and so

–

(a) the hearing shall be conducted in private, with only the parties, their advisors and the arbitrators permitted to be present throughout, and

(b) the documents used in, prepared for, and in, the arbitration proceedings (“the arbitral documents”) shall not be used or disclosed for any other purpose, subject to subsection (2).

(2) Subsection (1)(b) does not prohibit –

(a) the arbitral documents from being disclosed with the consent of the parties, or pursuant to an order or direction of the court,

(b) the use of an arbitral document by any person where -

(i) the document has previously been placed in the public domain in good faith, and

(ii) that person has obtained the document from a source other than the arbitration proceedings,

¹⁴ Where provision for trust arbitration is made pursuant to the Trusts (Guernsey) Law 2007, section 63: see Lewin on Trusts, 20th Edn at 49-008.



(c) the disclosure of an arbitration award to a third party if it is necessary to do so in order to enforce or protect the legal rights of a party to the arbitration agreement

16. In light of this, we recommend that the Commission revisit its decision not to recommend its proposal for codification. As the Commission acknowledged, its proposal would provide welcome guidance, both as to the conceptual basis for the obligation of confidentiality, and the circumstances permitting parties to derogate from it.

17. We also note that a clear and explicit statutory framework for arbitral confidentiality would assist in facilitating trust arbitration. Trust disputes often involve conflicts between family members or questions concerning the succession plans of a settlor, all of which are likely to involve highly sensitive information which potential litigants would not wish to be ventilated in public proceedings.¹⁵

(b) Open justice


18. Both in England and in offshore jurisdictions, there have been a number of recent decisions in which privacy applications, brought by litigants seeking to protect inherently sensitive commercial or family information, have been rejected by courts emphasizing the importance of open justice.¹⁶ For example:

- a. *V v T* [2014] EWHC 3432 (Ch), in which the Court declined an application under CPR 39.2(3) for the hearing of a claim under the Variation of Trusts Act 1958 be heard in private.¹⁷ The Court emphasised the “*fundamental principle of open justice*” and applied a number of traditional corollaries of this principle, including, *inter alia*, that the public are entitled to attend court proceedings, the media is entitled to report on them, and the hearing of cases in

¹⁵ See also Lewin on Trusts, 20th Edn at 49-001: “*An alternative to proceedings in court is arbitration. Arbitration offers advantages of privacy and confidentiality, often matters significant in family trusts, and a choice of arbitrator*”

¹⁶ For a further example see *Gestrust SA v Sixteen Defendants* [2016] EWHC 3067 see at [98].

¹⁷ The Court however did order reporting restrictions (despite ordering that the hearing be in open court) in light of the specific family circumstances: see [28].



public will deter inappropriate behaviour by the court. Morgan J specifically noted at [20] – [21] that the inherent sensitivity of the information sought to be kept private (concerning the family in question) did not justify a derogation from the open justice principle:


“I suspect that in many applications under the 1958 Act the parties are reluctant to have their cases heard in open court. The subject matter of an application under the 1958 Act may be regarded by the parties as a private family matter involving a discussion of the family’s private financial affairs. The parties may take the view that those matters concern no-one but themselves and that is a sufficient justification for the hearing to be in private. If that is their view, the law is clear that it is not a sufficient justification for the hearing to be in private. The 1958 Act conferred this jurisdiction upon the court. In 1958, and at all times since, the general principle has been that court hearings are in open court and that has applied to applications under this Act as to other court hearings.

[21] *In the present case, the parties have suggested that there are specific reasons why the court should be persuaded to derogate from the general principle of open justice. The first reason put forward relates to the fact that the trusts directly or indirectly own the shares in a private company. It is said that there is a risk that a hearing in open court would lead to the company’s customers becoming aware of the levels of profit made by the company and that would lead to those customers effectively squeezing the profit margins of the company, damaging the value of the trust assets. I have considered the evidence put forward in support of this submission and I do not regard it as particularly strong. It certainly does not come anywhere near satisfying the requirement of clear and cogent evidence justifying a derogation from the open justice principle.”¹⁸*

- b. Similarly, in *Hamersmith-Stewart v Cromwell Trust Company Ltd & Others* 2021/CLE/gen/01043¹⁹ the Supreme Court of The Bahamas recently rejected a trustee’s

¹⁸ This decision was applied by the Court of Appeal in *MN v OP* [2019] EWCA Civ 679 at [26] – [28].

¹⁹ See also the Court of Appeal decision in *Hot Pancakes Limited et al v Amber Louise Murphy et al* SCCiv App. 95 of 2020.



application to seal the Court’s file, and took the opportunity to re-emphasise the importance of the open justice principle. Charles J noted that the principle is protected in the Constitution of The Bahamas at Article 20(9)²⁰ (albeit the principle was subject to exceptions such as national security concerns or “*where the release of confidential information such as private financial records might harm the reputation of one of the parties*”²¹). The Court emphasised the “*heavy burden*” that an applicant had to discharge to displace the open justice principle²² and rejected the trustee’s arguments that, *inter alia*, the provision for trust arbitrations in The Bahamas through the 2011 Trustee Amendment Act had “*reinforced the public policy of protecting trust matters from prying eyes and ensuring confidentiality*”,²³ concluding:

*“In my judgment, the effects on the trusts, asserted by the Trustee are no more than inconveniences. If the risk was sufficiently compelling to justify derogation from open justice, many parties to litigation would be entitled to sealing orders, which would undermine the effectiveness of the principle of open justice itself”*²⁴

19. The trend in a number of recent cases is therefore to emphasise the requirement that Court proceedings be open and transparent, even where the subject matter of the litigation is a sensitive family dispute. In light of this trend, the ability to resolve such disputes via arbitration, in a private and confidential manner, offers an attractive alternative to prospective litigants: something that would be reinforced by the statutory codification of arbitral confidentiality.

Consultation Questions 6 and 7: Protected characteristics

²⁰ At [12].

²¹ At [16].

²² At [41] for instance: “*it is the Court that has to determine whether the matter should be sealed or not, bearing in mind the constitutional principle of open justice. This principle, as I earlier stated, is rooted in deep and long history dating back hundreds of years and it could be traced to decisions made before the signing of Magna Carta in 1215. This principle is viewed as an underlying or core principle of English law. Today, the concept is so widely accepted that there is a general presumption that there should be judicial openness. Now, in The Bahamas, it has constitutional connotations.*

²³ At [27].

²⁴ At [32] – [33].



20. In Chapter 4, the Commission considers issues of discrimination in the context of arbitral appointments and in particular the degree to which parties can stipulate criteria for the choice of an arbitrator which might otherwise be considered discriminatory.²⁵ Specific consideration is given to the Supreme Court decision in *Hashwani v Jivraj* [2011] UKSC 40. In *Hashwani*, an arbitration agreement provided that “*in the event of a dispute between them which they were unable to resolve, that dispute should be resolved by arbitration before three arbitrators, each of whom should be a respected member of the Ismaili community, of which they were both members*”.²⁶ Lord Clarke set out the relevant question for determination as follows:

*“The question is whether, in all the circumstances the provision that all the arbitrators should be respected members of the Ismaili community was legitimate and justified. In my opinion it was ... The parties could properly regard arbitration before three Ismailis as likely to involve a procedure in which the parties could have confidence and as likely to lead to conclusions of fact in which they could have particular confidence”*²⁷

21. The Commission’s proposal is to recommend that:

*“(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 2020”*²⁸

²⁵ Consultation Paper, paragraph 4.2.

²⁶ Per Lord Clarke at [1].

²⁷ Per Lord Clarke at [70].

²⁸ Law Commission Paper, paragraphs 4.19 and 4.36. To an extent, the Commission’s proposal seems to adopt concepts from the law on indirect discrimination (such as the proportionality of the legitimate aim) and transposes them into the context of direct discrimination when under the Equality Act 2010, the “*proportionate means of achieving a legitimate aim*” is a defence to direct discrimination where the protected characteristic is age: section 13(2) of the Equality Act 2010.




22. Section 4 of the Equality Act lists the ‘protected characteristics’ as follows: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, sexual orientation. The effect of the Commission’s proposal would be that (as set out in one of its examples at paragraph 4.20) where a party appointed a female arbitrator in the context of an arbitration agreement which provided that the “*arbitrator must be a man*”, a challenge by the opposing party based on the gender of the arbitrator *per se* would not be possible.
23. From the Chancery perspective, the Commission’s proposal engages issues about the proper dividing line between freedom of disposition and concerns as to equality.²⁹
24. Traditionally, English law has been tolerant towards private trusts “*whose objects are persons identified by name or ascertainable by reference to a described class*”³⁰ to the extent that courts have refused to invoke principle or public policy in their response, and have been more “*willing to interfere with such trusts where their discriminatory terms take the form of uncertain conditions*”.³¹ Indeed, there are various examples of English authorities where the relevant settlement specifically envisaged individuals with a certain protected characteristic taking an active role in the resolution of issues arising in the administration of the trust.
25. The best-known example is *Re Tuck’s Settlement Trusts* [1978] Ch. 49,³² in which the trust deed provided that, in order to benefit, descendants of the settlor had to marry an “*approved wife*” defined as a “*wife of Jewish blood by one or both of her parents and who has been brought up in and has never departed from and at the date of her marriage continues to worship according to*

²⁹ See Harding, ‘*Charitable Trusts and Discrimination: Two Themes*’ [2016] 2(1) CJCL 227.

³⁰ *Ibid.* at 231.

³¹ *Ibid.* at Fn. 11. Earlier in the article Harding cites *Blathwayt v Baron Crawley* [1976] AC 397 where the relevant clause of the will stated that if any person should become entitled as tenant for life or tenant in tail male to possession of the estate should (where material): “*be or become a Roman Catholic ... the estate hereby limited to him shall cease and determine and be utterly void and my principal estate shall thereupon go to the person next entitled*”. Lord Wilberforce held at 424: “*Clauses relating in one way or another to the Roman Catholic Church, or faith, have been known and recognised for too many years both in Acts of Parliaments ... and in wills and settlements for it now to be possible to avoid them on this ground*”.

³² See also for reference *Re Tepper’s Will Trusts* [1987] Ch. 358.



the Jewish faith".³³ A further clause provided that "*As to which facts in case of dispute or doubt, the decision of the Chief Rabbi in London of either the Portuguese or Anglo German Community (known respectively as the Sephardim and the Ashkenazim Communities) shall be conclusive*".³⁴ The Court of Appeal upheld the provision which had been challenged on the grounds, *inter alia*, that the referral to the Chief Rabbi rendered the clause too uncertain. Lord Denning MR³⁵ in particular saw no issue in having the Chief Rabbi determine any dispute in these circumstances:

"But if the appointed person is ready and willing to resolve the doubt or difficulty, I see no reason why he should not do so. So long as he does not misconduct himself or come to a decision which is wholly unreasonable, I think his decision should stand. After all, that was plainly the intention of the testator or settlor. He or his advisers knew that only too often in the past a testator's intentions have been defeated by various rules of construction adopted by the courts: and that the solution of them has in any case been attended by much delay and expense in having them decided by the courts. In modern times the courts have been much more sensible. Ever since Perrin v. Morgan [1943] A.C. 399 and In re Jebb, deed. [1966] Ch. 666. But still the testator may even today think that the courts of law are not really the most suitable means of deciding the dispute or doubt. He would be quite right. As this very case shows, the courts may get bogged down in distinctions between conceptual uncertainty and evidential uncertainty: and between conditions subsequent and conditions precedent. The testator may want to cut out all that cackle, and let someone decide it who really will understand what the testator is talking about: and thus save an expensive journey to the lawyers and the courts. For my part, I would not blame him. I would give effect to his intentions. Take this very case. Who better to decide these questions of "Jewish blood" and "Jewish faith" than a Chief Rabbi? The settlor mentions two Chief Rabbis. It is not necessary to ask both of them. Either one will suffice. I venture to suggest that his decision would be much more acceptable to all concerned than the decision of a court of law. I would let him decide it."

³³ Per Lord Denning MR at 58D.

³⁴ Per Lord Denning MR at 58E.

³⁵ Much of whose judgment was obiter but whose comments in this regard were not rejected by the majority.




26. It might be thought that this position is in favour of the approach set out by the Supreme Court in *Hashwani* and *prima facie* against the Commission’s proposals, which might be characterised in turn as potentially limiting freedom of disposition. As *Re Tuck’s Settlement Trusts* might indicate, it may be thought that there could be cases in the trust context where the parties have sought it desirable that there be a particular characteristic. Moreover, opponents of the Commission’s proposals may say that arbitrations are a consensual process whereby the parties already have considerable freedom to structure the proceedings as they want, and that there should therefore be no further interference in the manner in which the parties select those who are to resolve their dispute.
27. However, in our view, the Law Commission’s proposals should be embraced rather than rejected.
28. First, the proper scope of the Law Commission’s suggestion should be appreciated. If this proposal were to be applied in the context of a trust arbitration for instance, it is clear that any intrusion on settlor freedom would be limited as it merely seeks to address the choice of the *arbitrator* of any such dispute: it does not prohibit a settlor setting particular conditions as to the identity of the trustee or the nature of the object.³⁶
29. Secondly and relatedly, the Law Commission’s proposal would not lose whatever utility³⁷ may be had from specifying a particular characteristic for an arbitrator as long as such an exercise would be legitimate and relevant to the dispute at hand (perhaps as envisaged by Lord Denning MR in *Re Tuck’s Settlement Trusts*³⁸). It would not preclude the analysis conducted by the Supreme Court in *Hashwani* where (for instance) it was considered both legitimate and justified to require all arbitrators be respected members of the Ismaili community as the “*parties could properly regard arbitration before three Ismailis as likely to involve a procedure in which the*

³⁶ Indeed, as the authors of Lewin on Trusts, 20th Edn note at 49-006, citing *Re Tuck’s Settlement Trusts*, that arbitration clauses should “*be distinguished from provisions which merely enable particular contentious facts, or matters on which the trustees cannot agree, to be referred to a third party*”.

³⁷ See Russell on Arbitration, 24th Edn (2015) at 4-016: “*It is frequently of fundamental importance to parties that they are able to select arbitrators based on certain personal characteristics (such as nationality, cultural background, or other personal or geographical qualities)*”.

³⁸ The reasoning of Lord Denning MR was anyway primarily focused on whether the provision was sufficiently certain and met the requisite standard.



*parties could have confidence and as likely to lead to conclusions of fact in which they could have particular confidence*³⁹. What the proposal *would* eliminate however is arbitrary discrimination which can have no justification.

30. Thirdly, making this limited inroad into freedom of disposition has the wider advantage of updating this area of law in conformity with recent trends in other jurisdictions. For instance, as has been noted by Harding⁴⁰, in Canada and South Africa a different approach has been taken to the dividing line between equality and settlor freedom with much greater emphasis being placed on the former. An example cited in the Canadian context is the decision in *Canada Trust Co v Ontario (Human Rights Commission)* [1990] 69 DLR (4th) 321 (Ont CA)⁴¹ where Robins JA noted: “[t]he freedom of an owner of property to dispose of his or her property as he or she chooses is an important social interest that has long been recognised in our society and is firmly rooted in our law ... That interest must, however, be limited in the case of this trust by public policy considerations”⁴²

31. Fourthly, it is anyway wrong to presuppose that parties have an untrammelled right to specify in their arbitration agreements their choice of arbitrator or that there is anything necessarily objectionable with regulating these private choices. As the authors of *Russell on Arbitration*, 24th Edn (2015) note:

*“The law does not impose general restrictions on who may be appointed an arbitrator. The authority of the arbitral tribunal arises from the parties’ contract, and the law generally allows contracting parties complete freedom to choose their tribunal”*⁴³ ... *“This freedom may not be without limitation. Arbitration Act 1996 s. 1(b) provides that the parties are free to agree how their disputes are resolved subject only to such safeguards which are necessary in the public interest”*

³⁹ Per Lord Clarke at [70].

⁴⁰ Harding, ‘Charitable Trusts and Discrimination: Two Themes’ [2016] 2(1) CJCCL 227 at 232.

⁴¹ As set out at *ibid.* at 232 – 235.

⁴² *Canada Trust Co v Ontario (Human Rights Commission)* [1990] 69 DLR (4th) 321 (Ont CA) at 334.

⁴³ At 4-011.



32. For all of the above reasons, we agree with the Law Commission’s proposal as set out above: to the extent that it could or would be applied to trust disputes if they were arbitrable under the Arbitration Act 1996, we believe it would make a small inroad into settlor freedom in order to safeguard against arbitrary and unjustifiable discrimination.

Consultation Questions 18 and 19: Emergency arbitrators

33. As the Commission notes, an increasing number of arbitral institutions’ rules provide for the appointment of an emergency arbitrator to hear applications for interim relief before the arbitral tribunal that will hear the dispute itself is constituted.


34. There is clearly demand for such emergency arbitration provisions. This is shown both by the tendency for arbitral institutions to adopt them and by survey evidence. The 2015 International Arbitration Survey conducted by Queen Mary University of London indicated that 93% of arbitration users favoured the inclusion of emergency arbitrator provisions in institutional rules.⁴⁴

35. The importance of emergency arbitrators should not, however, be overstated. In the same survey, only 29% of respondents said that they would prefer to seek interim relief from an emergency arbitrator, as against 46% who would look to the domestic courts.⁴⁵ As the Commission notes, the courts of England and Wales can act much more quickly than can any existing emergency arbitrator scheme. They also offer considerable advantages, including the possibility of applying for relief *ex parte*, direct enforceability of their orders by proceedings for contempt, and the possibility of making orders that bind third parties.

36. Many of these advantages would be particularly salient if trust arbitration were to be introduced. In the large number of trust disputes where some form of fraud is alleged, it will often be vital to act speedily, without notice to the other side, and in such a way that third parties will be bound

⁴⁴ Queen Mary University of London, *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration*, available at https://arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf, page 3.

⁴⁵ *Ibid.*, page 27.



by the order. A freezing injunction granted by the courts is and will likely remain the only way to obtain the relief required. That said, there is a large number of cases in which the possibility of seeking relief from an emergency arbitrator would be a useful additional tool for parties seeking to preserve the status quo in advance of arbitral proceedings.


37. In such cases, the enforceability of the orders of emergency arbitrators will be of prime importance. It is true that the experience of emergency arbitrators to date indicates that almost all parties comply with their orders without any need for coercive measures, not least in view of the fact that most arbitral institutions' rules permit the arbitral tribunal to penalise noncompliance with interim orders made either by the tribunal itself or by an emergency arbitrator.⁴⁶ Nonetheless, parties considering the use of an emergency arbitrator clearly take the view that it is important that their decisions should be enforceable in the last resort. The 2015 International Arbitration Survey indicated that the enforceability of the decisions of emergency arbitrators was by far the most important factor influencing parties' decisions whether to seek interim relief from an emergency arbitrator or from the courts.⁴⁷ Similarly, in the 2021 QMUL International Arbitration Survey, 39% of respondents indicated that the ability to enforce emergency arbitrators' decisions or interim measures ordered by arbitral tribunals would make a given seat more attractive to arbitration users.⁴⁸ There is no reason to think that this would be any less true in relation to chancery claims than in the commercial sphere.

38. We therefore welcome the Commission's desire to take account of the position of emergency arbitrators in any reforms to the Arbitration Act 1996. In particular, we concur with the Commission's provisional views on Consultation Questions 18 and 19. Although the Singapore example of including emergency arbitrators in the definition of "the arbitral tribunal" is interesting and has the virtue of simplicity, we agree that large sections of the Arbitration Act could not

⁴⁶ International Chamber of Commerce, *ICC Commission Report: Emergency Arbitrator Proceedings*, 2019, available at <https://iccwbo.org/content/uploads/sites/3/2019/03/icc-arbitration-adr-commission-report-on-emergency-arbitrator-proceedings.pdf>, page 200.

⁴⁷ At page 27.

⁴⁸ Queen Mary University of London, *2021 International Arbitration Survey: Adapting arbitration to a changing world*, available at https://arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf, page 8.



appropriately be applied to emergency arbitrators. Similarly, we see no basis for the court to administer a scheme of emergency arbitrators: this would be both superfluous and out of line with the principle that the court should seek to interfere as little as possible in the arbitration process.⁴⁹

Consultation Question 20: Repeal of section 44(5) of the Arbitration Act 1996

39. We agree with the Commission’s provisional view on the repeal of subsection 44(5) of the Arbitration Act 1996. Although, as the Commission notes, Leggatt J in *Gerald Metals v Timis*⁵⁰ did not in fact hold that the mere availability of an emergency arbitrator procedure made recourse to the courts impossible under subsection 44(5) of the 1996 Act, it does seem that some stakeholders have understood the decision in this way.⁵¹ Given the proliferation of emergency arbitrator provisions and the importance that most arbitration users attach to the possibility of seeking interim relief from the courts, this could undermine the attractiveness of London as a seat.

40. This would be still more important if trust arbitration were introduced, given that interim relief from the courts rather than an emergency arbitrator is likely to remain necessary in many trust cases, for the reasons stated at paragraph 35 above. Since section 44(5) appears redundant and could potentially be off-putting to arbitration users, we support its repeal.

Consultation Question 21: ways of accommodating the orders of an emergency arbitrator

⁴⁹ As Lord Thomas of Cwmgiedd put it extrajudicially in 2017, “*The position of every Commercial Court towards arbitration can be summarised as ‘Maximum support. Minimum interference.’*”: Lord Thomas of Cwmgiedd, “Commercial Dispute Resolution: Courts and Arbitration”, 6 April 2017, National Judges’ College, Beijing, available at <https://www.judiciary.uk/wp-content/uploads/2017/04/lcj-speech-national-judges-college-beijing-april2017.pdf>, at paragraph 25.

⁵⁰ [2016] EWHC 2327 (Ch)


⁵¹ See for example Victoria Clark and Nadia Hubuck, “The emergency arbitrator is officially a teenager”, *Practical Law Arbitration Blog*, 5 April 2020, available at <http://arbitrationblog.practicallaw.com/the-emergency-arbitrator-is-officially-a-teenager/>: “*The effect of this provision [ie s 44(5)] is that, where relief is sought against a party to an arbitration clause (and concerns about the time it would take to constitute the tribunal are the basis of the application), the fact that the parties have adopted arbitration rules that offer emergency arbitrator proceedings are likely to result in the English court having no jurisdiction to act*”.



41. We disagree with the provisional view expressed by the Commission and prefer the first proposed option, “*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*”.
42. This question is clearly one of significance, in light of the importance attached by users to the enforceability of emergency arbitrators’ decisions; and also one where England and Wales may be well placed to set a global lead, given that the number of jurisdictions which have made express provision in their domestic arbitration laws for the enforcement of emergency arbitrators’ decisions remains very limited.
43. We are aware of four jurisdictions which have so far made such provision: Singapore, Hong Kong, New Zealand and the Netherlands. There are, broadly speaking, two models: to assimilate the emergency arbitrator to the arbitral tribunal (with the effect that the provisions of the arbitration law relating to the enforcement of interim orders by fully constituted tribunals apply); or to assimilate the interim order of an emergency arbitrator to an award.
44. Thus in Singapore and New Zealand, the definition in the local arbitration law of “arbitral tribunal” has simply been widened to encompass emergency arbitrators.⁵² Their interim orders are therefore enforceable on the same terms as those of fully constituted arbitral tribunals.
45. In Hong Kong, on the other hand, special provisions have been introduced to the effect that the interim relief awarded by an emergency arbitrator is enforceable on the same basis as an interim order of the court, provided the court’s leave is obtained. This is identical to the basis on which an arbitration award can be enforced.⁵³ Similarly, the Netherlands Code of Civil Procedure, while

⁵² Singapore International Arbitration Act, s 2(1): “*‘arbitral tribunal’ means a sole arbitrator or a panel of arbitrators or a permanent arbitral institution, and includes an emergency arbitrator appointed pursuant to the rules of arbitration agreed to or adopted by the parties including the rules of arbitration of an institution or organisation*”; New Zealand Arbitration Act 1996, s 2(1): “*‘arbitral tribunal’ ... includes any emergency arbitrator appointed under—(i) the arbitration agreement that the parties have entered into; or (ii) the arbitration rules of any institution or organisation that the parties have adopted*”.

⁵³ Arbitration Ordinance (Cap 609), s 22B(1): “*Any emergency relief granted, whether in or outside Hong Kong, by an emergency arbitrator under the relevant arbitration rules is enforceable in the same manner as an order or direction of the Court that has the same effect, but only with the leave of the Court*”. Cf. s 84: “*Subject to section 26(2), an award,*



it does not refer to emergency arbitrators by name, makes provision for interim relief to be awarded by “*an arbitral tribunal separately appointed for that purpose*”, provided that the parties authorise it to do so.⁵⁴ A decision by such a tribunal to grant interim relief constitutes an arbitral award which may be enforced under the provisions of the Code of Civil Procedure.⁵⁵

46. We agree with the reasoning of the Commission that neither of these models is appropriate. Including emergency arbitrators within the definition of the arbitral tribunal is likely to have unwanted consequences without substantial redrafting of the Arbitration Act; and, as the Commission states, it is probably inappropriate to provide for judgment to be entered on an order that is by nature provisional and reversible.


47. We nonetheless think that some express provision ought to be made for the enforcement of peremptory orders made by emergency arbitrators and that leaving the work to section 44 is undesirable, for three reasons.

48. First and most importantly, leaving the work to section 44 does not achieve the objective of allowing enforcement of the orders of emergency arbitrators. A party having obtained an order from an emergency arbitrator and needing to enforce it would have to make a new application to the court under section 44 for what would – at least in form – be a new order. Even if, in practice, the court would probably be guided by the order already granted by the emergency arbitrator, this

whether made in or outside Hong Kong, in arbitral proceedings by an arbitral tribunal is enforceable in the same manner as a judgment of the Court that has the same effect, but only with the leave of the Court.”

⁵⁴ Netherlands Code of Civil Procedure, art. 1043b(2): “*Bij overeenkomst kunnen de partijen een afzonderlijk daartoe te benoemen scheidsgerecht, binnen de grenzen gesteld bij artikel 254, eerste lid, de bevoegdheid verlenen, ongeacht of het arbitraal geding ten gronde aanhangig is, op verzoek van een der partijen, een voorlopige voorziening te treffen, met uitzondering van bewarende maatregelen als bedoeld in de vierde titel van het Derde Boek.*” [By agreement, the parties may authorise an arbitral tribunal separately appointed for that purpose, irrespective of whether the arbitral proceedings on the merits are pending within the limits set by Article 254(1), to grant provisional relief at the request of any of the parties, except for conservatory measures as referred to in the Fourth Title of the Third Book.]


⁵⁵ Ibid., art. 1043b(4): “*Tenzij het scheidsgerecht anders bepaalt, geldt een uitspraak van het scheidsgerecht over het verzoek een voorlopige voorziening te treffen als een arbitraal vonnis; daarop zijn de bepalingen van de derde tot en met de vijfde afdeling van deze titel van toepassing.*” [Unless the arbitral tribunal determines otherwise, a decision by the arbitral tribunal on the request to grant provisional relief shall constitute an arbitral award to which the provisions of Sections Three to Five inclusive of this Title shall be applicable.]



would involve considerable duplication of effort and open the way for the party against which relief was being sought to have a second bite of the cherry. Further, it would not be in line with the general principles of the 1996 Act. Parties which opt for arbitral rules which provide for an emergency arbitrator should be entitled to rely on orders made by the emergency arbitrator without having to argue the matter fully again in court.⁵⁶ Similarly, the court ought to support the interim orders of an emergency arbitrator rather than supplanting them (even if only in form). In our view, the fact that the Commission’s first proposal “*maintains the primacy of the arbitral regime*” ought to be decisive.

49. Second, the Commission’s first proposal is also more compatible with many arbitral institutions’ rules, which usually aim for parallelism between the interim relief granted by an emergency arbitrator and the interim relief granted by a fully constituted tribunal. For example:
- a. The ICDR’s International Arbitration Rules provide at Art. 7(4) that “*Any interim award or order shall have the same effect as an interim measure made pursuant to Article 27 and shall be binding on the parties when rendered*”.
 - b. The LCIA Rules provide at Art. 9.8 that “*The Emergency Arbitrator may make any order or award which the Arbitral Tribunal could make under the Arbitration Agreement*”.
50. It follows in our view that the procedures for enforcing an interim order of an emergency order should resemble as much as possible those for enforcing an interim order of an arbitral tribunal.
51. Third, survey evidence suggests that arbitration users themselves favour direct enforceability of emergency arbitrators’ decisions: in the 2015 QMUL International Arbitration Survey, 78% of respondents were in favour of decisions rendered by emergency arbitrators being enforceable in the same way as arbitral awards.

⁵⁶ Consider for example the speech of Lord Fraser of Carmyllie QC in the House of Lords during the passage of the Arbitration Bill: “*We started from the principle that if parties have chosen arbitration rather than the courts to resolve their dispute, this decision must be respected. We propose therefore to curtail the ability of the court to intervene in the arbitral process except where the assistance of the court is clearly necessary*” (HL Deb 18 Jan 1996 vol 569 col 760).



52. We therefore support the proposal that preemptory orders of an emergency arbitrator be enforceable in the same way as preemptory orders of an arbitral tribunal.

Consultation Questions 22 – 25: Section 67: Rehearing or Appeal

53. In Chapter 8 paragraphs 8.1 – 8.46, the Commission considers modifying the procedure concerning challenges to a tribunal’s substantive jurisdiction under section 67 of the Arbitration Act 1996. The current law (as per the Supreme Court in *Dallah Real Estate & Tourism Holding Co v Pakistan* [2011] 1 AC 763⁵⁷) is that section 67 challenges involve a *de novo* hearing rather than an appeal. The Commission’s proposal is that:

*“(1) where a party has participated in arbitral proceedings, and has objected to the jurisdiction of the arbitral tribunal; and
(2) 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”*.⁵⁸

54. The Commission sees this as striking a balance between retaining the supervisory court’s ability to have the final say as to jurisdiction, while avoiding the “*double hearing problem*”⁵⁹ where parties effectively have two bites of the cherry and may improve their evidential position in the substantive challenge in the Court following a review of the tribunal’s conclusions as to substantive jurisdiction.⁶⁰

⁵⁷ See per Lord Mance at [30]: “*the nature of the present exercise is, in my opinion, also unaffected where an arbitral tribunal has either assumed or, after full deliberation, concluded that it had jurisdiction. There is in law no distinction between these situations. The tribunal’s own view of its jurisdiction has no legal or evidential value, when the issue is whether the tribunal had any legitimate authority in relation to the Government at all. This is so however full was the evidence before it and however carefully deliberated was its conclusion. It is also so whatever the composition of the tribunal – a comment made in view of Dallah’s repeated (but no more attractive for that) submission that weight should be given to the tribunal’s “eminence”, “high standing and great experience”*”.

⁵⁸ Consultation Paper, paragraph 8.46.

⁵⁹ Consultation Paper, paragraph 8.43.


⁶⁰ Consultation Paper, paragraph 8.31.



55. Whilst the Commission acknowledges that there may be little practical need for such a reform given the small percentage of cases (at least in England and Wales) in which a section 67 challenge is made,⁶¹ the proposed amendment is likely to be welcomed by practitioners and we agree with it.
56. The conventional argument in favour of a *de novo* hearing for a party which has had full participation in the proceedings has been criticised by a number of commentators.⁶² The Commission’s proposal does not detract from the core principle that the tribunal cannot be the final arbiter of its own jurisdiction, but it avoids the unfortunate and costly scenario in which arguments on substantive jurisdiction are effectively heard and determined twice.
57. In this context, one issue of particular interest to Chancery practitioners is the impact of the Commission’s proposal on third parties. If legislation to facilitate trust arbitration is recommended by the Commission, the requirement to have a *de novo* hearing would be of real benefit to a beneficiary (in particular a minor beneficiary) who may not have been involved in the original arbitration, but who may nevertheless seek to challenge the tribunal’s substantive jurisdiction at a later point. The Commission’s proposal does not however affect that possibility: it allows beneficiaries who have not been party to the arbitration themselves to challenge it later and limits

⁶¹ Consultation Paper, paragraph 8.33.

⁶² For examples, see for instance Handbook of UNCITRAL Arbitration, 3rd Edn at 1-37: “*In English law, jurisdictional issues, including those relating to the scope of the arbitration agreement are reviewed de novo by the courts. This de novo review includes review of the underlying factual findings of the Tribunal. This position was confirmed by the UK Supreme Court in the Dallah Real Estate case ... For the author, the de novo review of the legal analysis relating to jurisdiction is understandable. However, the review of the factual basis as if there had been no arbitration is difficult to justify where both parties have participated in the arbitration. In such a case, the parties have had an opportunity to set out the factual basis for their jurisdictional claims. Permitting the parties to in essence re-run the factual basis for jurisdiction is not only wasteful but also potentially detrimental*”; Joseph KC, Jurisdiction and Arbitration Agreements and their Enforcement, 3rd Edn at 13-51: “*There is therefore as a matter of English law no difference between a situation where the Tribunal has assumed it has jurisdiction and the result of a fully contested hearing at which all relevant evidence is called. This is said to be the case because a Tribunal cannot finally determine the issue of jurisdiction but only give its ruling. This last conclusion, however, is debatable as it ignores that a party has chosen to call evidence in order to support or establish a position with regard to jurisdiction. The concept of two evidential bites at the cherry does not appear to have much to be said in its favour. It is also suggested that it is not a conclusion demanded by the Arbitration Act or the similar concepts underlying the Model Law.*”



the ‘appeal’ to those who have fully participated in the proceedings and thereby seek to have two attempts at challenging jurisdiction.⁶³

Consultation Question 27: Appeals

58. At paragraphs 9.1 – 9.53, the Commission considers the position with respect to appeals on a point of law. Having reviewed the historical context of section 69 of the Arbitration Act 1996,⁶⁴ the Commission proposed *not* to amend the current provision dealing with appeals on points of law which broadly requires either party consent or permission from the court.⁶⁵

59. The Commission sees this as striking the appropriate balance⁶⁶ between the competing concerns as to the “*finality of arbitral awards ... [which] tends towards limiting appeals*”⁶⁷ and the view that appeals are necessary in order to ensure that the law is consistently applied “*so that everyone has the same rights and duties ... [and it is] undesirable if there are pockets of activity where the law does not apply, or is applied incorrectly*”.⁶⁸

60. From a Chancery perspective, the Commission’s decision to recommend keeping the current formulation in section 69 is likely to be considered favourably by practitioners and we support it.

⁶³ In this sense it may accord with part of the reasoning in *Dallah Real Estate & Tourism Holding Co v Pakistan* [2011] 1 AC 763 per Lord Mance at [26]: “*An arbitral tribunal’s decision as to the existence of its own jurisdiction cannot therefore bind a party who has not submitted the question of arbitrability to the tribunal. This leaves for consideration the nature of the exercise which a court should undertake where there has been no such submission and the court is asked to enforce an award. Domestically, there is no doubt that, whether or not a party’s challenge to the jurisdiction has been raised, argued and decided before the arbitrator, a party who has not submitted to the arbitrator’s jurisdiction is entitled to a full judicial determination on evidence of an issue of jurisdiction before the English court, on an application made in time for that purpose under s.67 of the Arbitration Act 1996, just as he would be entitled under s.72 if he had taken no part before the arbitrator*” (emphasis added)


⁶⁴ Consultation Paper, paragraphs 9.3 – 9.14.

⁶⁵ Consultation Paper, paragraph 9.53: “*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*”

⁶⁶ Consultation Paper, paragraph 9.50.

⁶⁷ Consultation Paper, paragraph 9.48.

⁶⁸ Consultation Paper, paragraph 9.49.



61. At the outset, it is worth noting that the main arguments in favour of reform and the criticism of section 69⁶⁹ were also considered and rejected by the Departmental Advisory Committee more than 25 years ago:

“We received a number of responses calling for the abolition of any right of appeal on the substantive issues in the arbitration. These were based on the proposition that by agreeing to arbitrate their dispute, the parties were agreeing to abide by the decision of their chosen tribunal, not by the decision of the Court, so that whether or not a Court would reach the same conclusion was simply irrelevant ...

[285] This proposition is accepted in many countries. We have considered it carefully, but we are not persuaded that we should recommend that the right of appeal should be abolished. It seems to us, that with the safeguards we propose, a limited right of appeal is consistent with the fact that the parties have chosen to arbitrate rather than litigate”⁷⁰

62. If legislation is introduced to facilitate trust arbitration, the notion that there would be no further review or oversight from the supervisory court is deeply unattractive. Indeed, the theoretical context in English law (against which trust arbitrations would take place in England and Wales) is the fundamental principle *“to the law of trusts that the court has jurisdiction to supervise and if appropriate intervene in the administration of a trust, including a discretionary trust”*.⁷¹

63. Retaining an ability to appeal on a point of law for trust disputes would also be consistent with the approach advocated in the Trust Law Committee’s 2012 paper,⁷² as well as the approach taken in some other offshore jurisdictions which specifically provide for appeals on a point of law: for example, see section 91 of the Bahamian Arbitration Act 2009 and the supplementary provisions at section 92 or section 64 (and the supplementary provision at section 65) of The Arbitration (Guernsey) Law, 2016 which also frames the right in a similar way to England and Wales:

⁶⁹ Consultation Paper, paragraph 9.27.

⁷⁰ Departmental Advisory Committee on Arbitration Law Report on The Arbitration Bill, February 1996, Chairman: The Rt Hon Lord Justice Saville at [284] – [285].

⁷¹ *Schmidt v Rosewood Trust Ltd* [2003] UKPC 26 per Lord Walker at [36].

⁷² Trust Law Committee, ‘Arbitration of trust disputes’, 1 April 2012, see [50(f)] and [39]: *“We acknowledge that some right of appeal is necessary and may be significant”*.



“64. (1) Unless otherwise agreed by the parties, a party may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings. An agreement to dispense with reasons for the tribunal’s award shall be considered an agreement to exclude the court’s jurisdiction under this section”⁷³

64. Of course, the importance of the role of the supervisory court and the ability to oversee the proper administration of trusts and disputes in relation to them does not preclude the parties from deciding themselves, mutually, that there should be no further right of appeal.

65. However, the current formulation of section 69 strikes this balance well: it is, as the Commission notes,⁷⁴ not mandatory and parties are free to structure the procedure of their dispute as they see fit (within certain parameters) and provide for the arbitral tribunal’s decision to be final even if the panel were to commit an error of law. For similar reasons, it is suggested that the Commission’s rejection of the suggestion that *“appeals from arbitral awards should go only as far as the High Court, with no further right of appeal, to increase the finality of arbitral awards”*⁷⁵ is also correct.

Consultation Question 36: Domestic arbitration


66. In respect of the Commission’s proposal to use the powers in section 88 of the 1996 Act to repeal sections 85 to 87, we consider that it is useful to distinguish between the effects of section 86 and those of section 87.

67. If those sections were ever to be commenced, their effect in relation to arbitrations where all parties were nationals of and resident in the United Kingdom would be:

⁷³ The Arbitration (Guernsey) Law 2016, section 64.

⁷⁴ Consultation Paper, paragraph 9.32.

⁷⁵ Consultation Paper, paragraph 11.149.

- 
- a. to provide additional grounds under which the court may decline to stay legal proceedings in favour of an arbitration under section 9 of the 1996 Act (section 86); and,
 - b. to make an agreement to exclude the jurisdiction of the court under sections 45 and 69 of the 1996 Act unenforceable unless made after the commencement of the arbitral proceedings (section 87).

68. We do not think it would be useful to have different rules for the staying of legal proceedings in domestic arbitration cases. Although the argument that such distinctions would be precluded by European law is unlikely any longer to be relevant following the UK's withdrawal from the European Union, making such distinctions based on the nationality and residence of the parties still seems to us undesirable in principle. Section 86 of the 1996 Act should therefore in our view be repealed.

69. There might, on the other hand, be grounds for retaining the provision in section 87, especially if trust arbitrations were to be introduced. As Lord Thomas of Cwmgiedd CJ observed extrajudicially in his 2016 Bailii Lecture, the more restrictive test for appeals from arbitration awards on points of law applied by section 69 of the 1996 Act, coupled with the right of parties to contract out of section 69 entirely, has substantially reduced the number of appeals on points of law as compared with the situation before the passage of the Arbitration Act 1979.⁷⁶ That has in Lord Thomas's words, "*reduce[d] the potential for the courts to develop and explain the law*".⁷⁷

70. The development of the law of trusts in England and Wales is at least as driven by case law as is commercial law. If trust arbitration were introduced, a similar effect as that observed by Lord Thomas in areas such as shipping and insurance law might also be seen in trust law.

⁷⁶ Lord Thomas of Cwmgiedd, "Developing commercial law through the courts: rebalancing the relationship between the courts and arbitration", *The Bailii Lecture 2016*, 9 March 2016, available at <https://www.judiciary.uk/wp-content/uploads/2016/03/lcj-speech-bailli-lecture-20160309.pdf>.

⁷⁷ *Ibid.* at paragraph 22.




71. It might, therefore, be prudent to retain the possibility of making some distinction between domestic arbitrations (that is, those where all the parties are nationals of and resident in the UK and where the underlying trust instrument is governed by English law) and trust arbitrations where the parties have no strong connection with the UK and the proper law of the trust is not English law. In the former case, there may well be a stronger case for restricting parties' ability to exclude recourse to the courts on a point of law so as to maintain the ability of the courts of England and Wales to develop the jurisdiction's trust law.
72. For that reason, while it is obviously unattractive in principle to maintain uncommenced provisions on the statute book indefinitely, and while we agree that the 1996 Act appears to have functioned well without those provisions in force over the last 25 years, we would have reservations about the repeal of section 86 before a clearer view is available of the impact of the introduction of trust arbitration.

Consultation Question 37: Do you think that any of the suggestions discussed in Chapter 11 needs revisiting in full, and if so, why?

(1) Law governing the arbitration agreement

73. Opinions vary as to the correctness of the Supreme Court's decision in *Enka v Chubb*⁷⁸ that an express or implied choice of law in relation to a contract carries across as an implied choice of law to govern an arbitration agreement ancillary to that contract. We make no submission on the point generally.
74. We would, however, suggest that the Supreme Court's decision may apply with less force in relation to trust instruments, should trust arbitration be introduced. The factors that settlers of

⁷⁸ [2020] UKSC 38.



trusts may have in mind when selecting a proper law for the trust are likely to be different from those which guide commercial parties in selecting a proper law for their contract. Settlers frequently select proper laws because they offer features for the trust they intend to create which are not available in other legal systems (for example, the validity of non-charitable purpose trusts or the absence of a perpetuity period), or even for fiscal reasons. Further, many international trusts contain clauses permitting (or in some cases even requiring) the trustees to vary the proper law of the trust for a variety of reasons, including amendments to local trust law, political instability or fiscal changes.

75. Where a settlor drafts a trust instrument providing for the trust to be governed by the law of jurisdiction X and incorporating an arbitration clause providing for arbitration in London, there may thus be considerably weaker grounds for considering that the proper law of the trust should prevail as the law of the arbitration clause. The proper law of the trust may not reflect the settlor's original intention at all (if it has changed) and, even if it does, that intention may not have been based on a preference for a given legal system in the round, but simply on some aspect of its trust law that meets the needs of that particular settlor.
76. In addition, since trust arbitration is a relatively new phenomenon and is not provided for in the laws of many trust jurisdictions, applying the law of the trust as the law of the arbitration clause might make numerous arbitration clauses unenforceable. Although in such cases the law of the seat might prevail under the validation principle set out by the Supreme Court majority,⁷⁹ it would be desirable to avoid such uncertainty by providing that, where a trust instrument contains an arbitration clause with a choice of seat in favour of England and Wales, the governing law of the arbitration clause is also English law.

Commission Question 38: Additional topics for review and reform

77. We turn finally to the topic of trust arbitration in its own right.

⁷⁹ At paragraphs 95 – 97 of *Enka* (*supra*).



78. Notwithstanding the fundamental and growing importance of arbitration in respect of the resolution of commercial disputes, it remains the case that arbitration is an underutilised process in respect of Chancery work. The principal reason for this is simple: the Arbitration Act 1996 is not well-suited to the resolution of disputes involving trusts.

79. The trust – and analogous concepts of the administration of (solvent or insolvent) funds – is central to Chancery practice. Trusts and administered funds are a feature of the English law of property (jointly owned property being held through a trust of land); succession (the devolution of estates being via will trusts and statutory intestacy trusts); charity (many charities being structured as trusts or funds); pensions (many pension schemes being structured as trusts or funds); and tax (with legitimate tax planning regularly conducted via family settlements).


80. We note that, at paragraph 1.8 of the Consultation Paper, the Commission records that:

“Separately, responses to previous programme consultations have argued for the introduction of trust law arbitration, which is not possible under the current law. The Law Commission intends during the course of the 14th programme to consider the scope for introducing trust law arbitration, alongside wider work on modernising trust law.”

81. Respectfully, we suggest that the lack of any provision for trust arbitration should be considered as perhaps the most significant current lacuna in the arbitration law of the United Kingdom.

82. The introduction of legislation to facilitate trust arbitration is an issue which could properly be addressed as part of the Commission’s current consideration of the Arbitration Act 1996. We therefore respectfully advocate that the Commission use the opportunity of the current Programme of Law Reform to consider the introduction of new sections of the Arbitration Act 1996, facilitating the arbitration of trust disputes in the United Kingdom.

83. Therefore, in response to Consultation Question 38 (*“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?”), we recommend that the Commission propose legislation to facilitate the arbitration of trust disputes.

84. The conceptual difficulties with trust arbitration are well-known and much discussed in the academic literature. The starting point for the consideration of the topic is a 2008 paper produced by John Wood, David Brownbill KC, and Christopher McCall KC on behalf of the Trust Law Committee.⁸⁰


85. The primary conceptual difficulty identified by Wood, Brownbill and McCall is a concern that trust disputes are inherently non-arbitrable, on the basis that, *“the trust concept is itself the creature of the courts (historically the courts of equity), exercising judicial discretions as described by the Privy Council in Schmidt v Rosewood Trustees [2003] 2 AC 709 [sic], so that the legal rights of beneficiaries and trustees can validly be determined only by the courts”*⁸¹.

86. In addition to this fundamental conceptual issue, there are real difficulties in adapting the provisions of the Arbitration Act to the trust context. In particular:

- a. There is some doubt as to whether a unilateral instrument such as a trust deed (or other unilateral instrument, such as a will) is capable of constituting an ‘arbitration agreement’ for the purposes of s.6(1) of the Arbitration Act 1996, in circumstances in which it cannot be said that beneficiaries who take rights under that instrument are ‘parties’ to the document for the purposes of s.82 of the Arbitration Act 1996. Similarly and without further clarification, there may be some doubt as to the extent to which a bilateral document which is not a synallagmatic contract (such as a pension deed) could constitute an arbitration agreement.
- b. The position of minor, unborn, unascertained, and incapable beneficiaries presents a particular difficulty, since it is difficult to see how such beneficiaries could have their rights adjudicated upon by an arbitral tribunal in circumstances in which they cannot participate in

⁸⁰ ‘The Arbitration of Trust Disputes’ (2012) 18(4) Trusts & Trustees 296.

⁸¹ Ibid., page 300.



the arbitral process. Put simply, the consensual process of arbitration under the Arbitration Act 1996 is particularly ill-suited to the position of such beneficiaries.

- c. Finally, the Arbitration Act 1996, designed as it is to cater primarily for commercial disputes, does not on its face provide the breadth of remedies exercised by the Court under its equitable jurisdiction: the powers of the arbitrator at s.48 of the Arbitration Act 1996 do not, for example, permit the tribunal to appoint a replacement trustee of a trust.

87. In order to resolve the conceptual uncertainties surrounding trust arbitration, in 2011 the Trust Law Committee promoted to the Law Commission the prospect of amending the Arbitration Act 1996. In response, in its Final Report on the 11th Programme of Law Reform dated 27th May 2011, the Law Commission said as follows:

“Trust law arbitration

Project in brief

3.66 Arbitration is a method of settling legal disputes privately, without going to court. The parties are bound by the arbitrator’s decision, with only limited rights of appeal, and usually cannot otherwise take the dispute to court.

3.67 Some trust disputes may be suitable for arbitration. At present two or more people can enter into a valid arbitration agreement. However, any award that is made will not bind other interested parties, such as other beneficiaries (who may be under-age and therefore not able to enter into a binding arbitration agreement).

3.68 This means that it is not feasible for those who create trusts governed by the law of England and Wales to require that trustees and beneficiaries have resort to arbitration to resolve their differences, rather than litigation. However, other jurisdictions such as Guernsey and the state of Florida have enacted legislation that enables binding trust law



arbitration. Practitioners and other stakeholders interested in this area of law have argued that it would be beneficial for this jurisdiction also to introduce such reforms.

Support for the project

3.69 This project was proposed by the Trust Law Committee, a group of academics and practitioners in the field of trust law. The Department for Business, Innovation and Skills supported the Law Commission conducting research and consultative work investigating the feasibility of extending the legislative framework for arbitration to cover disputes concerning trusts.

3.70 The Law Commission recognises the great importance of the trust industry, and that work in this area would have the potential to generate a range of benefits. The technical nature of the work makes it suitable for the Law Commission. The project has not been taken forward solely on the grounds that the Commission does not have the capacity to include this work in its Eleventh Programme.”

88. Since the conclusion of the 11th Programme of Law Reform, further jurisdictions have enacted statutory reform to facilitate trust arbitration by addressing the conceptual difficulties summarised above. The most significant such reform is perhaps that enacted by The Bahamas, which on 30th December 2011 enacted the Trustee (Amendment) Act 2011, *inter alia* making provision for trust arbitration in that jurisdiction. It does so via new sections 91A – 91C and the new Second Schedule to the Trustee Act of The Bahamas. The full text of these provisions is set out at the Appendix to this paper.

89. In broad terms, the approach under the Bahamian legislation is as follows:

- a. S.91A(2) of the Trustee Act contains a deeming provision, deeming a trust instrument containing an arbitration clause to have effect as if it were an arbitration agreement and as if the parties to the trust were parties to that agreement.



- b. S.91A(3) applies the Second Schedule, which modifies the provisions of the Bahamian Arbitration Act for the purposes of trust arbitration.
- c. S.91B(2) confers the Court’s supervisory powers over trusts on the arbitral tribunal in a trust arbitration.
- d. S.91B(3)–(9) enables the trust instrument or the tribunal to appoint persons to represent the interests of minor, unborn, unascertained, or incapable beneficiaries in respect of a trust arbitration.

90. These provisions have been in force for over 10 years, and there are now cases in The Bahamas dealing with the application of these provisions: see in particular *Volpi v Delanson Services Ltd*, 7th August 2019 (in which the Bahamian Supreme Court stayed a breach of trust action in The Bahamas in favour of an arbitration pursuant to a clause in the trust instrument) and 13th June 2022 (addressing *inter alia* an application to stay an arbitration pending a challenge and appeal to an arbitral award which had been issued in the ensuing arbitration). It is clear that the statutory ability in The Bahamas to include binding arbitration clauses in trust instruments is being put to use by settlors in that jurisdiction.

91. We would respectfully suggest that the Bahamian Trustee (Amendment) Act 2011 – which was drafted with the assistance of members of the Trust Law Committee⁸² – provides an extremely helpful template and starting point for the consideration of trust arbitration legislation in this jurisdiction.

Andrew Holden
XXIV Old Buildings
James Bradford
39 Essex Chambers
James Kane
XXIV Old Buildings
14 December 2022

⁸² We are aware that David Brownbill KC assisted in the drafting of the Act.

CLEARY GOTTlieb STEEN & HAMILTON LLP

AMERICAS
NEW YORK
SAN FRANCISCO
SÃO PAULO
SILICON VALLEY
WASHINGTON, D.C.

ASIA
BEIJING
HONG KONG
SEOUL

2 London Wall Place
London EC2Y 5AU
T: +44 20 7614 2200
F: +44 20 7600 1698
clearygottlieb.com

EUROPE & MIDDLE EAST
ABU DHABI
BRUSSELS
COLOGNE
FRANKFURT
LONDON
MILAN
PARIS
ROME

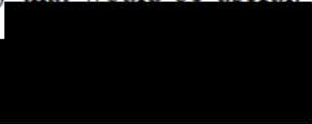
15 December 2022

Commercial and Common Law Team
(Arbitration)
Law Commission
1st Floor, Tower, 52, Queen Anne's Gate
London
SW1H 9AG
arbitration@lawcommission.gov.uk

By Email

Dear Sirs,

Response to Law Commission Consultation Paper on Provisional Reform Proposals to the Arbitration Act 1996 (the "Consultation Paper")

1. We are pleased to submit this response to the Law Commission's Consultation Paper regarding the Arbitration Act 1996. At the outset, we wish to express support for, and commend, the Law Commission's efforts on this project and the comprehensive review already conducted, resulting in the Consultation Paper. We also agree with the overarching sentiment reflected in the Consultation Paper that the Arbitration Act 1996 "*works well*", and that as such there is no need for wholesale reform although there are particular issues which should be considered for review.
2. Given the stage of the Law Commission's consultation and in the interest of being concise, we have not sought to address every question posed by the Law Commission and have limited our response to the specific topics where we have identified particular points to raise for further consideration.
3. Thank you in advance for considering our response. We are of course available to discuss any of these issues, to answer any questions you may have and to assist the Law Commission further with the consultation process in any way that would be useful. Please do not hesitate to contact us at the following details: 

Consultation Question 1. 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?

4. We agree. In discussing dispute resolution choices with our clients we consistently hear that confidentiality remains one of the key drivers in deciding whether or not to opt for arbitration. However, we agree with the Law Commission's provisional conclusion that it would be challenging and potentially counter-productive to the relative stability of the position as it has developed through the case law to try and introduce a fixed definition for confidentiality.
5. We wish to highlight one point regarding investor-state arbitration. Paragraph 2.28 of the Consultation Paper states "*For example, investor-state arbitrations tend to start from a default position of transparency rather than confidentiality*". The sources cited reference treaty-based arbitration, however, we are aware of increasing use of commercial arbitration agreements between state-owned or state-related entities and commercial counter-parties, where this default transparency does not apply but the rationale for greater transparency in investor-state arbitration would apply equally in principle.
6. Whilst we agree with the Law Commission's overall conclusion not to try and expressly address investor-state arbitrations in the Act, this is an additional reason why we agree with not codifying the confidentiality regime. The current approach allows for the flexibility to address those cases where greater transparency may be appropriate, including these quasi investor-state arbitrations which are conducted under commercial arbitration rules rather than treaty-based arbitration.

Consultation Question 11. 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. Do you agree?

7. Our experience resonates with the report in the Consultation Paper that there is a need / desire for express summary procedures to allow for more efficient dispute resolution and the associated time/cost savings. This has particularly been the case in straightforward debt claims, or claims where there is very little factual dispute between the parties and the 'answer' revolves around contractual interpretation or a point of law.
8. We are unsure whether introducing this change will have the effect in practice of emboldening arbitrators to adopt summary procedures, particularly given the concerns around due process and enforcement/New York Convention requirements referenced in the Consultation Paper. Tribunals may prefer to continue to manage matters requiring expedition of some sort through traditional case management powers. By way of anecdotal example, in a recent case where the liability to pay was undisputed and only the amount was in issue, an experienced tribunal opted not to utilise the Early Determination procedure under the LCIA rules as the claimant party requested (even though the arbitration agreement expressly contemplated reliance on that procedure). The tribunal instead adopted a compressed timetable with limited provision for witness and expert evidence. In practice, this was equally efficient for the parties and it is not clear that a summary disposal could realistically have been achieved any faster particularly given the (desirable) need to consult with the parties on process.
9. That said, we would not be opposed to introducing explicit provision for a summary procedure in the Arbitration Act and providing encouragement and statutory support for arbitrators to adopt that process in appropriate cases. We raise the following additional points for consideration:

- (i) **Mandatory/non-mandatory.** The Law Commission's provisional proposal is that any summary procedure should be non-mandatory. We query whether that might undermine the effectiveness of the provision, and whether it is necessary in circumstances where a summary determination would not be as of right but upon request by one of the parties to the tribunal, which could refuse to adopt a summary procedure in the circumstances. We would suggest having a requirement to opt-out expressly (this is related to point (ii) below).
- (ii) **Expedited/summary procedures under arbitration rules.** As the Consultation Paper notes, a number of arbitral rules do now make provision for expedited process or summary procedure of some form (see Footnote 13, Consultation Paper). If the summary procedure is to be non-mandatory, we foresee a need to make clear whether the summary procedure provided for under the Arbitration Act is supplemental to, or instead of, any equivalent or similar process in the arbitral rules chosen by the parties. For example, if the arbitral rules provide for an expedited process, we can foresee an argument that by choosing those rules, the parties have chosen the expedited process and thereby excluded summary disposal available under the Arbitration Act.

Consultation Question 12. 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. Do you agree?

10. We agree, and consider that this will assist with making any summary procedure adopted more defensible against subsequent challenge and potential enforcement issues in other jurisdictions.

Consultation Question 13. We provisionally propose that the Arbitration Act 1996 should stipulate the threshold for success in any summary procedure. Do you agree?

11. Even within our team, there are differences of opinion on the issues around introducing any threshold for the summary procedure and what that threshold should be. Whilst some agree with stipulating a threshold for the reasons given in the Consultation Paper, others consider that it would be unhelpful to import a test derived from English litigation into arbitration in this way and instead suggest that the Arbitration Act should recognise the possibility of a tribunal adopting a summary procedure, but not prescribe how the tribunal should approach that procedure. As with many aspects of arbitration, a standard will emerge over time with practice, and importing an English litigation procedural test may give the impression that there is some 'home advantage' for English parties and/or other stakeholders in an English seated arbitration.

Consultation Question 14. 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. Do you agree?

12. As above, there are differences of opinion. Some agree, and consider the certainty of importing an established standard under English law to be a benefit, while others disagree for the same reasons given in response to Question 13 above, and consider that doing so would be a disadvantage.

Consultation Question 18. We provisionally conclude that the provisions of the Arbitration Act 1996 should not apply generally to emergency arbitrators. Do you agree?

13. We agree, for the reasons given in the Consultation Paper.

Consultation Question 22. We provisionally propose that:

- (i) where a party has participated in arbitral proceedings, and has objected to the jurisdiction of the arbitral tribunal; and
- (ii) 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. Do you agree?

14. We agree and consider that this change would bolster the finality of arbitral awards as the Law Commission suggests. We do think it is an important qualification that this is only the case where a party has fully participated in the arbitration resulting in the award and has put their case on jurisdiction. We suggest that it would be worth including a provision that for ‘participation’ to result in any section 67 challenge being limited to an appeal, the party challenging jurisdiction must have advanced a substantive challenge to jurisdiction and made submissions to the tribunal on the same.

Consultation Question 23. 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?

15. No, we consider that the additional requirements of consent from either the other party/parties or the tribunal is a sufficient control on section 32, and it may be that it provides a helpful practical mechanism and/or ‘safety valve’ to allow some flexibility for certain cases if the change to section 67 contemplated in Question 22 is introduced.

Consultation Question 24. We provisionally conclude that our proposed change to section 67 of the Arbitration Act 1996 would not require any similar change to section 103. Do you agree?

16. We agree, for the reasons given in the Consultation Paper.

Consultation Question 25. 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. Do you agree?

17. We agree, for the reasons given in the Consultation Paper.

Consultation Question 26. 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?

18. We agree, for the reasons given in the Consultation Paper.

Consultation Question 31. 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?

19. Yes whilst we agree that the current rules are sufficiently flexible and broad as to accommodate these developments, we would support an express reference to this. We have understood anecdotally through conversations with co-counsel in various international jurisdictions that where some or all of the process has been conducted virtually or using electronic documents (including electronically signed awards) it can present challenges with enforcement. An express reference in the Arbitration Act may assist with this as well as keeping the language of the legislation clearly in line with these developments.

Yours faithfully,



Cleary Gottlieb Steen & Hamilton LLP

Response ID ANON-PT57-RUBQ-A

Submitted to Law Commission Consultation: Review of the Arbitration Act 1996
Submitted on 2022-12-14 18:01:38

About you

What is your name?

Name:

[REDACTED]

What is the name of your organisation?

Enter the name of your organisation:

Clifford Chance LLP

Are you responding to this consultation in a personal capacity or on behalf of your organisation?

Response on behalf of organisation

If other, please state::

What is your email address?

Email:

[REDACTED]

What is your telephone number?

Telephone number:

[REDACTED]

If you want the information that you provide in response to this consultation to be treated as confidential, please explain to us why you regard the information as confidential. As explained in our privacy notice, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

Please explain to us why you regard the information as confidential:

Consultation questions

Consultation Question 1: 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?

Agree

Please share your views below.:

Yes. We agree this is best addressed by the courts.

Consultation Question 2: We provisionally conclude that the Arbitration Act 1996 should not impose a duty of independence on arbitrators. Do you agree?

Agree

Please share your views below.:

Yes. We agree that the key criteria is impartiality.

Consultation Question 3: 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. Do you agree?

Agree

Please share your views below.:

Yes. We are of the view that this is an existing duty but see benefit in codifying it.

Consultation Question 4: Should the Arbitration Act 1996 specify the state of knowledge required of an arbitrator's duty of disclosure, and why?

No

Please share your views below.:

No. While we would expect an arbitrator to make reasonable enquiries, we agree with the comments of Lady Arden in *Halliburton v Chubb*, as noted at paragraph 3.53 of the consultation paper, that the state of knowledge required of an arbitrator is best left to the courts.

Consultation Question 5: 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?

What they ought to know

Please share your views below.:

Our view is that it would be proportionate for the duty, if it were to be specified, to be based upon what an arbitrator ought to know after making reasonable enquiries.

We consider it incumbent upon anyone called upon to carry out an impartial judicial or professional service to conduct reasonable, proportionate enquiries that there are no immediate circumstances giving rise to justifiable doubts, for example, a partner at a law firm may not have actual knowledge that a party or its affiliate is a client of that firm but it would be proportionate and reasonable to carry out conflicts checks. On the other hand, someone who is self-employed may be more confident that their actual knowledge is sufficient.

Consultation Question 6:

More broadly justified

Please share your views below.:

Our view is that the requirement of a protected characteristic in an arbitrator should be enforceable if it can be more broadly justified. We agree with the comments made by Lord Clarke in *Hashwani v Jivraj*, as noted at paragraph 4.8 of the consultation paper, that the approach taken by the Court of Appeal was 'too legalistic and technical'.

Consultation Question 7:

Agree

Please share your views below.:

Yes. This particularly applies to the neutral nationality of a chair or sole arbitrator and faith-based arbitration. In both situations, we do not see that public policy is offended by the parties wishing to have someone respectively neutral or from a specific community which may have its own customs.

Consultation Question 8: Should arbitrators incur liability for resignation at all, and why?

Liability for resignation

Please share your views below.:

Yes. As recorded in our response to Question 9, our view is that arbitrators should incur liability for resignation only if the resignation is proved to be "manifestly" unreasonable.

Consultation Question 9: Should arbitrators incur liability for resignation only if the resignation is proved to be unreasonable?

Yes

Please share your views below.:

Yes, but only if the resignation is proved to be "manifestly" unreasonable. We disagree that a resignation in the face of an unjustified challenge should be seen as unreasonable, because the arbitrator in question may consider it better to be replaced and for the arbitration to proceed than to delay the arbitration whilst a challenge is made, even if unsuccessful.

Consultation Question 10: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 11: 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. Do you agree?

Agree

Please share your views below.:

Yes. Whilst we consider that tribunals have this power, we agree that users would like to see it made express in the Act.

Consultation Question 12: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 13: We provisionally propose that the Arbitration Act 1996 should stipulate the threshold for success in any summary procedure. Do you agree?

Agree

Please share your views below.:

Yes, in order to avoid inconsistent articulations of the test.

Consultation Question 14: 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. Do you agree?

Disagree

Please share your views below.:

No. We prefer "manifestly without merit" because that test can be applied to the claim as pleaded and without necessarily requiring additional evidence. The alternative formulation of "no real prospect of success" will often require additional evidence and argument to be determined, which if unsuccessful prolongs the arbitration and adds to costs.

Consultation Question 15: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 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?

Yes

Please share your views below.:

Yes. This would make clear that the court's powers are consistent across court proceedings and arbitral proceedings.

Consultation Question 17: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 18: We provisionally conclude that the provisions of the Arbitration Act 1996 should not apply generally to emergency arbitrators. Do you agree?

Agree

Please share your views below.:

Consultation Question 19: 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?

Agree

Please share your views below.:

Consultation Question 20: Do you think that section 44(5) of the Arbitration Act 1996 should be repealed, and why?

Yes

Please share your views below.:

Yes. We agree with the Commission that sections 44(3) and 44(4) mean that section 44(5) is redundant. In our opinion, it would be advantageous to resolve the ambiguity created by Gerald Metals, which may be said to be deterring parties from utilising emergency arbitrators.

Consultation Question 21:

Permission under section 44

Please share your views below.:

We prefer option (2) and agree with the Commission's view that this is the more streamlined way of dealing with interim measures.

Consultation Question 22:

Agree

Please share your views below.:

Yes. We share concerns that the current approach of a rehearing often creates undesirable delay and cost and gives rise to questions of fairness.

We agree with the Commission's view that it is not fair to pursue a rehearing before the court which ignores what has gone on before the tribunal. In our experience, the current approach of a rehearing compares unfavourably with a number of other major seats and – on balance – is a source of dissatisfaction amongst commercial users of London arbitration and makes London a less attractive seat. We agree that any review should be limited to the record before the tribunal but that new evidence can be allowed in exceptional circumstances.

We note the recent decision of Mr Justice Males in the Court of Appeal in *DHL Project & Chartering Limited v Gemini Ocean Shipping Co Limited* ("Newcastle Express") [2022] EWCA Civ 1555 (at 16), in which he stated in respect of the current section 67 framework:

'This has led some commentators to suggest that the present approach is unsatisfactory. To the extent that it results in two fully contested hearings on the question of jurisdiction, the first before the arbitrators and the second before the court, there is some force in that suggestion. In general, a party who takes part in a challenge to jurisdiction before the arbitrators can reasonably be expected to deploy its full case and, if it loses after a fair procedure, has no inherent right to a second bite at the cherry.'

Consultation Question 23: 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?

Yes

Please share your views below.:

Yes. In our opinion, introducing this proposal would promote procedural efficiency. While there are already extra hurdles in place for a section 32 application to be made, it is desirable to create consistency between sections 67 and 32.

Consultation Question 24: We provisionally conclude that our proposed change to section 67 of the Arbitration Act 1996 would not require any similar change to section 103. Do you agree?

Agree

Please share your views below.:

Yes. Given the different scenarios identified in the report, we agree that it is preferable for the courts to determine how best to address section 103 objections having regard to arguments such as *res judicata* and international developments.

Consultation Question 25: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 26: 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?

Agree

Please share your views below.:

Consultation Question 27: 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?

Agree

Please share your views below.:

Consultation Question 28: Do you think that section 7 of the Arbitration Act 1996 (separability of arbitration agreement) should be mandatory, and why?

Yes

Please share your views below.:

Yes. In our opinion, most commercial parties to arbitration seated in England would expect the English courts to recognise the principle of separability of the arbitration agreement. As such, we consider that section 7 should be mandatory regardless of the parties' choice of the governing law of the arbitration agreement.

Consultation Question 29: 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?

Agree

Please share your views below.:

Yes, with permission of the High Court or the Court of Appeal.

Consultation Question 30: 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?

No

Please share your views below.:

No. While there may be some overlap, we consider this to be an unnecessary amendment. Referral of points of law by a tribunal should not be encouraged.

Consultation Question 31: 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?

Yes

Please share your views below.:

Yes. We agree with the Commission that the use of remote hearings and electronic documentation are becoming ever more relevant and that to include reference to these in the Act underlines to the tribunal the appropriateness of encouraging cost savings.

Consultation Question 32: Do you think that section 39 of the Arbitration Act 1996 should be amended to refer to "orders" (rather than "awards"), and why?

No

Please share your views below.:

No. We think that section 39 should be amended to refer to a tribunal's power to make orders OR provisional award(s).

The Commission notes that the case law is unsettled and that commentaries suggest that section 39 might concern both orders and awards. We do not think it appropriate to amend section 39 so as to restrict tribunals in this regard.

Consultation Question 33: Do you think that section 39(1) of the Arbitration Act 1996 should be amended to refer to "remedies" (rather than "relief"), and why?

Yes

Please share your views below.:

Yes. We agree that this amendment should be made for internal consistency and would not affect the rights of parties.

Consultation Question 34: 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?

Agree

Please share your views below.:

Consultation Question 35: 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?

Agree

Please share your views below.:

Consultation Question 36: We provisionally propose that sections 85 to 87 of the Arbitration Act 1996 (on domestic arbitration agreements) should be repealed. Do you agree?

Agree

Please share your views below.:

Consultation Question 37: Do you think that any of the suggestions discussed in Chapter 11 needs revisiting in full, and if so, why?

Please share your views below.:

No.

Consultation Question 38: 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?

Please share your views below.:

No. However we note the confirmation in the consultation paper that the Law Commission will be considering the scope for introducing trust law arbitration as part of the 14th programme of reform.

We support the introduction of trust law arbitration and would welcome the opportunity to comment further on this in due course.

RESPONSE OF THE COMMERCIAL BAR ASSOCIATION TO THE LAW
COMMISSION'S CONSULTATION ON THE ARBITRATION ACT 1996

15 December 2022

Contributors

David Joseph KC
Alexander Gunning KC
Andrew George KC
Thomas Raphael KC
David Bailey KC
Philippa Hopkins KC
Alexander Wright KC
Gaurav Sharma
Matthew McGhee
Emile Yusupoff
Hannah Glover
Tom Leary
Abdul-Lateef Jinadu
Celia Rooney
Alexander Huff
David Holloway
Karen Maxwell

This is the response of the Commercial Bar Association (“Combar”) to the Law Commission’s consultation on the Arbitration Act 1996. Combar represents over 1,600 individual practitioner members of the Commercial Bar in England and Wales, many of whom specialise in disputes that are referred to arbitration. This response has been prepared following extensive consultation within Combar, including the circulation of a request for responses to specific issues that was circulated to all members of Combar.

Consultation Question 1

1. 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?
 - 1.1. We agree with the Law Commission’s provisional conclusion, essentially for the reasons set out in the Consultation Paper.
 - 1.2. Confidentiality is an important feature of most arbitrations, but, for the reasons set out in the Consultation Paper, it is neither a universal nor a necessary requirement for a successful arbitration agreement or process and there are a number of well-recognised situations where default rules either expressly limit confidentiality or make specific provisions as to the applicable confidentiality regime.
 - 1.3. Further, the law of confidentiality and privacy is not just complex and developing in a number of areas far removed from the law of arbitration, but different considerations might apply depending upon the specific issue being addressed (eg, in the arbitral context, attendees at hearings; the nature of a dispute; the fact that an arbitration is taking place; the confidentiality of documents disclosed in the arbitral process; the confidentiality of awards once made).
 - 1.4. The factors set out above all make any attempt at statutory intervention extremely difficult and, as the Law Commission recognise, any such exercise would result in a set of (probably broadly defined) default provisions which

the parties and arbitration institutions would be free to, and in many cases we suspect would, contract out of by providing their own confidentiality provisions.

- 1.5. Moreover, we are not aware of any substantial practical problems in this area at present and none of those we have consulted have expressed any support for statutory intervention in this area.

Consultation Question 2

2. We provisionally conclude that the Arbitration Act 1996 should not impose a duty of independence on arbitrators. Do you agree?

- 2.1 Yes. There is no need to impose a duty of independence on arbitrators in circumstances where section 33 of the 1996 Act already imposes a general duty of fairness and impartiality.

- 2.2 Indeed, in many trade/maritime arbitrations, which feature prominently in this seat, there is a long tradition of repeat appointments from a pool of specialist arbitrators. It might well be difficult in practical terms to satisfy a statutory test of independence for these kinds of commonly encountered arbitrations.

Consultation Question 3

3. 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. Do you agree?

- 3.1 No. Whilst we consider it important for arbitrators to disclose circumstances that might reasonably call their impartiality into question, that duty of disclosure is already implicit in the express duty of fairness and impartiality in section 33 of the 1996 Act and in the contract between the parties and the arbitrator: see the Supreme Court in *Halliburton Co v Chubb Bermuda Insurance Ltd* [2021] AC 1083 at §§76-77 and §167.

- 3.2 We consider it unnecessary to expressly provide for a duty of disclosure and to do so would risk confusion. In particular we have concerns about: (i) how an

express duty could be properly drafted without clearly articulating the state of the arbitrator's knowledge required to trigger the duty of disclosure; (ii) how to cater for express or implicit waivers of the duty by the parties; and (iii) the interaction of the new duty with section 33 of the 1996 Act.

3.3 We consider that there is no need to place the duty of disclosure on an express statutory footing and, since it could be unhelpful to do so, it is best left to judicial development. There is also a need for some flexibility in international arbitration which codification might undermine.

3.4 We would respectfully adopt Lady Arden's comments in *Halliburton* at §162, where her Ladyship said: "*I would add that the conclusion that as a matter of the law of 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 (see para 112 above). 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*".

Consultation Question 4

4. Should the Arbitration Act 1996 specify the state of knowledge required of an arbitrator's duty of disclosure, and why?

4.1 No. In addition to the points made above about why an express duty of disclosure would be undesirable, the common law remains in a state of development as to the state of knowledge required for an arbitrator's duty to arise and we consider that best left to the Courts. Lord Hodge found in *Halliburton* at §107 that: "*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*".

- 4.2 Any attempt to codify this developing area of law could ossify the duty of disclosure in a manner that is either too narrow (excluding constructive knowledge altogether) or too broad (requiring reasonable enquiries to be made in every case). We consider this best left to judicial development.
- 4.3 Moreover, any such statutory provision might lead to unintended consequences and applications requiring arbitrators, for example, to search for details of cases conducted by other barristers in the arbitrator's chambers, which would itself give rise to practicability and confidentiality issues.

Consultation Question 5

5. 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?
- 5.1 As set out above, we do not think that it would be appropriate for the 1996 Act to specify the state of knowledge required for an arbitrator's duty of disclosure. The answer is likely to vary according to the circumstances of each case and, whilst it is clear that actual knowledge would give rise to a duty of disclosure, the law relating to constructive knowledge and reasonable enquiry remains in a state of development. We would be loath to state the position definitively at this stage, as to do so would risk: (i) excluding reasonable enquiries altogether; or (ii) imposing a general duty of reasonable enquiry that is overly broad.

Consultation Question 6

6. 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 by the House of Lords)?
- 6.1 Properly understood, this arises only if discrimination legislation is imposed on arbitration clauses by the Law Commission's proposals. (The paper leaves

open that discrimination law might already apply to arbitration clauses and appointments: we believe that is clearly not the case following *Hashwani*).

- 6.2 Combar's view is that, on the assumption that discrimination legislation were to be extended to arbitration clauses by the Law Commission's proposals (or otherwise), there is no good reason to depart from the broader test of justification used by the Supreme Court in *Hashwani*. It produced a more sensible result in that case and its greater flexibility is more appropriate for arbitration, given the range of sensitive considerations that would need to be taken into account. The Consultation Paper does not identify any reason why the Supreme Court's reasoning was wrong. Further, the Court of Appeal's requirement of necessity seems out of line with the Equality Act, under which the justification threshold in substance matches the Supreme Court's test.

Consultation Question 7

7. We provisionally propose that:
- (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.

Do you agree?

- 7.1 The application of discrimination legislation to arbitration agreement and arbitrator appointment is a complex and politically sensitive question.

- 7.2 Combar unconditionally condemns wrongful discrimination in arbitrator appointment or arbitration clauses and supports the leading institutions which are taking measures to improve diversity. However, condemning wrongful discrimination generally does not automatically demand legislation in a

particular field, as the scope of discrimination law is consciously limited. The Law Commission's proposals need to be scrutinised to test the case for expanding discrimination law to arbitration in the way proposed.

- 7.3 Combar consulted and received a range of views from its members. However, the majority view is that the Law Commission's proposals should not be adopted. Adopting the proposed reform might well have unintended consequences with regard to the encouragement of greater inclusivity in arbitration, as well as in the application of justified "*not same nationality*" clauses by the principal arbitral institutions, the administration of arbitration by religious and other ethnic community organisations and indeed in the enforcement of awards across the world under the New York Convention. It would also give rise to difficult questions of fact that would, if raised, have to be resolved in costly court proceedings. The particular vice at which this proposed reform is directed appears to be certain old wordings referring to "commercial men". We explain in Appendix A that we believe that such clauses would be interpreted to mean any "commercial person", but that such clauses could be addressed in a bespoke provision designed to dispel any uncertainty in this respect. We would not recommend the broader approach proposed by the Law Commission unless it had the strong support of the arbitration community as well as international and domestic institutions.
- 7.4 We set out in greater detail in Appendix A hereto the present position as well as some of the technical difficulties to which the proposed reforms are likely to give rise to.

Consultation Question 8

8. Should arbitrators incur liability for resignation at all, and why?
- 8.1. We do not consider this to be an issue that requires reform.

- 8.2. We do not think the premise of the Law Commission’s analysis (expressed at §5.9) that an arbitrator necessarily (or ‘by default’) incurs liability upon resignation is correct. Liability will arise only where the arbitrator resigns in breach of his or her contractual obligations. Our understanding is that any arbitration clause will be subject to express and/or implied terms governing the circumstances in which resignation will be permitted, and in practice those terms are likely to permit resignation in most relevant circumstances where it would be reasonable for an arbitrator to resign.
- 8.3. The DAC Report §111 (cited at §5.13) says that “*in theory it could be said an arbitrator cannot unilaterally resign if this conflicts with the express or implied terms of his engagement*” (§111).¹ We consider this consistent with our view above, and inconsistent with the suggestion of rigid default liability arising on resignation. Similarly, we do not read the passages of *Merkin and Flannery on the Arbitration Act 1996* and *Russell on Arbitration* (also cited at §5.13) to support the existence of a default contractual liability on resignation.²
- 8.4. Against that backdrop, we understand s.25(3) to have the effect that *even if* the arbitrator’s resignation is in the circumstances a breach of contract for which he or she is *prima facie* liable, the Court nevertheless has a dispensing power if the arbitrator’s actions are reasonable.
- 8.5. The implication of the Law Commission’s potential proposed reform at §5.23 is that the law would change from permitting an arbitrator relief for any liability arising from a reasonable resignation, to giving arbitrators immunity for unreasonable resignations. That would be a surprising change which we do not support based on the materials provided. 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

¹ The DAC Report also states at §111 “*as a matter of practical politics an arbitrator who refuses to go on cannot be made to do so, though of course he may incur a liability for breach of his agreement to act.*” (Emphasis added)

² *Russell* at §4-162 refers to “*any liability*” incurred on resignation (i.e. suggesting that no liability necessarily arises); and *Merkin and Flannery* p317 suggests that the arbitrator “*may also face liability and the loss of fees if he resigns under section 25 of the Act.*” *Merkin and Flannery* at p309 refers similarly to s25(3) setting out “*the basic right of an arbitrator to apply to the court for relief from liability for breach of contract and for an order as to his fees and expenses, following his resignation.*” (Emphasis added in each case). See to similar effect: Ambrose, Maxwell and Collett, *London Maritime Arbitration* (4th ed 2017) at §20.43.

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.

- 8.6. We note the Law Commission's concern that arbitrators may be discouraged from resigning even in appropriate cases (§5.18). In practice, we do not understand there to be any concerns about arbitrator resignation. Our experience is that arbitrator resignations are not uncommon but are resolved amicably and without recourse to satellite litigation. It is not our experience that arbitrators are discouraged from resigning even in appropriate cases because of the risk of liability attaching. That view appears to be endorsed in the extract from *Flannery & Merkin* cited at §5.16.³
- 8.7. For completeness (on the issue of reasonableness), we do not read the extracts from *Halliburton* cited at §5.17 to support the proposition stated in that paragraph that "*it has been held 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.*" Specifically, we read Popplewell J (as he then was) as saying only that an unfounded allegation was not a good reason to *require resignation*; he was not addressing the question of whether resignation would be unreasonable for the purposes of s.25(3). And Lord Hodge at [68] held only that "*An arbitrator when deciding to accept a reference is not under the same obligation as a judge to hear the case, but having taken up the reference, the arbitrator may reasonably feel under an obligation to carry out the remit unless there are substantial grounds for self-disqualification.*" Again, there is no reference there to the reasonableness threshold under s25(4). The Law Commission suggests arbitrators may be caught in a dilemma when their impartiality is challenged on grounds that are credible but objectively not necessarily correct, suggesting

³ And see especially fn304: "*The fact that there has not been a single reported instance of an application under this provision suggests that no arbitrator has been brave enough (or foolish enough) to start one, or that every case of a resigning arbitrator has been resolved by agreement (we suspect the latter).*" (Emphasis added)

they face risks of liability if they resign, and risks of costs if they do not. We do not think this is the reality.

- 8.8. If, contrary to our understanding, there is evidence to suggest that liability on resignation is a material concern amongst arbitrators then it would be useful to consider the following before formulating specific proposals for reform: (i) the circumstances in which resignation would constitute a breach of contract, such as to generate potential liability; (ii) the circumstances in which such resignations would be likely to be found to be unreasonable within s25(4); and (iii) the nature of the immunity which would be proposed (and in particular, whether it would extend to an immunity from repayment of fees).

Consultation Question 9

9. Should arbitrators incur liability for resignation only if the resignation is proved to be unreasonable?
- 9.1. Certain Combar members have expressed the view that 'reasonable' is a difficult standard to apply, and there is an argument in favour of reforming s25(4) to provide more granular criteria to assist parties in determining what constitutes reasonable grounds for resignation and thus relief under s25(3). However, given the open-textured nature of the analysis that would be carried out on any application under s25(3), on balance we think that the current formulation is appropriate and best left to be developed by the Court.
- 9.2. We do not consider it is appropriate for the burden of proof to be reversed such that the appointing parties must demonstrate unreasonableness on the part of the arbitrator given the premise of the analysis is that the arbitrator has acted in breach of contract in resigning; in particular as breach of contract will require conduct inconsistent with express or sensible implied terms of arbitration agreements.

Consultation Question 10

10. 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. Do you agree?
- 10.1. Combar members consulted were divided on this issue.
- 10.2. We agree with the reasoning at §5.25 as to the proper construction of s.24 of the Arbitration Act, noting the position in the DAC Report and Supplementary DAC Report.⁴ There is nonetheless a cogent distinction to be drawn between instances where the arbitrator is acting or purporting to act *qua* arbitrator (in which case immunity continues to attach under s.29, even following removal) and where the arbitrator is acting as a litigant in the context of s.24 proceedings before the Courts concerning his or her removal as arbitrator (in which case there is no immunity from the costs consequences that would usually follow). It appears from *Cofeley Ltd v Bingham, Knowles Ltd* [2016] EWHC 540 (Comm) at [4] that this is the principled basis for the Court's jurisdiction to award costs against an arbitrator under s.24, albeit the reasoning there is compressed. To that extent, we disagree with the analysis in §5.39 that acting as a respondent to a s.24 application necessarily falls within the scope of s.29.
- 10.3. For that reason, we do not consider that there is any principled objection to an arbitrator being liable for costs if he or she participates in and unsuccessfully resists an application for removal under s.24, or that such a costs liability is inconsistent with the principle of statutory immunity under s.29.
- 10.4. In practice we do not understand that this is a significant concern (although that is subject to the issue of professional liability insurance, to which we return below). It appears to be recognised that to make a costs award against an arbitrator is an exceptional course, as Henshaw J recently held in *C Limited v D*,

⁴ Cited at fn18

X [2020] EWHC 1283 (Comm) (noted at §5.32).⁵ It is also notable that in all of the decisions in which costs have been awarded against arbitrators, the arbitrators participated in the proceedings to at least some degree.⁶

10.5. We nonetheless recognise two potential difficulties with the law as it currently stands. First, arbitrators have a *prima facie* exposure to costs liability under s.24 applications because the arbitrator is required to be made a defendant to that application as a result of CPR 62.6(1).⁷ That means that the arbitrator is joined as a party regardless of whether he or she wishes to participate in the proceedings. Second, we are concerned that professional indemnity insurance is not available for adverse costs liabilities (assuming that §5.32 is correct on this point). We can readily understand that these two factors, taken together, give rise to a degree of concern.

10.6. One potential reform that would substantially alleviate this difficulty would be to substitute the requirement in CPR 62.6(1) that the arbitrator be made a defendant to a s.24 claim for a requirement that the arbitrator be given notice of the claim.⁸ Nothing in that change would affect the arbitrator's statutory right under s.24(5) to appear and be heard by the Court, and we assume in most cases where the arbitrator wished to be heard he or she would apply to be joined as a party, with the consequent costs risks under the standard CPR Part 44 principles. It would be useful to carry out further and specific consultation on this issue, and we do not necessarily recommend it but rather raise it for consideration. We recognise this course has disadvantages, or at least potential disadvantages. It could operate to discourage the neutral participation of an arbitrator under s.24 in circumstances where the Court would find that

⁵ See especially [58]: "*It seems correct in principle that section 29 would not preclude an arbitrator from being ordered to pay costs in relation to a section 24 application that he had opposed. Nonetheless, costs awards against arbitrators are extremely rare...*"

⁶ The core of the reasoning for the costs award in *Cofeley* is that the arbitrator (1) failed to respond to settlement proposals following issue of the s.24 application and (2) continued to participate in the proceedings in a manner that was not entirely neutral: see [15], [17].

⁷ Note on this point *Merkin & Flannery* (p307): "*If the application is successful, a costs order may be made against the arbitrator personally in respect of the costs of the section 24 application, but only if they are made a party to the proceedings (and not otherwise).*"

⁸ We understand that could be effected by deleting reference to s.24 in CPR 62.6(1). By operation of CPR 62.6(2) and s.24(1), the claimant under s.24 would be required to serve the application notice and evidence in support on the arbitrator in any event.

participation useful (including for the provision of information), although it seems to us that the arbitrator would remain in a position to provide any information by letter to the Court without formally being joined to the proceedings. It would also undermine the availability of costs as a sanction for the non-disclosing arbitrator, in the circumstances contemplated by Lord Hodge in *Halliburton Co v Chubb Bermuda Insurance Ltd* [2021] AC 1083 at [111].⁹ Although certain Combar members considered this to be a useful sanction, we think the better view is that this is conduct which falls within the scope of s.29 and in respect of which arbitrators attract immunity.

- 10.7. Finally, we also note the Commission's concern (at §5.41) that any application to Court triggered by something done by the arbitrator might expose the arbitrator to costs liability (most relevantly including applications under ss. 67-69). We do not think this is a material concern. Arbitrators are not required to be, nor in our experience are routinely made, parties to applications under ss.67-69 such that a potential costs liability would be triggered. It would be necessary to understand the scope of that potential and actual exposure to costs before considering any proposal for reform on that issue.

Consultation Question 11

11. 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. Do you agree?

11.1 We agree with the Law Commission's provisional conclusion, essentially for the reasons set out in the Consultation Paper.

11.2 As noted in the Consultation Paper, s.33(1)(b) of the Arbitration Act provides tribunals with a wide latitude to "adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be

⁹ As noted at §5.35.

determined". At the same time, s.33(1)(a) imposes a duty on tribunals to "act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent."

- 11.3 In principle, there is no reason to suppose that a tribunal does not already have the power to dispose of a claim or issue by means of a summary procedure pursuant to s.33(1)(b), or that the s.33(1)(a) duty should in any way inhibit that power. This is apparent from the recent decision of the English Commercial Court in Travis Coal v Essar Global Fund Limited [2014] EWHC 2510 (Comm).
- 11.4 However, as Mr Justice Blair noted in his decision,¹⁰ in the absence of an express power, "the availability or otherwise of summary judgment procedures in international arbitration generally is an important debate". In each case, the question will be "whether the procedure adopted by the Tribunal was within the scope of its powers, and was otherwise fair." Experience suggests that, absent an express power, it is relatively unusual for English-seated tribunals to adopt summary procedures to deal with issues or, indeed, entire claims or issues. One reason for this is likely to be a concern that doing so will put the tribunal in breach of its s.33(a) duty and give rise to a potential award challenge under s.68(2)(a) of the Arbitration Act.
- 11.5 In light of these considerations, we would support the inclusion of an express provision in the Arbitration Act making explicit the tribunal's power to dispose of claims or issues summarily, where the parties have agreed that the tribunal has such a power.
- 11.6 Further, we note that Question 14 of the Consultation Paper refers to the power to decide a "claim or defence or issue" following a summary procedure (emphasis added) whereas Question 11 only refers to deciding "a claim or an issue" in this way. For the avoidance of doubt, we would support a power that applies to deciding a claim, defence or issue by means of a summary procedure.

¹⁰ At [44].

Consultation Question 12

12. 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. Do you agree?
 - 12.1. We agree with the Law Commission's provisional proposal.
 - 12.2. The circumstances of the case, including the nature of the claims, defences or issues; the timing of any application for summary determination; and the impact on the proceedings as a whole if the claim, defence or issue is decided following a summary procedure, will all factor into the question of whether it is appropriate for the tribunal to adopt a summary procedure in any given case.
 - 12.3. In the normal way, the arbitral tribunal should elicit and take account of the views of the parties on whether or not a summary procedure is appropriate in the circumstances of the case, and if so, the procedural steps to be adopted, including whether there should be a hearing, and the timing of those steps.

Consultation Question 13

13. We provisionally propose that the Arbitration Act 1996 should stipulate the threshold for success in any summary procedure. Do you agree?
 - 13.1. We agree with the Law Commission's provisional proposal.
 - 13.2. Stipulating the threshold for success will provide parties with a measure of predictability in terms of the test that will be applied and therefore what needs to be established in any summary procedure. It will allow claimants and defendants to make an informed decision about their prospects of success, and therefore whether or not they should apply for summary disposal at all.
 - 13.3. By the same token, providing a statutory power for summary disposal without stipulating what is required for success appears to us likely to lead to at least two outcomes which we think are best avoided.

- 13.4. First, we anticipate that the issue of the applicable threshold for success is likely to be argued afresh in every arbitration where a party makes an application for summary disposal. This will lead to a variety of incrementally different standards being adopted by tribunals, and uncertainty in general as to what exactly a party is required to show in order to meet the summary disposal threshold. This in turn is likely to lead to more parties contracting out of the summary disposal procedure altogether.
- 13.5. Secondly, we anticipate challenges under s.68(2)(a) where a party is unhappy with the manner in which a summary disposal application has been dealt with and complains of a breach of the s.33(1)(a) duty of fairness. While this may ultimately lead to the establishment of a settled threshold test by the Courts, this will take time and come at the considerable expense of parties who had agreed to the summary procedure power for their arbitral disputes.
- 13.6. These potential consequences can be avoided by stipulating the threshold for success in the revised statute.

Consultation Question 14

14. 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. Do you agree?
 - 14.1. We disagree with the Law Commission's proposal in relation to the wording used to stipulate the threshold for success.
 - 14.2. We note that at §6.32 of the Consultation Paper the Law Commission identifies two candidates for a suitable threshold. We would support the use of the first candidate identified in that paragraph, namely summary disposal where a claim, defence or a party's position in relation an issue is "manifestly without merit".
 - 14.3. We would also suggest that there is no need for the threshold test to stipulate that there must be "no other compelling reason for it to continue to a full

hearing". We anticipate that the parties will wish to present their views in appropriate circumstances as to why the proceedings should continue to a hearing where a claim, defence or issue has been decided summarily, and it seems to us that nothing will prevent a tribunal from adopting such a course should it consider that to be appropriate.

- 14.4. As the Consultation Paper correctly states, the "manifestly without merit" standard is a threshold that is likely to be recognised amongst international parties and practitioners alike (including those in the United Kingdom) for summary disposal in international arbitration proceedings, having been incorporated in recent years into the latest iterations of international arbitral rules around the world. A number of examples are noted at footnote 4 of Chapter 6 of the Consultation Paper.
- 14.5. By contrast, a test derived from the English Civil Procedure Rules is likely to be seen by both international and domestic users of arbitration as an English 'domestic' legal standard, and result in a tendency to argue for the application of principles deriving from English law authorities applying the Civil Procedure Rules. We do not see any inherent advantage in adopting such a 'domestic' standard. However, we can see disadvantages, including in particular a potential hesitancy on the part of international parties and their counsel to make use of the summary disposal procedure based on a concern that the process will require them to argue their case on the basis of English procedural law as developed by judicial precedent, rather than standards developed in the practice of international arbitration more generally.
- 14.6. A further concern associated with adopting a 'domestic' standard is uncertainty arising from further development of the standard in the English courts in the context of the Civil Procedure Rules. For example, in a recent decision, the Court of Appeal considered that the applicable test for summary judgment was whether or not the claim was "bound to fail" (*Begum v Maran (UK) Ltd* [2021] EWCA Civ 326). Adopting the "no real prospect of success" threshold from the Civil Procedure Rules could thus leave parties and the tribunal wondering whether they should look to apply the words as written in the statute, or the latest judicial interpretation of that standard.

- 14.7. In light of the above and in the context of the Law Commission's goal of ensuring that the Arbitration Act "remains state of the art, both for domestic arbitrations, and in support of London as the world's first choice for international commercial arbitration", we suggest adopting the international standard rather than the domestic standard derived from English and Welsh court proceedings.

Consultation Question 15

15. 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. Do you agree?
- 15.1. No, we do not agree.
- 15.2. We understand that the Law Commission considers that the issuing of witness summonses, as opposed to the taking of evidence by way of deposition, is adequately covered by s. 43 and is subject to the limitations contained in that section – namely, that the arbitration be "conducted" in England and Wales and that the witness' attendance be before the tribunal, not the court (see the discussion in A v. C [2020] EWHC 258 (Comm) at [27]-[30]). We agree that to some extent there is therefore duplication between s. 44(2)(a) and s. 43.
- 15.3. However, the only reason for amending s. 44(2)(a) is to remove what might be said to be surplusage. Set against this is the risk that s. 44(2)(a) will become too restrictive – and certainly more restricted than the Law Commission appears to anticipate.
- 15.4. In particular, as presently drafted, s. 44(2)(a) is thought to allow for an order for the taking of *written* evidence from a witness as well as oral evidence (see, e.g. *Russell on Arbitration* at §7-198). For example, the court can (and sometimes does) order that a witness give evidence in the form of an affidavit of assets.

We see no reason why s. 44(2)(a) should be curtailed to prevent orders of this kind being made.

Consultation Question 16

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?
- 16.1. Authors and those consulted were divided on this issue, but the majority view is that an amendment to confirm that orders can be made against third parties is probably desirable.
- 16.2. The reasons why that majority view is held are as follows. First, we do not share the Law Commission's confidence that, on the present state of the law, orders under all sub-paragraphs of ss. 44(2) can be made against third parties. Secondly, we think it is desirable that such orders should be available.
- 16.3. As to the first of these reasons, as the law stands currently, orders against third party witnesses can certainly be made under s. 44(2)(a) (*A v C* [2020] EWCA Civ 409). We consider that the position as regards the making of orders against third parties under the other sub-paragraphs of s. 44(2) is not clear, and that that lack of clarity is unsatisfactory. The question of whether orders can be made under ss. 44(2)(b)-(e) was expressly left open by the Court of Appeal in *A v. C*, and the first instance decisions are not conclusive. Certainly, the Court of Appeal has *not* held that the decisions in *Cruz City 1 Mauritius Holdings v Unitech Ltd (No 3)* [2014] EWHC 3074 (Comm) and *DTEK Trading SA v Morozov* [2017] 1 Lloyd's Rep 126, both of which held that orders against third parties are not available, are wrong. It follows that the law cannot be regarded as settled either way.
- 16.4. As to the second reason, we consider that the court ought to be able, in an appropriate case, to support an (English or overseas seated) arbitration by making an order against a third party. That is not to say that orders should *always* be available against third parties who have not signed up to the arbitral

process. Clearly, it will be a matter for judicial discretion as to whether to make an interim order in any given case – and the fact that the proposed target of the order is not a party to the arbitration agreement will, no doubt, be a factor to be taken into account. But the way in which the discretion is exercised should be left to the courts.

- 16.5. The minority view of the authors/consultees is that no amendment is appropriate. Reasons for this view differ: some consider that the law already allows for orders against third parties and so does not need to be changed; others think that extending the other sub-sections of s. 44 to third parties is over-intrusive and contrary to principle; others think that an amendment would suggest that the courts are likely to intervene in arbitrations to a greater degree, and that this would send the “wrong message” to potential users of London arbitration.

Consultation Question 17

17. 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. Do you agree?
- 17.1. We agree that if s. 44 is to be amended to provide in terms that orders can be made against third parties, then the proposed amendment is probably justified. This is because the third party in question is (*ex hypothesi*) not a party to the arbitration and the justification for the restriction on the right of appeal in s. 44(6) – that the primary recourse is to the arbitrators and not to the court – is absent.
- 17.2. We assume that for these purposes the Law Commission has in mind “true” third parties, and not those who are claiming “under or through” a party to an arbitration agreement (per s. 82(2)) or under the Contracts (Rights of Third Parties) Act 1999 (per s. 8 of that Act). Those parties, though in one sense “third parties”, are treated as “parties” for the purpose of the 1996 Act, and there seems no reason why they should have an enhanced right of appeal.

Consultation Question 18

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

18.1. We agree. Emergency arbitrators are a creation of the various institutional arbitral rules. Parties can sign up to those rules, or not, as they choose. Their role is strictly limited; they are superseded by the arbitral tribunal once appointed. Furthermore, the main rules that allow for the appointment of emergency arbitrators include provisions regulating the conduct of emergency arbitrators, including, for example, requiring them to act fairly (see e.g. LCIA Rules 2020, rule 9.14; ICC Rules 2021, Appendix V, Article 5.2). We therefore consider that making them subject to the provisions of the Act would cause confusion and give rise to no clear benefit.

Consultation Question 19

19. 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?

19.1. We agree. There is no reason why the courts should be concerned with the appointment of emergency arbitrators (even if they had the resources to make this happen, which we doubt). This ought to be a matter for the institutions which promulgate rules that make reference to emergency arbitrators.

Consultation Question 20

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

20.1. We do not think that s. 44(5) should be repealed in its entirety, though some consider that it merits amendment.

- 20.2. S. 44(5) ought not to be repealed altogether, because of the message that this would risk sending to the international community. We are aware, anecdotally, that there is already a perception – in our view unjustified – that the English court intervenes excessively in English-seated arbitrations; this is presented by some as a reason not to choose England as an arbitral seat. Those who are against any repeal or alteration consider that there is a very real risk that the removal of s. 44(5) would add fuel to this particular fire. S. 44(5) is a clear statement that the courts will keep intervention to a minimum, and that is a statement that needs to be made.
- 20.3. Some of the authors and those consulted consider, however, that thought should be given to amending s. 44(5) to remove the phrase in parentheses: “*and any arbitral or other institution or person vested by the parties with power in that regard*”. That phrase has led to the unhelpful view, perhaps fuelled by *Gerald Metals SA v Timis* [2016] EWHC 2327 (Ch) (even if, as the Law Commission suggests, that decision has been misconstrued), that an emergency arbitrator having powers to act *precludes* the Court from being able to make a s. 44 order.
- 20.4. Separately – but relatedly – a number of those consulted consider that the Law Commission ought to give consideration to amending s. 44(3), which falls to be read together with s. 44(5). The concerns raised relate to the requirements for (i) urgency and (ii) that the order made be “*necessary for the purpose of preserving evidence or assets*”. Notwithstanding what we have said above in relation to the general principle of non-intervention, it may be that s. 44(3) as it stands is too narrowly formulated. The concept of “*assets*” has been stretched to, if not beyond, breaking point (see, e.g., the discussion in *Euroil Ltd v Cameroon Offshore Petroleum SARL* [2014] EWHC 52 (Comm)). Further, the requirement for urgency can give rise to difficulties – sometimes, for instance, the nature of the application sought to be made is one that demands secrecy from the respondent, but the application cannot be said to be “urgent” in the ordinary sense of that word (e.g. some applications for freezing injunctions).
- 20.5. The relaxation of the statutory requirements of s. 44(3) would not, in fact, expand the courts’ jurisdiction greatly (if at all) because of the expansive approach that they have taken to the interpretation of the sub-section. It is also

worth noting that many international rules take a more generous approach to intervention by national courts for the purposes of ordering interim or conservatory measures than is contemplated by s. 44(3) (e.g. LCIA Rules 2020, Article 28.2). We would welcome an amendment that takes a more straightforward approach to the difficulties that have been caused by the current wording of the sub-section. For example, consideration might be given to (i) including, as an alternative to urgency, the liberty to make an order where the nature of the application justifies it; and/or (ii) removing the “for the purpose of preserving evidence or assets” requirement.

Consultation Question 21

21. 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.
- 21.1. We do not consider that any amendment to the Act is required to accommodate the orders of emergency arbitrators. It follows that we do not believe that either of the proposed amendments is necessary or, indeed, desirable.
- 21.2. If an emergency arbitrator’s order is ignored, we consider that the correct course is either to seek an order from the tribunal (if by then constituted), or, if the matter is urgent and the tribunal is not constituted or cannot act, for the aggrieved party to apply to the court under s. 44. We are not persuaded that an amendment to s. 44(4) is required because we see no reason why the court should need to intervene to enforce the order of an emergency arbitrator without the permission of the properly constituted tribunal in a non-urgent case.
- 21.3. We note that this view is predicated on our belief (as set out at paragraph 20.3 above) that the existence of an emergency arbitrator does not preclude the Court from being able to make an Order under s. 44. As also set out in

paragraph 20.3 above, if this is genuinely considered to be in doubt, it would be appropriate to amend s. 44(5) to clarify the position.

Consultation Question 22.

22. We provisionally propose that:

(1) where a party has participated in arbitral proceedings, and has objected to the jurisdiction of the arbitral tribunal; and

(2) 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. Do you agree?

22.1. The authors and the Combar members who responded to the consultation were split on this issue. There was a clear majority which did not agree with the proposal to reform section 67, but there was a significant minority which supported the proposal.

The majority view

22.2. The Law Commission's proposal to revise section 67 involves a direct challenge to the reasoning of the DAC. That challenge does not seem to have arisen out of any unanticipated consequence of the DAC's conclusions, or market demand, or any disjunct between the practice in England that sets it at a competitive disadvantage to other jurisdictions. Rather it represents a rethink of one of the key elements of the structure of the Arbitration Act 1996. The majority of Combar members are not persuaded that this is justified – and are concerned that an unprompted change of this kind to the structure of the Act might have negative consequences for the arbitration market in London.

22.3. At the heart of the Law Commission's reasoning is an assertion that the justification for the present position (and hence the principal objection to reform) is "*theoretical*" (see §§8.37-8.40) – i.e. that a tribunal which does not in fact have jurisdiction cannot confer jurisdiction on itself. The majority of Combar respondents considered that, to the extent that the objection is

theoretical, it is nevertheless important, not least as there is significantly less publicity, scrutiny and accountability of arbitrators' decisions than (for comparison) the decisions of judges.

22.4. The Law Commission presents two responses to this:

22.4.1. First (at §§8.39-8.40) it suggests that the Court is still the final arbiter and can consider the evidence that was before the tribunal. However, the effect of the Law Commission's proposal would be that a Court would very rarely, if ever, look at all of the evidence that was before the tribunal; instead, a Court will merely review the tribunal's reasoning to establish whether there is an appealable defect in that reasoning. Matters such as the credibility of witnesses can and do form the basis of arbitrator decisions on jurisdiction, and should be capable of review.

22.4.2. Second, the Law Commission's further justification (at §8.41) is that in circumstances where both parties participate, "*the parties are conferring on the tribunal a "collateral" jurisdiction to decide the question as to whether it has jurisdiction*". This argument is made without reference to any theoretical basis. Further, it is undermined where (as is commonly the case) the party disputing jurisdiction is unable to engage in the arbitration without raising the issue that would go to the tribunal's jurisdiction. A paradigm example of such a case is one where the respondent disputes ever entering the agreement that contains the arbitration clause. Such a party does not have a free choice whether to confer the 'collateral' jurisdiction on the tribunal. Either it participates in the arbitration and raises the issue that would undermine the Tribunal's jurisdiction, or it has to allow the arbitration to proceed *in absentia*, with an increased probability that it will then be subject to an adverse award. That is not a free choice.

22.5. That latter concern fuels the observations of numerous respondents that the Law Commission's proposal would unfairly place a respondent to arbitration, who disputes jurisdiction, on the horns of a dilemma. That dilemma would be

exacerbated by the fact that the respondent would be compelled to elect at an early stage how to approach matters.

- 22.6. Further, to the extent that arbitration respondents seek to preserve their rights before the Court, this could be to the detriment of the arbitration process as a whole. Under the current scheme of s. 67, a party challenging jurisdiction will often participate in the arbitration. This is to the benefit of the arbitration claimant and the tribunal, who do not need to deal with the practical difficulties of proceeding in the absence of the arbitration respondent.
- 22.7. At the heart of the Law Commission's criticism of the current system (and, hence, of the DAC's prior reasoning) is that (a) it has the potential to cause delay and increase costs through repetition and (b) it allows the party a second go (which might lead to a reversal of the Tribunal's conclusion).
- 22.8. Those criticisms need to be understood in context:
- 22.8.1. First, several respondents observed that, in their experience, the need for a complete rehearing arises in a relatively small proportion of cases. That seems to be consistent with the Law Commission's own review at §§8.32-8.36. The rarity of any problem tends to illustrate that no change is required.
- 22.8.2. Second, if and insofar as the problem relates to or arises from the management of evidence, that is a matter over which the Courts can and do exercise control, as observed in *The Kalisti*, and noted at §§8.35-8.36. Perhaps that control could be exercised more frequently, but even if that is so, it does not justify changing the starting point for any challenge.
- 22.8.3. Third, in addition to using case management techniques, these unusual cases can be dealt with by other means, such as application for security for costs under s.70(6) and/or through costs sanctions (in line with the Commercial Court's recent emphasis on deterring misguided arbitration challenges when revising the Commercial Court Guide).

22.8.4. Fourth, where an issue of jurisdiction is to be raised, ss.31(1) and 73(1)(a) of the Act require the point to be taken forthwith. If an arbitration claimant is concerned that the respondent might be unscrupulous and seek to challenge the decision in full both before the tribunal and before the Court, then the claimant in that case would have the option of (seeking permission from the tribunal or the counterparty for) a direct reference of the jurisdictional question to the Court under s.32.

22.8.5. Fifth, it is not inherently surprising that the Court will from time to time overturn the Tribunal's findings. That is precisely why the release valve of s.67 exists. For every party that is upset at this result, there is a counterparty that feels that the result vindicates the existence of the system.

22.9. The significance of the proposed reform, and the perceived unfairness of placing an arbitration respondent on the horns of a dilemma, were considered to outweigh significantly the benefit of the proposal.

22.10. Moreover, the Law Commission's proposal would set the approach in England and Wales apart from the norm internationally.

22.10.1. The standard internationally is that a jurisdictional challenge will result in a *de novo* hearing. That is the case in the principal commercial arbitration centres with which London competes for business.

22.10.2. The only exception to this identified by the Law Commission is Switzerland. However, it is our understanding that Switzerland adopts a totally different procedure to that proposed by the Law Commission: namely, by means of paper-only appeals in which the Swiss Supreme Court cannot (save very exceptionally) review the facts, but is not restricted in its consideration of the applicable legal principles.

22.10.3. The minority view expressed below places emphasis on the US 2nd Circuit Court of Appeals in *Beijing Shougang Mininv Inv Co Ltd v Mongolia*. That was a dispute under the Mongolia/PRC bilateral

investment agreement (*i.e.*, it was not a case in which the existence of the arbitration process was in issue). The parties confirmed in PO1 that the Tribunal had been properly constituted and agreed that jurisdictional issues would be addressed in the first stage of the arbitration. That formed the basis for the Court's finding of fact that the parties had agreed to submit the question of arbitrability under the investment agreement to the Tribunal, so as to preclude the Court from undertaking a *de novo* review. The unusual facts of that case do not justify a revision to the law governing commercial arbitrations in England and Wales.

22.11. Finally, the Law Commission's proposal would mean that the approach taken to domestic arbitrations would deviate from the uniform approach taken to arbitration awards under the New York Convention, and thus from both the approach that England and Wales takes in respect of foreign-seated arbitrations and the approach taken by other states which are signatories to the New York Convention.

22.12. The proposal would result in the creation of parallel regimes in that s67 of the Act would be amended but s103 would not¹¹. That is inconsistent and difficult to justify.

The minority view

22.13. Where respondents supported the proposals, this was for broadly the reasons that the Law Commission has identified in the consultation paper. As a matter of principle, respondents indicated that there should be the minimum interference necessary from the Court, with the option of a review of the tribunal's decision (rather than a complete re-hearing) being sufficient for this purpose. Section 68 may also work in parallel with s.67 to ensure that unfair factual findings by the tribunal do not tie the hands of the Court.

¹¹ This might leave it open to a party to apply under s66 (which applies irrespective of the seat) to enforce a foreign award and then argue that only s67 applies to the defence of such enforcement which gives it superior rights than would be the case under s103.

- 22.14. In support of the Law Commission's proposal, it might also be said that a complete rehearing is highly unusual in commercial dispute resolution, even where jurisdiction is challenged. In a dispute as to the jurisdiction of the English Courts, an appeal from the decision of a Judge finding that the English Courts do have jurisdiction is not by way of rehearing, and is subject to the ordinary rules governing permission to appeal in CPR Part 52. In the arbitration context, if jurisdiction is determined by the Court as a matter of first instance under s.32, routes of appeal are even narrower: only the Judge may grant leave to appeal, and only where the further requirements set out in s.32(6) are met.
- 22.15. In both cases the same theoretical objection identified by the Law Commission at §8.37 could be made, viz., that a decision-maker is finding a jurisdiction which the respondent or defendant would say he has no jurisdiction to determine. The distinction made between Judges and arbitrators concerning publicity, scrutiny and accountability (cf. §1.3) was acknowledged but not felt by the minority to be sufficient to justify an entirely different approach when set against the shortcomings of a full rehearing.
- 22.16. Supporters of the Law Commission's proposal also do not agree that it would put England at odds with other New York Convention countries. Whilst it is true that a number of other jurisdictions determine jurisdictional challenges by way of rehearing, the US 2nd Circuit Court of Appeals in *Beijing Shougang Mininv Inv Co Ltd v Mongolia* took an expansive view to what constitutes a submission of the question of arbitrability to the tribunal precluding a *de novo* review. The authors now understand that the *certiorari* application to the US Supreme Court (referred to at fn 28) has been denied.
- 22.17. One respondent also indicated that it was odd that the current operation of s.67 means that a judge hearing a challenge under s.67 was not able simply to uphold the tribunal's decision on jurisdiction for the reasons given by the tribunal but was instead required to make a fresh determination. Although the Commercial Court Guide allows for challenges to be dismissed on paper where they have no real prospect of success, there may be challenges which have a

real prospect of success on paper, but on hearing the challenge a judge forms the view that the tribunal's decision is correct for the reasons that the tribunal gave. Further, those challenges that are potentially the most problematic under the present s.67 (i.e., fact-sensitive determinations requiring a full re-hearing of the evidence) are less susceptible to summary dismissal.

Additional observation

22.18. Finally, we note that the proposed reform is framed by reference to a party that has "*...participated in arbitration proceedings, and has objected to the jurisdiction of the arbitral tribunal*". It is certainly our experience that most challenges made under s.67 are by arbitration respondents. Since, however, s.67 also allows an arbitration claimant to challenge a finding by an arbitral tribunal that it has *no* jurisdiction¹², we assume that the proposed reform is intended to (at any rate, that if it is to be made at all, that it should) cover both an unsuccessful claimant and an unsuccessful "participating respondent". We would therefore suggest that the words "*and has objected to*" be replaced by "*and has participated in relation to the determination of*", or similar.

Consultation Question 23.

23. 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?

23.1. In our experience, the use of s.32 where an arbitral tribunal has already determined its own jurisdiction very rarely¹³ arises in practice, and indeed on one compelling statutory construction may not be permissible, with s.32 much more commonly used as a mechanism by which the Court may determine jurisdiction as a matter of first instance.

23.2. Nonetheless, if and to the extent that s.67 is to be reformed (as to which we would reiterate what is said above), and on the assumption (which may well

¹² *LG Caltex Gas Co Ltd & anor v China National Petroleum Corpn & anor* [2001] 1 WLR 1892, at [71]

¹³ Indeed the number of applications made under s.32 at all would seem to be relatively rare.

not be correct) that there is a possibility that s.32 might be used following a jurisdictional determination by an arbitral tribunal¹⁴, we agree that any limitation to the right under s.67 should apply equally to s.32, where s.32 is invoked after the Tribunal's decision on jurisdiction.

- 23.3. It might be said that applying the relevant limitation to s.32 may be unnecessary, given the additional hurdle in s.32 of requiring the permission of either the tribunal or any arbitral counterparties. However, we agree with §8.50 that there is sense in maintaining a principled consistency between s.32 and s.67.

Consultation Question 24.

24. We provisionally conclude that our proposed change to section 67 of the Arbitration Act 1996 would not require any similar change to section 103. Do you agree?

- 24.1. Yes, we agree.

Consultation Question 25.

25. 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. Do you agree?

- 25.1. Yes, we agree.

- 25.2. In practice, the issue being pre-empted by this reform is unlikely to occur. A tribunal which finds that it does have jurisdiction, but which has its award set aside by the Court under s.67, is unlikely then to reconsider its own jurisdiction and maintain a position that is contrary to the Court's decision. However, the proposed declaratory remedy is unlikely to cause any problems of its own and

¹⁴ As in *Film Finance Inc v Royal Bank of Scotland* [2007] EWHC 195 (Comm), [2007] 1 Lloyd's Rep 382, an unusual application inasmuch as the claimant was seeking a declaration to the effect that the arbitrator was right to find that he had jurisdiction.

it would be of assistance for it to be at least available to the Court in an appropriate case.

Consultation Question 26.

26. 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?

26.1. In common with [8.66], we consider that an arbitral tribunal probably already has jurisdiction to make an award of costs in connection with a ruling on jurisdiction, notwithstanding that it has no jurisdiction to determine the substantive dispute. We consider that the same is true where it has been found by the Court that the tribunal lacks substantive jurisdiction.

26.2. However, we agree that the matter should be put beyond doubt and therefore support the proposed reform. We consider that that would be particularly desirable, as (1) we have seen the contrary argued, and (2) it is doubtful (cf. §8.68) that the Court has the power to award costs of an arbitration consequent upon a finding that the tribunal has no jurisdiction: *Crest Nicholson (Eastern) Ltd v Western* [2008] BLR 426 at [54].

Consultation Question 27

27. 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?

27.1 We agree with the Law Commission consultation's proposal.

27.2 The present s.69 strikes a careful balance between preserving access to the courts on issues of law and ensuring the centrality of the principle of the finality of arbitral awards.

- 27.3 We have seen no evidence which would support reform to s.69, either to repeal it so that no appeals are allowed or to liberalise the regime so as to allow a greater ease of appeal. As the Law Commission's consultation identifies, as matters presently stand, s.69 is not mandatory, and it is open to parties to contract out of its application either by express reference in their arbitration agreement or by the arbitral rules that they choose.
- 27.4 As against the proponents of complete repeal, the present position leaves it up to the parties as to whether they wish to exclude the possibility of appeals on points of law. We see no convincing argument to change the present position. The choice which is left to the parties is consistent with the principle of party autonomy which underpins the 1996 Act.
- 27.5 Those who propose a liberalisation of the s.69 regime have not advanced, in our view, any cogent arguments to support such a course of action. There is no evidence of any appetite for greater latitude in allowing appeals on points of law. As the Law Commission identifies, the contention that a more permissible regime would aid the development of the commercial law misses the point as it appears to be a complaint about the popularity of arbitration. The mischief identified would be better addressed, if it needs to be addressed at all, by making litigation in court a more attractive proposition.
- 27.6 A similar justification advanced for liberalisation is the argument that allowing appeals more readily would allow a more vigorous public debate about the law. This to our mind is not a convincing argument. Much of what is referred to arbitration is specialist and of limited interest to the general public. Furthermore, as the Law Commission identifies, arbitral awards are not law and do not create binding precedent. Privacy and confidentiality are essential features of arbitration, the decision by the parties to have their disputes resolved privately should be respected.
- 27.7 The Law Commission also refers to the claim that liberalisation of the s.69 regime is warranted at the very least to allow applications to appeal in respect of the application for permission to be made to the Court of Appeal. Such a step

is said to be desirable in order to increase the flow of cases through the Court of Appeal. This is not in our view a persuasive reason to amend s.69 in any way. First no reason is advanced for why an increase in cases flowing through the Court of Appeal is desirable. Second there is no evidence that the Court of Appeal is experiencing an inadequate caseload. Third, as the Law Commission identifies, it is open to parties to expressly provide for a right to appeal on issues of law which bypasses the permission stage of s.69.

Consultation Question 28

28. Do you think that section 7 of the Arbitration Act 1996 (separability of arbitration agreement) should be mandatory, and why?

28.1. Yes. We refer in this regard to our proposed further reforms in this area in response to Q38 below.

Consultation Question 29

29. 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?

29.1. We agree with the Law Commission's proposal.

29.2. As is addressed in the Consultation Paper, it is clear from the case law and the absence of anything to the contrary in the DAC Reports that the absence of such a provision must have been a drafting error. There is no coherent policy reason why such an appeal should be prohibited and the current position (where the Act contains a recognised mistake) is undesirable.

Consultation Question 30

30. 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?

- 30.1. We do not support a relaxation of the jurisdictional requirements of these rules. As set out elsewhere in this response, considerable concern has been expressed in some quarters about what is perceived to be an over-interventionist role of the English Courts in arbitral proceedings. In addition to the possible presentational consequences in this regard of the proposed reform, we are concerned that even where the permission of the arbitrators is obtained, there are still inroads into party autonomy in that the Court is being asked to determine issues which (at least the objecting party believed) had contractually been agreed to be determined by arbitrators. Requiring the Court to consider for itself, by reference to relevant statutory criteria, the need for its own intervention is a useful safeguard.
- 30.2. We see the logical force in the proposal that the relevant requirements in ss32 and 45 should be co-extensive. We would propose replicating the provisions of s32(b)(iii) in s45(2)(b).

Consultation Question 31

31. 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?
- 31.1. Yes, subject to:
- 31.1.1. any power accordingly given to the tribunal remaining subject to the right of the parties to agree otherwise; and
- 31.1.2. the use of non-prescriptive and general language that avoids explicitly or implicitly mandating or constraining the contexts in which, and the kinds of, technology that may be employed.

- 31.2. It is likely that s.34 of the Act is sufficiently wide to allow for the use of remote hearings, electronic documents, and other forms of modern technology. Electronic documents are already, if anything, the norm in arbitration, whether ad hoc or institutional, English seated or otherwise. There does not appear to be any legal or principled basis for challenging their use. It is likewise unlikely that anything in English law provides for an absolute right to a physical hearing¹⁵, and the only *lex arbitri* that do are those of a minority of Model Law jurisdictions, none of which are major arbitration centres¹⁶. Many arbitrations (such as the majority of those conducted on LMAA terms) are uncontroversially conducted on documents only. *A fortiori* it would be an oddity if that were procedurally acceptable, but the use of a remote hearing was inherently illegitimate.
- 31.3. However, this is not yet conclusively confirmed in case law. Although there are helpful analogies from cases concerning court proceedings, the CPR is not the Act and at least a shadow of a flicker of uncertainty remains. This should be eradicated.
- 31.4. Aside from the green issues identified by the Commission, there are benefits to making explicit the compatibility of the Act with the provisions of popular arbitral institutions and reinforcing the status of England and Wales as a tech-friendly choice of seat.
- 31.5. Nonetheless, care needs to be taken in drafting such a provision. The detailed and often prescriptive provisions and mission statements in arbitral rules (including those cited by the Consultation Paper) are unsuitable for transplantation into national law, which needs to be broader and looser to provide for the diversity of parties, rules, and disputes involved in arbitrations.
- 31.6. Likewise, whilst there are benefits in using electronic documents and remote hearings for some arbitrations, their employment must be subject to party autonomy in the first instance, the judgment of the tribunal in the second, and (*in extremis*) the safety valve of s.68 in the third.

¹⁵ ICCA Report: “Does a Right to a Physical Hearing Exist in International Arbitration? England and Wales” (2021)

¹⁶ ICCA Report: “Does a Right to a Physical Hearing Exist in International Arbitration? General Report” (2022)

- 31.7. Specific reference to “electronic documents”, “remote hearings”, or “modern technology” should be avoided. Rather, neutral phrasing should be used, such as: *“Procedural and evidential matters include...the nature and application of any media and technology employed in conducting the proceedings”*. A reference to specific media and technology, such as remote hearings and electronic documents, invites the question of whether others (including those yet to be widely employed or even developed) are included in or implicitly excluded by the provision. Today’s supposedly innovative modernism needs to avoid risking becoming tomorrow’s atrophied conservatism.

Consultation Question 32

32. Do you think that section 39 of the Arbitration Act 1996 should be amended to refer to “orders” (rather than “awards”), and why?
- 32.1. No. It seems to us that if, as set out in s39(1), the parties are *“free to agree that the Tribunal shall have power to order on a provisional basis any relief which it would have power to grant in a final award”* this might well have been intended to include the power to make a provisional award should the parties so wish (ie one that is subject to ss.67- 69). The reference to “orders” within s.39(2) are merely part of non-exhaustive examples of relief which the Tribunal may grant under this section and, as the Law Commission recognises, the clear heading of the section - *“Power to make provisional awards”* - suggests that it was intended by this section to clothe parties with the right to confer jurisdiction on arbitrators to make provisional awards. This is consistent with the fact that there are cases where the impact of a provisional order/award (eg an interim order/award restraining the removal or use of property) may potentially be so significant that the parties have good reason, when negotiating their agreement, to seek to confer on the arbitrators a power to make any such provisional orders/awards subject to potential challenge under ss.67 – 69.
- 32.2. To the extent an amendment for consistency is considered appropriate, we would therefore suggest amending sub-sections (1) and (3) to refer to “order or

award” rather than just “*order*” (and a similar amendment could also be made to the heading of the section).

Consultation Question 33

33. Do you think that section 39(1) of the Arbitration Act 1996 should be amended to refer to “remedies” (rather than “relief”), and why?

33.1. It is possible that the language of “relief” is used in s.39(1) to denote the fact that the relief in question is only being granted on a provisional basis. In any event, we do not understand the difference in terminology between s.39(1) and s.48 to have caused any issues in practice. Accordingly, we are not persuaded that there is any need for change to s.39(1). We note that Article 25.1(iii) of the LCIA Rules follows the terminology of the 1996 Act and refers to “*relief*”. In addition, the SIAC Rules (at Rule 30) refer to “*interim relief*”. The HKIAC Rules (at Article 23) refer to Interim Measures of Protection and Emergency Relief. The UNCITRAL, ICC and SCC Rules all refer to “*interim measures*”.

Consultation Question 34

34. 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?

34.1. We agree; and we consider that the amendment should make express reference to the requirement for materiality. We draw attention, in addition, to two areas that the Law Commission should consider when formulating any change to either or both of ss.70(2)(b) and 70(3) (and/or s. 57).

- 34.2. First, where parties have chosen to have their arbitration administered under the main institutional rules, the parties will have “otherwise agreed” on the powers of the Tribunal for the purposes of s.57(1). The powers of correction under those rules are often more extensive than those under s. 57 and operate on different timescales (see e.g. ICC Rules Art 36 and LCIA Rules Art 27). We think it would be sensible for any amendment to ss.57/70 to make clear that the extension in s.70 also applies to any application under institutional rules similar to s.57 – e.g. by making clear at the end of s.57(1) that where the parties agree on the powers of the Tribunal in similar respects to those set out in s.57, any application to the Tribunal under those powers will be treated as “available recourse under s. 57” for the purposes of s. 70 (see the discussion in *K v S* [2015] EWHC 1945 (Comm) at [16]).
- 34.3. Secondly, given that issues can arise as to whether or not a s.57 application is “material” to a proposed challenge, we consider that the Law Commission should give thought to including an express provision in s.70 enabling a party to protect its position in the manner suggested by Bryan J in *Daewoo Shipbuilding & Marine Engineering Co Ltd v Songa Offshore Equinox Ltd* [2018] EWHC 538 (Comm) at §65: that is to say, one which allows a party in doubt as to “materiality” to issue a prospective application for an extension of time for challenge. Without such an amendment, we are concerned that any such application might be said not to be open to a party, either by reason of the provisions of s.70(2)(b), or because of the limits in s.79(3).

Consultation Question 35

35. We provisionally conclude that section 70(8) of the Arbitration Act (granting leave to appeal subject to conditions) should be retained as we consider it serves a useful function. Do you agree?

- 35.1. Yes, for the reasons set out in the Consultation Paper.

Consultation Question 36

36. We provisionally propose that sections 85 to 87 of the Arbitration Act 1996 (on domestic arbitration agreements) should be repealed. Do you agree?

36.1. We agree with the Law Commission's proposal.

36.2. As is addressed in the Consultation Paper, ss.85-87 have never been brought into force¹⁷. Although the DAC held back from proposing abolition of the distinctive status for domestic arbitration agreements in their February 1996 Report, they raised significant objections to, and saw little merit in, there being any such distinction. The provisions of ss.85-87 watered down the repealed provisions of the 1975 and 1950 Arbitration Acts, and the unusual inclusion of an easy repeal mechanism in s.88 reflected the DAC's unease in retaining any distinction at all.

36.3. There has been no notable demand for the resurrection of the distinction, whether in line with ss.85-87 or at all. There is no policy case for giving the court additional powers to refuse stays or to override otherwise valid arbitration agreements purely on the grounds that neither party is foreign. There is no reason not to scrap these redundant provisions.

Consultation Question 37

37. Do you think that any of the suggestions discussed in Chapter 11 needs revisiting in full, and if so, why?

37.1 Subject to the specific points made in response to Q38 below, which topics are briefly touched on in Chapter 11, no. We particularly considered the merits of seeking to explain how s.35 of the Limitation Act 1980 applies to arbitration and relates to s.13 of the 1996 Act (see Consultation Paper §§11.49-11.50) but

¹⁷ See also Russell on Arbitration 24th Ed. at 2-005 and fn.26

concluded that it did not need to be revisited in full. This is a technical and complicated area that is best left to the courts to develop.

Consultation Question 38

38. 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?

38.1 Combar consider that there are two significant, albeit somewhat linked, topics in need of review and reform.

38.2 They both relate to questions of governing law and ensure that England and Wales is a more and not a less attractive destination for international commercial arbitration than its principal competitors.

38.3 The first addresses the need for reform to provide for a default rule for the governing law of the arbitration, which should be law of the seat unless another law is expressly chosen by the parties in their arbitration agreement.

38.4 The second addresses reform to s4(5) of the 1996 Act.

38.5 Each of these are identified as potential areas for reform in the Consultation Paper respectively at §§11.8 – 11.12 and at §§11.37 – 11.42. We address each separately.

Law Governing the arbitration agreement

38.6 The proposed reform would be to follow, albeit with necessary amendment, the wording of s6 of the Arbitration (Scotland) Act 2010 so as to provide:

Where –

(a) the parties to an arbitration agreement agree that an arbitration under that agreement is to be seated in England and Wales, but

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

then, unless the parties otherwise agree, the arbitration agreement is to be governed by the law of England and Wales.

- 38.7 The governing law of the arbitration agreement is one of the single most important aspects of arbitration, most of all in international arbitration (where in the absence of an express choice in the arbitration agreement) there are multiple potential candidates for governing law.
- 38.8 The governing law of the arbitration agreement will determine whether an arbitration agreement has been concluded, or incorporated into the parties' contract, who is a party to the arbitration agreement, its scope (in other words what disputes it covers and what disputes fall outside the agreement), what types of dispute are arbitrable, whether the arbitration agreement has been repudiated, terminated or waived.
- 38.9 Nevertheless, despite the central and critical importance of the governing law of the arbitration agreement it is rare to find an arbitration clause which itself expresses a governing law of the arbitration agreement.¹⁸
- 38.10 The answer to the question of which law governs the arbitration agreement has been recently addressed in two Supreme Court decisions in *Enka v Chubb* [2020] UKSC 38 and in *Kabab Ji SAL (Lebanon) v Kout Food Group* [2021] UKSC 48. The question was approached by reference to a detailed examination of the English common law choice of law principles which are to be applied as the law of forum given that the question of the governing law of an arbitration agreement falls outside the scope of the Rome Convention/ Regulation regime. The outcome of the Supreme Court's analysis is that where parties have either expressly or impliedly chosen a law to govern their main contract and not specified a law to govern the arbitration agreement then it will be presumed that that law will also govern the arbitration agreement, which forms part of the main contract (the general rule).¹⁹ That presumption may be displaced by

¹⁸ *Enka* at [43]

¹⁹ *Enka* at [170] (iv).

a provision in the arbitration law of the seat, indicating that the law governing the arbitration agreement shall follow that of the seat, or the existence of a serious risk that, if governed by the same law as the main contract, the arbitration agreement would be ineffective (the invalidation principle).²⁰ Where, however, the parties have not made such an express or implied choice of law, then the governing law of the arbitration agreement will be determined by reference to the law which has the closest connection to the parties' contract which is presumptively the law of the seat even if that is different to the law applicable to the substantive obligations (the default rule).²¹ Further, the fact that parties have agreed upon a multi-tier dispute resolution provision with specific features located in various countries will not generally displace the presumption in favour of the seat.²²

- 38.11 The question for present consideration is not whether the detailed choice of law analysis of the Supreme Court was wrong in principle, but rather what policy should be adopted in the Arbitration Act in order to (a) achieve maximum certainty, speed, and convenience with regard to the upholding of the parties' arbitration agreement and their covenant to arbitrate not litigate; and (b) promote England and Wales as a neutral arbitral venue that continues to be attractive as the leading destination for international commercial arbitration.
- 38.12 Neutrality, certainty, speed and convenience are amongst the most highly prized characteristics of international arbitration around the world and the reformed Arbitration Act should do everything it can to protect and enhance these qualities. In other words, addressing a point raised in the Consultation Paper²³, this is not a question of conflicts of laws but rather the protection and reinforcement of arbitration as an effective process.
- 38.13 The answer to the relevant question of policy is plain in our view. Express statutory provision should be made, so as to align the governing law with the

²⁰ *Enka* at [170] (vi).

²¹ *Enka* at [170] (viii).

²² *Enka* at [170] (ix).

²³ LC Consultation Paper at 11.12.

seat, so that in all but an exceptional case there will be one single law governing not just the arbitration agreement itself but the procedural law of the arbitration.

38.14 There are several reasons for stating this. We address these below, albeit briefly.

38.15 First; whilst every practitioner and judge considering this matter agrees that certainty is highly desirable in this area, maximum certainty is only achieved through the proposed reform. This would enable every user of English arbitration to understand that in choosing to arbitrate here they have opted into a package which addresses all the relevant questions as to the operation and conduct of the arbitration agreement and the arbitration under a single pre-identified law. This conforms with the parties' legitimate and presumed expectations that agreeing on English arbitration gives rise to a uniform package of rights for the conduct of such a process.²⁴

38.16 Second; the very purpose (from a policy perspective) of a neutral seat is to insulate as a separable contract it from the governing law of the main or matrix contract and ensure that the arbitration agreement is given effect to (including as to arbitrability, scope and separability etc) irrespective of the system of law governing the main or matrix contract. English arbitration law is likely to be less attractive than its competitors if it fails to give assurance to potential users that a choice of an arbitral seat in England and Wales means that (absent a specific choice to the contrary) English law applies so that full effect will be given to the choice of a neutral seat. This is a point that has been emphasised by a number of our competitors in the last twelve months, each of whom have a strong sense of the importance of that insulation.

38.17 Third; even though the Supreme Court has stated clearly the general and default rules for ascertainment of the governing law, the outcome of that process is by no means easy to predict. Three examples suffice. It is not always

²⁴ See further Lord Lloyd Jones in *SSAFA v Viersen* [2022] UKSC 29 2 November 2022 at [83] emphasising that the legitimate expectations of the parties is a fundamental objective across all of the conflicts of laws.

easy to predict the outcome of an argument as to the existence or non-existence of an implied choice of law. Indeed, in *Enka* that dispute was considered all the way to the Supreme Court and was evenly balanced with two of their Lordships dissenting (Lord Burrows and Lord Sales). It is also not easy to predict the outcome of an argument as to whether the invalidation principle has any application to a given case (this has also given rise to argument in a number of recent cases including *Kabab Ji* and *Enka*). Yet further, the conclusions of the English courts on application of curial conflicts of law principles in this area are unlikely to accord with the analysis of many of our competitor counter-parts. In *Kabab Ji* this led to the unsatisfactory situation of the English Supreme Court concluding that the governing law of the arbitration agreement was English law, the law of the main contract, and the French Cour de Cassation concluding it was French law, the law of the seat, giving great weight to the principles of separability.²⁵

38.18 Fourth; it is both inconvenient and expensive to argue out under foreign laws vital questions as to whether an arbitration agreement has been concluded, who is party to it, or its scope. If parties have chosen English arbitration, they are entitled to believe that such an agreed form of dispute resolution would be enforced or struck down speedily and conveniently through a summary process one way or other without the need for a lengthy and expensive trial on foreign law. Yet further, even after a foreign law has been ascertained it might be vulnerable to attack as being incompatible with consumer protections in this jurisdiction.²⁶

38.19 Fifth; although in principle the procedural law and the governing law address different aspects of the arbitration process there is in truth much overlap. This is in particular the case where there are allegations that the conduct of one party

²⁵ https://www.lexology.com/library/detail.aspx?g=fca05be4-97f4-4213-8f1e-365448e7e202&utm_source=Lexology+Daily+Newsfeed&utm_medium=HTML+email+-+Body+-+General+section&utm_campaign=Lexology+subscriber+daily+feed&utm_content=Lexology+Daily+Newsfeed+2022-12-08&utm_term=

²⁶ See the Court of Appeal's recent decision in *Amir Soleymani v Nifti Gateway* [2022] EWCA Civ 1297, the outcome of which is a yet further trial on compatibility of New York law with consumer rights legislative protection.

has led to the termination of an arbitration agreement, its repudiation or indeed its breach. Reasons of convenience point strongly to having all these matters determined under one unified set of laws - the law of the seat. Moreover, as is clear below the provisions of s4(5) in its current form give rise to the real problem of having questions of separability and arbitrability governed by a foreign law. That simply would never have been contemplated by parties choosing English arbitration.

38.20 Sixth; there is considerable scope for further difficulty when it comes to questions of enforcement of the obligation to arbitrate and not litigate if they are to be considered under separate governing and procedural laws. The right of the English courts to grant anti-suit relief subsists even where the arbitration is governed by a foreign law. This is clear from *Enka* itself. Nevertheless, an anti-suit injunction is often needed at very short notice to prevent harm, and if it is necessary to obtain proof of breach under a foreign law at short notice and to the standard of "clear breach", this will in many cases mean that parties do not have the protection they thought they had in choosing English arbitration. Yet further, if a claim in damages were to be advanced for breach of the arbitration covenant, this would have to be proved under a foreign governing law by reference to an English seated arbitration. The scope for confusion and difficulty is considerable.

38.21 Seventh; the most recent White & Case/ Queen Mary 2021 International Arbitration Survey emphasise three important matters.²⁷ First that the competition amongst the leading seats is strong and there is already empirical evidence that our main competitors on the continent are loudly proclaiming the superiority of their product in this particular regard.²⁸ Second, that the users of international arbitration are looking for a seat that provides both certainty and effective court support and enforcement of arbitration agreements. Thirdly, that London is either the dominant or second most popular seat across

²⁷ www.arbitration.qmul.ac.uk

the whole world apart from Latin America (for reasons of language). This is a unique position and gives rise to particular issues. London arbitration sees a wide cross section of work where parties have chosen to arbitrate here but because of regional or country specific requirements, they are obliged to provide for a foreign governing law in their main contract. In other words, the particular policy issues identified above are ones which support the proposed reforms to ensure that London remains attractive as a neutral venue.

38.22 Eighth; this is not a problem which can be addressed satisfactorily in institutional rules. The most commonly chosen institutional rules across the globe are: ICC; SIAC, HKIAC, LCIA and CIETAC. Only one of these rules, LCIA, makes any provision to align the choice of law with an English seat for obvious reasons. Nevertheless, the relevant LCIA Rule (Article 16.4) does not address this effectively but leads to a circular argument after *Enka* as to whether the parties have made a choice of law for the arbitration agreement in their main contract creating (depending on the nature of the clause in question) considerable and undesirable uncertainty. Only statute can address this properly.

38.23 Ninth and finally; it is sometimes said that adopting this statutory reform will not assist in cases where parties have not expressly chosen a seat. This is correct and the proposed wording makes that quite clear. The underlying rationale of this proposed reform is to provide an effective policy solution where parties have designated and chosen England and Wales as the juridical seat.

Section 4(5)

38.24 Section 4(5) of the 1996 Act provides that a choice of a foreign law in respect of a matter will disapply the non-mandatory provisions of the 1996 Act on that matter.

- 38.25 If the proposed reform aligning the law of the arbitration agreement with that of the seat were adopted the scope for s.4(5) would be very limited and it might be thought it could be left as it is. It would only have application in the rare case where parties in their arbitration agreement choose to arbitrate in London under another foreign governing law.
- 38.26 Nevertheless, on any view the position as it now stands under s.4(5) gives rise to very difficult issues of considerable practical importance for users of English arbitration. For example a choice of foreign law to govern the arbitration agreement would mean that a) *kompetenz- kompetenz*; b) separability and c) arbitrability would all be governed under a foreign law.
- 38.27 As already indicated above, London is the preferred seat across the world. This will include many high value procurement contracts which contain a foreign governing law clause and English arbitration. Often this is the only private law (as opposed to public international law) protection that a foreign joint venture partner or investor will have from interference with their contractual rights under local laws. Unless the principal proposed reform is adopted or, as a minimum, the alternative proposed reforms to the language of s.4(5) and the list of mandatory provisions, the neutrality of London as an arbitral seat is likely to be compromised. That can only serve to make England and Wales a less attractive venue for international arbitration.
- 38.28 Moreover s.4(5) is unique amongst the leading seats of the world. The competition is strong as already noted, and differences such as these can and do lead to a significant drift of work away.
- 38.29 As a result, we propose in addition to the proposed reform suggested with regard to governing law of the arbitration agreement to clarify s.4(5) of the Act so as to provide (amendments in bold):

*“The choice of a law other than the law of England and Wales or Northern Ireland as the applicable law in respect of a **specific** matter provided for by **one or more specific** non-mandatory provision of this Part is equivalent to an agreement making provision about that **specific** matter. For this purpose an applicable law determined in accordance with the parties’ agreement, or which is objectively determined in the absence of any express or implied choice, shall be treated as chosen by the parties.”*

38.30 Further we would recommend (as foreshadowed in the Consultation Paper) to add ss.7 (separability), 30 (kompetenz – kompetenz) and 58 (finality) to the mandatory provisions of the Arbitration Act in Schedule 1

Conclusion

38.31 The proposed reforms would serve to protect and enhance the integrity of the choice of England and Wales as an arbitral seat. Ultimately this is not a question of conflicts of law but of ensuring that English law embraces the fundamental minimum standards of protection that are required by parties choosing arbitration in a neutral seat.

APPENDIX A

FURTHER OBSERVATIONS ON QUESTION 7

(A) The Current Position

1. The exclusion of arbitrators from the scope of discrimination law is the result of deliberate judicial and legislative choices, by the Supreme Court in *Hashwani*, and by Parliament when rejecting Baroness Cox's bill, which would have expanded aspects of discrimination law to arbitration. The Government's reasons for rejecting that bill included that it was important not to interfere with minority community arbitration.²⁹
2. As to *Hashwani*, the Law Commission observe there is no consensus that it should be reversed (§4.13). In fact the dominant position in the arbitration community is that the decision is right,³⁰ and the Court of Appeal's decision was heavily criticised, with the ICC, LCIA and the Ismaili community intervening. The ICC said that until the Court of Appeal's decision was overruled, it would stop selecting English seats.³¹
3. This illustrates the sensitivities of a departure from the existing position which the proposals would create, a point not acknowledged in the Paper. Such a departure would require substantial justification, including why it is territorially justifiable,³² why it is appropriate exceptionally to cover a situation analogous to the acquirer of services in this context when equality law does not generally do so,³³ and why *Hashwani* should be

²⁹ A. Astewani, *Reflections on the Rise and fall of the Arbitration and Mediation Services Bill* [2017] PL 544.

³⁰ There is extensive writing on this. See eg R. Davies, "A Line Drawn in the Right Place" 129 LQR 129; H. Dundas, "The Return of Normality" (2011) *Arbitration* 467; R. Smith, A. Welch: "Jivraj v Hashwani" Int ALR 2011 N35.

³¹ In the ICC's intervention in the Supreme Court in *Hashwani*, which we can provide copies of.

³² No justification is given for departing from standard principles of territoriality. It is instructive that the Equality Act ("EA")'s prohibitions are territorially limited, applying primarily to workers in the UK or (for example, peripatetic employees) whose employment is closely connected to the UK. But it seems the Paper is proposing that its discrimination proposals, which involve partial re-use of the EA's concepts, apply to any arbitration seated in London, even if the formal seat is the only connection to England and Wales, and the facts, parties, arbitrators, applicable law of the substance, applicable law of the arbitration agreement, and venue of the arbitration, have no connection to here. This would require justification.

³³ They do not generally apply to the purchasers of services (as opposed to service providers, where restrictions apply). But the position of parties selecting arbitrators is more analogous to the position of purchasers of services than employers, as the Supreme Court in effect concluded in *Hashwani*. The appointment of arbitrators is not equivalent to the instruction of barristers. Arbitrators are neutral decision-makers.

reversed in substance; as well as engaging with arguments of principle and policy against such a reform; and identifying an evidence base for reform.

(B) Uncertainty and lack of justification as to the scope of the proposals

4. The Law Commission's paper appears to intend to ban only direct not indirect discrimination in clauses. (Although it incorrectly suggests indirect discrimination in arbitration clauses might already be covered by discrimination law generally: see further, Example 2, at §4.20. This is clearly not the law, as following *Hashwani* it is clear that the Equality Act does not apply³⁴). One reading is that it is intended only to ban discriminatory clauses (subject to justification) which expressly use a term identifying a protected characteristic ("PC") as defined in the Equality Act ("EA"). But the paper does not address the boundaries, eg whether it would apply to "more or less" direct reference, eg "arbitration before Bet Din".
5. This illustrates the difficulties of the sort of bespoke partial adoption of discrimination law the Paper proposes. The Law Commission do not explain why they do not prohibit indirect discrimination, but it is probably because of the major consequences which would result. It would bring within presumptive prohibition, and need for justification, e.g. arbitration clauses requiring the arbitrator to be a KC, or an LMAA full member (given numerical facts). The Paper says at §4.20 (Example 2) its reform is not intended to catch this. In any event no case for covering indirect discrimination has been put forward and the practical implications have not been explored. Yet if it covers only express reference to PCs, there will be arbitrary distinctions which are hard to rationalise (eg "Ismaili" vs "Bet Din"). How a dividing line should be drawn is not addressed and is a major difficulty.
6. This highlights an unusual feature: in general equality law, direct discrimination cannot be justified, only indirect discrimination can. The Paper takes a bespoke approach, transferring the EA's protected characteristics into arbitration and prohibiting only direct discrimination (possibly *more or less* direct discrimination: above), but permitting

³⁴ *Hashwani* held that arbitrators are not workers in logic that applies to the Equality Act and arbitration appointments do not fall within the provisions relating to the instruction of barristers.

justification. Why is not made clear, yet it implicitly recognises an absolute ban would not work for arbitration, because clauses directly referring to a PC may be justifiable.

7. A related problem is the Law Commission has not addressed why all the EA's protected characteristics should apply to arbitration or the implications of this. Internationally the EA's concepts are not universal, nor are they always transparent in their application. So, e.g., restrictions on nationality might be affected as "race" (see paragraphs 16 to 20 below) and years of experience might be affected as "age", yet it is not explained why this is not a matter for the parties' choice, and there is uncertainty as to both. Further, there is a serious concern about expecting parties including international parties to use technical and non-transparent concepts of UK domestic EA law. This would be a major departure from the simple international-user friendly drafting philosophy of the 1996 Act. Uncertainty and complexity could be significant problems for the perception, and reality, of London as an attractive seat.

(C) Justification is not cost free

8. An implicit rationale of the proposals is that there is no difficulty with expanding the scope of discrimination law, because if a differentiating criterion is justified it will be upheld, and if not, it is not justifiable. What the Paper does not do is consider the problems in principle and practice of expanding the scope of a *prima facie* ban to an activity. One reason why discrimination law is not expanded to all spheres is that in some spheres it is considered inappropriate either to require people to justify their choices, or to transfer the power to decide to the courts. In practice, applying the net of discrimination law to an area can impose significant burdens in decision making and litigation. While banning discrimination can justify the imposition of burdens, such burdens must be assessed before expanding discrimination law to fields outside its central sphere of employment.
9. There are particular problems of this kind in relation to arbitration, which the Paper has not assessed, but which need to be weighed. In principle, while the Law Commission's paper focusses on abstract examples of discrimination against which there would be likely to be a moral consensus (clear discrimination on the grounds of sex) in reality the cases it is likely to affect are susceptible of at least arguable justification, of which there are strong defenders, such as minority community arbitration clauses. Indeed, the proposal gives no protection to the potentially "discriminated"-against arbitrator, and only affects parties

who have agreed to arbitrate according to a criterion but where one of them changes their mind at the start of a dispute – a different situation to the central logic of discrimination law, where it is the affected person who is principally protected. The Law Commission has not as yet articulated a case as to why it is appropriate to extend the net of discrimination law to such cases, and why it is appropriate to qualify the contractual autonomy of parties to choose for themselves who determines their dispute in that situation, in particular as to probably or potentially justifiable clauses, like “not same nationality as the parties”.

10. In terms of practical difficulties, the reality of arbitration is that unwilling respondents use what comes to hand, to delay and obstruct arbitration and resist enforcement. As Combar respondees experienced in arbitration have stressed, a right to overturn or ignore the agreed criteria for appointment subject to subjective arguments of justification will, where it applies, lead to uncertainty, disputes over the appointment of arbitrators, delays, obstruction, jurisdiction challenges, and costly litigation (cf *Hashwani*). Justification could be an onerous exercise involving exploration of the clause, its purpose, and the context. Problems on enforcement would be also serious (see below). Therefore imposition of a *prima facie* prohibition subject to justification is in itself a serious interference with autonomy with major practical consequences.

(D) Striking down in part?

11. A problem of principle is that the Law Commission envisages that its reforms would render unenforceable the potentially discriminatory criterion, but leaving the arbitration obligation in place. But the criterion may well be an essential part of the agreement to arbitrate – as Steel J and the Court of Appeal thought in *Hashwani*. It is strongly arguable that it is wrong in principle to require parties to arbitrate in front of a tribunal contrary to their choice, as that is not what they agreed. They might have preferred to litigate in court instead. The Law Commission do not explain how their proposal should work in this regard, nor how this aspect is justifiable. There is also a risk that this issue could lead to problems internationally on enforcement.

(E) The Law Commission's Evidence Base

12. The Law Commission's evidence base for its reform is: (A) "commercial men" clauses; (B) "not same nationality as the parties"; (C) minority community arbitration clauses. They do not identify examples of directly discriminatory clauses on grounds of sex or race. Combar respondees have not seen these in practice and Combar thinks it is unlikely that parties would agree to these.

Commercial Men

13. "Commercial Men" clauses are old wordings, reflecting the unthinking assumptions of their time. Even originally it is likely they did not reflect a deliberate intention to exclude non-males, but just used "man" to mean "human". It is unclear to what extent they still exist today. Combar has limited anecdotal evidence, suggesting such clauses are rare, but do occasionally exist. It seems likely this is careless re-use of old wordings.
14. There is no real doubt that such clauses would be interpreted by the English courts to mean any "commercial person".³⁵ So they would not have any discriminatory effect in law; and they would not be caught by the Law Commission's proposals. But there is no decision yet, and it possible that such clauses are misunderstood, or create uncertainty, and possible discouragement for appointment of non-males.
15. Combar suggests that, independent of the Law Commission's current proposal, consideration should be given to a provision making clear that "Commercial Men" clauses properly read include any commercial person. This would confirm the current position, but could dispel uncertainty. Whether there is a sufficient problem in practice to justify even reform of this kind is at present unclear: it might be sufficient for the Law Commission to reconfirm the true meaning of such clauses in any report.

Not same nationality clauses

16. Clauses requiring, or requiring subject to limited exceptions, that arbitrators or in some cases certain arbitrators, be of different nationality to the parties, are well known. The Law Commission understates their importance at §4.14 (it is not just a matter of "presuming",

³⁵ HFW Briefing, "Adam and Eve Arbitration" (February 2018), and C. Ambrose, K. Maxwell, "Looking for a "commercial man": common difficulties in maritime arbitration clauses" (Lexology).

or making nationality “a relevant consideration”). These are important features of many important institutional rules, eg the ICC, LCIA, and WIPO rules and also the ICSID Convention. Indeed they exist in most institutional rules worldwide. The UNCITRAL Model law expressly recognises their legitimacy.³⁶

17. The Paper gives a limited picture of their justifications, commenting they are intended to give an “*(appearance) of neutrality*” (§4.15). In fact beyond neutrality they: (1) assist in ensuring arbitrators do not share one culture’s presuppositions; and (2) give international parties confidence in tribunals. They are widely regarded as fundamental features of international arbitration where appropriate, in extensive literature: “*commentators indicate that national neutrality of the arbitrator is the prevailing practice in today’s international commercial arbitration*”; “*one describes the appointment of the arbitrator of a nationality different than the parties to be “fundamental”*”; “*Practitioners and parties consider nationality of the arbitrator vitally important*”.³⁷
18. When such clauses were threatened by the Court of Appeal in *Hashwani*, there was widespread discontent in the arbitration community, and the ICC and LCIA intervened.
19. Although the connection between nationality and the EA’s PC of race is not explored, the Paper proceeds on the basis its prohibition would prohibit them subject to justification. Yet Combar considers that they are justified, in all examples it has considered. They would almost inevitably be held justified by the courts also, but after uncertainty and litigation. The result in the meanwhile could damage the reputation of England and Wales as a seat. Yet the Paper does not make a case for bringing such clauses within the scope of a need for justification, nor as to why any of them would not be justified, apart from saying it would be “*hasty to conclude ... that nationality ... ought never to be relevant*” (§4.15).
20. No material is identified criticising such clauses. The territorial legitimacy in principle of applying English law to override the rules of international institutions or the autonomy of the parties in these respects is not considered. The idea appears to be it is appropriate to ban discrimination in abstract, and if justified, they will be upheld. Combar’s view is this

³⁶ LCIA Rules §6.1, ICC Rules §§13.5 to 13.6, WIPO Rules Art 20.

³⁷ I. Lee, Practice and Predicament: The Nationality of the International Arbitrator (2007) 31 Fordham Int LJ 503.

is insufficient to justify the costs and problems caused by presumptively prohibiting such clauses subject to justification.

21. Those problems will arise both where a party chooses to challenge the appointment of, say, a sole arbitrator with neutral nationality and where an institution inadvertently chooses an arbitrator of non-neutral nationality but wishes to correct that error.

Minority community arbitration clauses

22. There is a long tradition of arbitration within minority communities whose members require that the arbitrators be defined by reference to membership of that community. In the Muslim community, there are agreements to arbitrate before Imams. There are analogous arrangements in the Sikh community. In *Hashwani*, the clause required the arbitrators be members of the Ismaili community. In the Jewish community, arbitration is often agreed before the Bet Din, and Bet Din tribunals are male religious judges. How the proposals would apply to these is not clear, as the discussion of the unclear intended boundaries of "direct" discrimination shows. It could turn on the exact wordings used.
23. *Hashwani v Jivraj* is generally thought to be correct amongst arbitration practitioners in this regard. The Law Commission do not identify any groundswell of opposition to it, nor clearly say that it is wrong or why. The only criticism they identify is one brief footnote in one textbook which does not represent writing generally.
24. The Law Commission has not engaged in an evidential exploration of minority community arbitration. Combar has limited information (minority community arbitration is not generally commercial).³⁸ In Combar's view, the evidence in the Paper does not make good a positive case for interfering with minority arbitration.
25. Again, the Paper appears to assume it is right to prohibit discrimination in principle subject to justification, and that if a minority community clause is justified, it will be upheld. In addition to the points above, the Law Commission has not addressed the political reasons against interference with minority community arbitration (including,

³⁸ To take just Bet Din arbitration, some Combar respondees have stressed it is a cheap, effective and familiar process, and what the parties have agreed. It covers a wide range of disputes including commercial. They observe that parties agree to it because it is a Jewish religious obligation to do so, and that if this is interfered with by law, the parties may just resolve their disputes outside arbitration, using communal sanctions.

transferring the assessment of justification to the courts, from members of a minority to Judges likely to be members of the majority community). Further, there has not been analysis of whether any minority clauses should be invalidated and if so which, or why, nor as to the practical impact of imposing a justification requirement on minority community arbitration specifically, in terms of costs of justification in generally cheap simple processes, or the impact of non-community arbitrators for the acceptability and workability of community processes. If there is a case for reform of minority community arbitration, it would need a wider perspective, considering the process as a whole. Consequently, an insufficient case is made out for reversing *Hashwani* and imposing a discrimination prohibition on minority community arbitration.

(F) International Arbitration and the New York Convention

Autonomy

26. The parties' contractual autonomy is generally considered to be the heart of international arbitration. As a result, a restriction on the parties' contractual autonomy to identify before whom their disputes will be arbitrated is likely to cause concern and opposition in the international arbitral community, in particular if based on local concepts. Anti-discrimination policy and particularly its boundaries are not self-evident across the 158 contracting states of the New York Convention.
27. The Law Commission do not justify imposing the Court's view of justification on international parties' choice of who should resolve their disputes in the cases where it would realistically arise, like "not same nationality" or "age" clauses, and other arguably justifiable clauses. One potential result is that in many cases parties who wish to use a PC criterion which is justifiable in their eyes will simply choose a non-English seat to avoid difficulty and risk, which would be easy to do, and could mean the proposals would only catch the unwary. Yet a main purpose of this review of the Act is to support the choice of London as a seat. The Paper assumes England will lead, but there is no evidence for that. It is more likely competing arbitral centres will proclaim their respect for the autonomy of the parties.
28. There is an argument at §4.21 that autonomy is not affected because the proposal relates only to objections by B to A's appointments, and supports the "*autonomous choice*" of A to

disregard the clause. This is unsound. The proposal will affect all choices, including third arbitrators or sole arbitrators, and generally it affects the parties' contractual autonomy to agree who should decide their disputes. The later choice of a party at the time of a dispute to disregard their agreement – generally for tactical reasons - is not the autonomy the principle of respecting parties' autonomy protects.

Article II(1) New York Convention

29. There would be serious arguments, which would benefit from further consideration, that the Law Commission's reform would breach Article II(1) of the New York Convention because it would be overriding arbitration clauses on local grounds not specified in the Convention.³⁹ There would also be a tension with the terms of the ICSID Convention, Arts 38-39, which include nationality criteria.

Enforcement Difficulties – Article V(1)(d)

30. The Law Commission's proposals might create significant problems for the enforcement of English arbitration awards abroad under the New York Convention – where the reform bites – and in turn may affect the willingness of parties to choose a London seat for this reason as well. This is because under Article V.1(d), a ground of resistance to enforcement is that “the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties.”

31. The enforcement of New York Convention awards is not always easy. Combar members have significant experience of respondents, in cases where there is any apparent departure from the wholly standard and non-objectionable in the process, seizing on possibly spurious “problems” with awards to resist enforcement in home courts, and those supposed problems, even if they would not be regarded as real by an English court, in fact being used by local courts to resist enforcement.

32. The Paper argues this risk is “theoretical” but the arguments made to minimise the risk are in our opinion unconvincing. Thus, (1) reference is made to the fact that English law has powers to remove arbitrators under s.24 or to complete tribunals under s.17 (§4.26). But these powers implement rather than override the parties' agreement; removal for

³⁹ See eg Gary Born, “The New York Convention: A Self-Executing Treaty” 40 Mich ILJ (2018), pp. 115-126.

grounds like bias is universal, and reflects implied terms of any arbitration agreement, and the express terms of most rules. (2) The Paper mentions the right to refuse enforcement is a discretion. But such discretion is very rarely used to enforce awards against which a ground of challenge is made out. In reality if the enforcing court thinks the arbitration clause is disrespected it is likely to refuse to enforce.

33. Next, (3) it is argued that where the composition of the tribunal was not in accordance with the parties' agreement, due to a provision of the law of the seat, this may not be a ground for the courts of another state to refuse to enforce, as discrimination prohibitions "ought not to attract the opprobrium of reasonable foreign courts" (§4.33). Combar thinks this is unrealistic. There will be different views on discrimination, in particular at the margins, in relation to those clauses in respect of which the Consultation Paper's proposals have any likelihood of real incidence. A particular problem could arise if an enforcing court concluded the proposals required the parties to arbitrate before a tribunal to which they had not agreed. The Law Commission is, we infer, limited by its focus on hypothetical straightforwardly toxic clauses which do not exist in practice. It is not considering the kinds of clauses which do actually exist and which might be argued to be unenforceable under the Law Commission's proposals.
34. There is a significant problem of applicable law. The Paper suggests the law of the seat may be applied by the enforcing court but Article V(1)(d) identifies the agreement of the parties as a separate criterion to the law of the seat. Further, enforcing courts will apply local law under V(2)(b), public policy. In Combar's opinion, enforcing courts may well apply their own principles to whether the arbitration clause has been respected.

(G) Conclusions

35. Combar concludes the Law Commission has not made out a sufficient case for its proposed reform.

A Response to Chapter 4 of the Law Commission Consultation

On its Review of the Arbitration Act 1996

Rhodri Davies KC

Background

1. I have a general practice at the Commercial Bar, with a mixture of Court and arbitration work. I occasionally sit as an arbitrator and have also been appointed to resolve disputes as an expert. I was counsel for the successful appellant in the Supreme Court in Jivraj v Hashwani [2011] UKSC 40, [2011] 1 WLR 1872 and acted for Mr Jivraj throughout the litigation. In the course of that litigation I gave a great deal of time and thought to some of the issues which arise here.

General position in discrimination law

2. The Consultation Paper does not attempt to seek to put its proposals in the general context of discrimination law. It assumes (rightly I think) that the Equality Act does not apply to arbitration agreements or to the appointment of arbitrators, but does not ask why not.
3. The answer is, I suggest, is that discrimination law does not apply to everything. In fact it is markedly asymmetrical. Hence an employer may not discriminate on prohibited grounds when hiring but an employee may discriminate on those very same grounds when deciding who to work for. Elias LJ pointed out that discrimination law was not all enveloping in X v Mid Sussex Citizens Advice Bureau [2011] EWCA Civ 28, where the Court of Appeal rejected the contention that the EU Directive in question in the Jivraj case applied to voluntary workers at a Citizens Advice Bureau who did not work under a contract. Elias LJ (with whom Rix and Tomlinson LJ agreed) said (paragraph 59):

... I wholly reject the premise underpinning the submission of both the appellant and the Commission that because the principle of non-discrimination is so important in EU law, the only reasonable inference is that the Directive was intended to apply to volunteers. The logic of that argument is that the principle should apply to all fields of human activity, but no-one suggests that this is the case. The Directive is plainly limited in its field of operation ...

4. In the context of procurement of goods and services (such as the services of arbitrators), discrimination law does not often apply. The Equality Act 2010 Act introduced a general duty on public authorities, and others carrying out public functions, to have regard to the need to eliminate unlawful discrimination and to promote equality of opportunity (s.149). However, this duty has important limitations:
 - a. The duty is only to “have due regard” – it is not absolute;
 - b. The duty does not apply to all protected characteristics – it excludes marriage and civil partnership;
 - c. The duty is not enforceable by action but only by judicial review (a procedure which is inapplicable to the private sector) – s.156;
 - d. A breach of the public sector equality duty does not render a contractual term void or unenforceable – see s.148(2). This means that, even with the public sector, there is no real precedent for the Commission’s proposal.
5. No equivalent duty is legislated for in relation to the private sector or the general public. In fact, so far as I am aware, discrimination law does not generally apply in the field of procurement by private persons or the private sector of goods or services. The provision in relation to barristers, referred to by the Commission at para 4.15, is an outlier. So far as I know, no similar provision applies to other trades or professions (I

don't know why that one applies to barristers) and that provision does not apply to barristers acting as arbitrators rather than as barristers.

6. One reason why there is not a private sector equality duty is, I would suggest, that discrimination law navigates tensions between competing rights and freedoms. One person's right to choose conflicts with another's right not to be discriminated against. These conflicts can be particularly difficult when religious beliefs are involved. The law navigates these tensions by limiting the characteristics to be protected (eg race, but not being fat or having red hair) and limiting the fields in which the protection applies (eg employing people, but not choosing where to shop).
7. The private sector, including consumers, is not subject to an equality duty and does not have to justify its choice of doctors, dentists, surveyors, builders, engineers, bakers or decorators. If a different rule is to apply to the choice of arbitrators, then some reason is required. I cannot see one and the Consultation Paper does not give one.
8. The Consultation Paper does contain a ringing declaration that "arbitration benefits when free from prejudice" (para 4.3). However, this is no basis for legislation. One might as well say that the car market or that for the services of window cleaners works best when free from prejudice, but such markets are not subject to equality legislation on the purchaser's side. Nor is it by any means clear that it is ethically wrong for a consumer or business owner to prefer a window cleaner, or arbitrator, from their own community.
9. In the particular case of arbitration the statement that "arbitration benefits when free from prejudice" runs headlong into the statement that "arbitration benefits when the state does not seek to interfere in the parties' agreements as to the choice of arbitrators". The success of arbitration in many spheres is testimony to the latter statement. As justification for the proposed legislation, the first statement lacks any support either in analysis or evidence.

Mischief and evidence

10. The evidence referred to at para 4.4 of the Consultation Paper appears to be concerned with the characteristics of the arbitrators appointed when the parties have a free choice. Insofar as there is a problem here the Commission's proposals do nothing to address it.
11. Para 4.5 segues into the different issue of qualifications specified in arbitration agreements, but without analysing or presenting evidence as to why this should be thought a problem.
12. In short, there is no connection between the limited evidence of a problem identified in the Consultation paper and the legislative remedies suggested.

Nationality

13. The Commission does not spell this out, but race is defined at s.9 of the Equality Act as including nationality:

s.9 Race includes—

(a) colour;

(b) nationality;

(c) ethnic or national origins.

14. As the Commission indicates, nationality is a complex issue in international arbitration. A provision which rendered nationality qualifications and dis-qualifications unenforceable in English law could have far reaching consequences. In Jivraj both the LCIA and the ICC were so concerned about the effects of the Court of Appeal judgment that they intervened in the Supreme Court. The ICC said that, following the CA decision in Jivraj, the ICC Court implemented a policy of not fixing the seat of an arbitration anywhere in the UK (insofar as the Court could fix the seat). I suspect that one result of the proposed legislation would be a flight of arbitration work away from the UK.

15. Nationality is also a major issue in the very big business of resolving sports disputes, where partiality on national grounds tends to be taken for granted (hence neutral referees). A prohibition on taking nationality into account when constituting tribunals in this world would be extremely problematic.

Ethnic, religious and national groups

16. The Commission says nothing about the effect of its proposals on community based adjudication schemes. This is a surprising omission, given the facts of Jivraj.

17. The freedom to agree upon how their disputes are to be resolved is particularly valued by minority communities, who may find that their culture, traditions and religious principles are not well understood by the Courts or by mainstream arbitration practitioners. In addition, as the Ismaili community noted in Jivraj, civil litigation and mainstream arbitration practices can be extremely expensive.

18. Dispute resolution within the community under the aegis of the Arbitration Act 1996 provides a means of alleviating these difficulties. If the parties consent, disputes can be submitted to arbitration by respected members of the community, who may give their services for free or at least below commercial rates. If something goes wrong, recourse can be had to the Courts under the remedial powers given by the Arbitration Act.

19. I believe that a number of communities have espoused such systems. The evidence in Jivraj showed that the Ismaili community has established a system of Conciliation and Arbitration Boards to resolve disputes within the community (see the Judgment of David Steel J at paragraphs 43-45) and in Virdee v Virdi [2003] EWCA Civ 41 the agreement provided for dispute resolution within the Sikh community. I believe that similar systems exist in the Jewish community and in various branches of Islam (as well as the Ismailis).

20. The disputes that go to arbitration before such tribunals are not necessarily theological in nature. The disputes that are submitted may include divorce, land and inheritance disputes as well as contractual disputes between businessmen from within the communities.

21. The real world effects of the Commission's proposal need to be considered here. Two members of a community defined by race, religion, ethnicity or nationality, agree to binding arbitration of their dispute within the community. One party then declares that the limitation of arbitrators to those from within the community is unenforceable and proposes to appoint a very eminent arbitrator from outside the community who is known to be formidable both in intellect and personality (perhaps a retired Judge). The other party then becomes concerned that their intended arbitrator lacks the status to match the first appointee and comes under pressure to appoint an equivalent. Even if they do not, difficulties are likely to arise with the presiding arbitrator. The Court, and any appointing authority, is forbidden from taking into account the qualification provision and, almost inevitably, appoints another eminent arbitrator from outside the community.

22. The original agreement for arbitrating within the community is totally destroyed.

23. There is also a costs consequence. Community arbitrators are commonly free or at least cheap. Professional arbitrators are not, and may also expect expensive and formal procedures. Not only has the parties' choice of tribunal been trampled upon, but their costs have rocketed.

24. It might be thought that the ability of arbitration to accommodate community based dispute resolution practices is a positive element of diversity. It should not be cast aside without a very good reason. Where the community is defined by religion, questions of breach of Article 9 rights may also be involved.

25. I note that the Commission's references to diversity, at para 4.4, are based on statistics from the LCIA and the ICC. No reference is made to the world outside that of international commercial arbitration.

Sole arbitrators and tribunals

26. The Commission suggests (para 4.21) that its proposal would only inhibit the ability of party B to complain if party A appointed an arbitrator who did not possess the agreed qualification (such as nationality or religious adherence) or, as the Commission puts it, out of "prejudice". Implicit in this is that party B can at least choose as it wishes when it comes to appointing its own arbitrator. This overlooks two points.

27. First, how is this to work in the case of an agreement for a sole arbitrator or when it comes to the appointment of a presiding arbitrator in a panel of three? Assuming the qualification requirement to be unenforceable, the result is bound to be either a sole arbitrator who does not possess the relevant qualification or a tribunal of which two thirds do not possess that qualification. In both cases party B will feel hard done by, possibly even discriminated against.

28. Secondly, as mentioned above, the "arms race" that tends to develop when arbitrators are being chosen is quite likely to have the effect that party B feels pressurised to appoint an arbitrator of an equivalent ilk to that put forward by A.

Justifying discrimination

29. It is, I would suggest, not a sufficient answer to the problems outlined above that, under the proposals, qualification proposals can be justified. Parties will be horrified at the mere possibility of having to fight out in Court the validity of their arbitration clause. The costs of such an exercise will be prohibitive and the result uncertain. The arbitration benefits of staying out of court and getting the Tribunal you want will be lost.

30. The complexities of such issues (on which the CA and SC disagreed on the facts in *Jivraj*) also invite the question of whether legislation should foster the growth of fact intensive satellite litigation over the enforceability of parts of arbitration clauses.

Consequences of contravention of any rule

31. There are two possible approaches to dealing with arbitration clauses which contravene a non-discrimination rule. One is to treat the clause as void and the other is to treat the clause as valid but without the offending requirement. Both approaches have their downsides. Treating the clause as void means that, despite having agreed to arbitrate, the parties have to go to Court. Treating the clause as valid, but without the offending qualification, means that the parties must arbitrate but in front of a tribunal which does not comply with the qualifications they agreed upon.

32. The Commission assumes that the latter is the better approach. This is questionable. The courts are the default option for everybody within their jurisdiction. No party can complain unduly if they end up in court. Arbitration has advantages and disadvantages (notably the lack of a full appeals process). Arbitration is enforced on the basis that it is what the parties agreed upon. Once the arbitration loses that quality, it is doubtful whether it should be enforced at all. The Court of Appeal's decision in *Jivraj* was that the arbitration agreement was void, not that it remained effective without the Ismaili qualification requirements.

33. A particular issue arises here with Article 6 of the Convention on Human Rights. Parties are entitled to a fair trial in Court. The exclusion of this right in the case of arbitration rests on the consent by each party to the arbitration. However, if a party consents to arbitrate on the basis that the tribunal will be drawn from their own community but that qualification is found to be unenforceable, then the validity of their Article 6 consent must be highly questionable. What is worse is that the issue may be a fact sensitive one depending on the prominence of the qualification in the

arbitration agreement. On any basis it must be a strong thing to force a party to arbitrate on terms other than those to which they agreed.

34. There is therefore the prospect of pre-arbitration litigation both as to (i) whether the qualification is justified and (ii) if not whether the arbitration clause remains enforceable.

35. To this may be added a potential third round if an attempt is made to enforce an award in a foreign court. It may easily be imagined that an Indian Court, for example, might take a different view from an English Court when considering the importance of a Hindu qualification in an arbitration clause.

Question 7

36. My answer to this question is that, because of the points outlined above, I firmly disagree. In my view, the proposal has no developed policy basis, it would be likely to have disastrous effects on community based arbitration schemes and, by including nationality in particular, it will drive international arbitration work away from the UK. It also risks fostering unnecessary satellite litigation over the justification for and enforceability of arbitration clauses. No justification has been given for risking these consequences.

Rhodri Davies KC

15 December 2022.

From: Dubot, Lisa [REDACTED]
Sent: 13 December 2022 14:20
To: arbitration
Cc: Abu-Manneh, Raid; O'Grady, Rachael
Subject: Your Consultation Paper on the Arbitration Act 1996 - Our Comments [MB-EME.FID16346930]

Dear Law Commission team

We have some comments on various proposed areas of reform to the Arbitration Act 1996, most of which we wrote about publicly in our article for Kluwer Arbitration Blog [here](#). This email sets out our views. We (*Lisa Dubot, Raid Abu-Manneh and Rachael O'Grady*) would like to submit these to you in our personal capacity please, just as we did with the prior feedback that we provided in July 2021. You will see that points 1 to 5 are neutrally expressed as they were written for Kluwer's Blog, but rest assured they remain our strong, personal opinions.

References to the Paper are to your Consultation Paper and "the Act" refers to the Arbitration Act 1996.

1. Non-discrimination in Arbitrators' Appointments

The Law Commission considers that the Act should prohibit discrimination in arbitrator appointments, acknowledging that, currently, nothing prevents an arbitration clause providing for "*commercial men*" as arbitrators from being struck down. It proposes that the Act should:

- (i) prohibit arbitral appointments on the basis of an arbitrator's [protected characteristic\(s\)](#) (namely: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation); and
- (ii) render unenforceable arbitration agreements requiring an arbitrator to have a protected characteristic(s), *unless* in the context of the arbitration in hand it is **a proportionate means of achieving a legitimate aim**.

The rationale for this proposal is sound, especially when we are far from gender parity amongst arbitrators, and preventing discrimination in arbitration is paramount. However, for the below reasons, the current proposal may not be the best way to achieve this end:

- (i) international arbitration practitioners will need to familiarise themselves with the [Equality Act 2010](#) – a complex English Act – and its related jurisprudence because the terms in bold above are borrowed from it rather than being defined in a standalone way for the purposes of the Act;
- (ii) "[protected characteristics](#)" form a closed list, there being no catch-all provision to take account of future developments;
- (iii) the "*proportionate means*" test will be developed by the English courts on a case-by-case basis, which could cause potential concern for foreign parties who may feel that the English court is not best-placed to consider their local cultural/religious considerations for arbitrator selection;
- (iv) the requirements may be employed as a guerrilla tactic (e.g., to significantly stall proceedings; for example, a respondent could engage an arbitrator whose maternity leave is imminent, knowing the claimant cannot challenge the appointment because "*pregnancy and maternity*" are protected characteristics); and
- (v) awards may still face enforcement barriers under the New York Convention on the basis that the tribunal was not composed in accordance with the parties' agreement (e.g., an all-woman tribunal appointed under a clause providing for "*commercial men*").

The key is to introduce a user-friendly test which (i) would be workable for the international business community and (ii) avoids being mired in complex local legislation. Save for one stakeholder, [who expressed an opinion earlier in the reform process](#), we are not aware of other stakeholders expressing any concerns with the current proposal. To date, most stakeholders have either (i) not publicly critiqued the current proposal or (ii) endorsed it or the rationale underpinning it.

2. Arbitrators' Duty of Disclosure

The Paper proposes codifying an arbitrator's continuing duty of disclosure - outlined in [Halliburton v Chubb](#) - but is against introducing a new statutory duty of independence, asserting that an arbitrator's connection to the parties doesn't really matter and is often inevitable; rather, its effect on impartiality, and the openness about such connections, is what counts. This seems a reasonable approach and is an important change which modernises legislation in line with soft law.

The Paper asks whether the Act should specify the state of knowledge required of an arbitrator's duty of disclosure duty and, if so, if it should be based on the arbitrator's actual knowledge or an objective standard (what he/she ought to know after making reasonable enquiries). Given the current uncertainty in English jurisprudence about the state of knowledge required, the Act should clarify this expressly. An objective standard may be best as international arbitrators are already familiar with this under the widely-consulted [IBA Guidelines on Conflicts of Interest](#) (General Standard 7(d)).

3. Summary Disposal

The Paper proposes an express summary disposal procedure that uses the English courts' threshold, namely the claim/defence has "*no real prospect of success*" and there is "*no other compelling reason*" for it to continue to full hearing. This is a rare but welcome proposal, not commonly found in foreign arbitration legislation, which seeks to promote cost and time efficiency and to reassure arbitrators, and foreign enforcing courts, that summary disposals may be appropriate and proper in the right circumstances (thereby combatting due process paranoia). This proposal could be particularly appealing to financial institutions enforcing payment obligations so may be attractive to speed up arbitrations.

The Act could adopt the "*manifestly without merit*" test outlined in many institutional rules, which may be better known by international arbitrators, but there is no settled jurisprudence on its meaning. Conversely, the meaning of the proposed threshold is clearly articulated in English case law, so this is likely to be the better option for legal certainty. The threshold set by English law is also high which should appease any concerns that foreign parties may have about this new procedure.

The Paper proposes that:

- (i) the summary procedure can only be invoked by party application (not unilaterally by an arbitrator); and
- (ii) the tribunal must consult with the parties on the form of the procedure.

Users should welcome these proposals, designed at protecting party autonomy and procedural due process whilst allowing flexibility. However, the Act should also incorporate a reasonable time limit for arbitrators to make their determination in order to protect against delay.

4. Emergency Arbitration and Section 44 (Court Powers Supporting Arbitral Proceedings)

[Emergency arbitration](#) is a new phenomenon which post-dates the Act. The Paper provisionally concludes that the provisions which apply to arbitrators should not apply to an emergency arbitrator ("EA") because many of them would be inappropriate in such context. Moreover, an EA regime should not be administered by the courts but by arbitral institutions, which are best-placed to administer such proceedings under their rules.

Adopting this proposal would mean that *ad hoc* arbitrations cannot, in future, benefit from an EA regime, something now well-engrained in modern arbitrations. This is significant because many traditional sectors, such as construction and commodities, as well as more recently established ones, such as [FinTech](#), favour *ad hoc* arbitration as an efficient option for resolving disputes. Consideration should therefore be given to ensuring that the Act provides an EA regime which could apply to *ad hoc* arbitrations and to institutional arbitrations where no EA mechanism is otherwise available.

The Paper addresses non-compliance with EA orders and proposes either:

- (i) permitting an EA to issue a peremptory order, backed up by a court order, if ignored; or
- (ii) bringing EAs into the remit of [section 44](#) and allowing EAs to give permission for section 44(4) applications so that the court can grant interim relief relating to the EA order.

While (ii) is simpler, (i) maintains the primacy of the arbitral regime and is what practitioners are accustomed to under sections 41 and 42.

The Paper discusses what it describes as the widespread, but "*incorrect*", perception that following the decision in [Gerald Metals, section 44\(5\) of the Act](#) precludes recourse to court where emergency arbitration is possible. Consequently, it suggests repealing section 44(5). Given the controversy generated by *Gerald Metals*, repealing section 44(5) would simplify things and would clarify that the Court can assist in the EA context within the confines of sections 44(3) and 44(4).

To address the "*vexed question*" of whether an order under section 44 can be made against someone who is not a party to the arbitration proceedings/agreement ("**third party**"), the Paper asks whether s44 should be amended "*to confirm that its orders can be made against a third party*". Third party orders are possible for most, but not all, matters listed in section 44(2) - it depends on the applicable domestic law rules, which are imported into that section. For this reason, it may be confusing to adopt the proposed blanket confirmation; it would likely be clearer to maintain the current status quo, especially in light of the evolving law concerning the matters listed in section 44(2).

5. Section 67 Challenges (Challenging Award Based on Tribunal's Lack of Jurisdiction)

Currently, [section 67](#) challenges may proceed by way of a re-hearing, with the inevitable duplication of cost and time (since the tribunal's ruling is given no weight) but with the advantage of the court having the final say.

The Paper proposes that a section 67 challenge should instead take the form of an **appeal** (review of the award) in circumstances where:

- (i) a party has participated in the arbitration and objected to the tribunal's jurisdiction; and
- (ii) the tribunal has ruled on jurisdiction in an award.

This seems sensible in order to prevent (i) the "*heads I win, tails it does not count*" mentality (ii) the tribunal's jurisdictional hearing being a "*dress rehearsal*" and (iii) duplication.

Currently, a party may also ask the court to determine a point of jurisdiction under [section 32](#), which is possible either *before* or *after* a tribunal has ruled on its jurisdiction. It makes sense for the proposed 'appeal, not rehearing' reform to apply equally to section 32 where the tribunal has ruled on jurisdiction. However, serious consideration should be given to whether it should apply in the following scenarios: (i) section 32 applicants who do not possess a tribunal ruling on jurisdiction and (ii) non-participating parties in an arbitration who may seek a jurisdictional determination or apply under section 67 (see [section 72](#)), since there will be no award to review or "*second bite of the cherry*", respectively.

6. Section 69 (Appeals on points of law)

Finally, we also have an opinion on section 69, which was not included within the Kluwer Blog due to word constraints. We note that (i) there are split camps on this section (section 69 should be repealed versus liberalise s69 so more appeals can be heard) and (ii) your Paper concludes in favour of the status quo, believing that it strikes the right balance between securing the finality of awards and ensuring blatant errors of law are remedied. We agree with this and believe that the section is not problematic in practice, so should be left untouched. We feel that having limited grounds for appeal has, very likely, been a factor that has led to London being such a popular seat globally.

We trust our opinions will be useful. Please let us know if we can be of any further assistance.

Kind regards,

Lisa, Raid and Rachael

Lisa Dubot

Global PSL, International Arbitration

Pronouns: she/her

[REDACTED]

Mayer Brown
10 avenue Hoche
75008, Paris (France)

[REDACTED]

mayerbrown.com



Please consider the environment before printing this e-mail. If you need to print it, consider printing it double-sided.

Response ID ANON-PT57-RUKY-U

Submitted to Law Commission Consultation: Review of the Arbitration Act 1996
Submitted on 2022-12-12 10:37:48

About you

What is your name?

Name:
Stuart Dutson

What is the name of your organisation?

Enter the name of your organisation:
Simmons & Simmons LLP

Are you responding to this consultation in a personal capacity or on behalf of your organisation?

Personal response

If other, please state::

What is your email address?

Email:
[REDACTED]

What is your telephone number?

Telephone number:
[REDACTED]

If you want the information that you provide in response to this consultation to be treated as confidential, please explain to us why you regard the information as confidential. As explained in our privacy notice, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

Please explain to us why you regard the information as confidential:

Consultation questions

Consultation Question 1: 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?

Disagree

Please share your views below.:

The commission will receive some views that English arbitration should not be confidential. The commission should not accept this view. In 1995 in Australia the high court ruled that Australian arbitrations were not confidential. This was a very negative development in Australia and was a competitive disadvantage for the Australian market. In response to overwhelming negative responses to the impact on the Australian arbitration market, The ALRC proposed that Australian arbitration act include an opt in for confidentiality and this was adopted. This was still not seen as good enough by Australian arbitration practitioners and the ALRC then proposed that this become an opt out. 20 years and 2 amendments later Australian law included confidentiality in arbitration unless parties contract out of it.

Consultation Question 2: We provisionally conclude that the Arbitration Act 1996 should not impose a duty of independence on arbitrators. Do you agree?

Agree

Please share your views below.:

Consultation Question 3: 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. Do you agree?

Disagree

Please share your views below.:

Consultation Question 4: Should the Arbitration Act 1996 specify the state of knowledge required of an arbitrator's duty of disclosure, and why?

Yes

Please share your views below.:

Consultation Question 5: 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?

What they ought to know

Please share your views below.:

Consultation Question 6:

Other

Please share your views below.:

The arbitration act should say nothing about this. If parties specify criteria for appointment of an arbitrator then this should be respected.

Consultation Question 7:

Disagree

Please share your views below.:

Consultation Question 8: Should arbitrators incur liability for resignation at all, and why?

Not Answered

Please share your views below.:

Consultation Question 9: Should arbitrators incur liability for resignation only if the resignation is proved to be unreasonable?

No

Please share your views below.:

It should be "manifestly unreasonable". It is too easy for a party to convince that actions are unreasonable. This can be a marginal call. To make clear that something properly unreasonable must occur the word manifestly should be added.

Consultation Question 10: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 11: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 12: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 13: We provisionally propose that the Arbitration Act 1996 should stipulate the threshold for success in any summary procedure. Do you agree?

Agree

Please share your views below.:

Consultation Question 14: 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. Do you agree?

Disagree

Please share your views below.:

Please use an arbitration test rather than a CPR test that will mean the proceedings looking more like high court proceedings.

Consultation Question 15: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 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?

Yes

Please share your views below.:

Consultation Question 17: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 18: We provisionally conclude that the provisions of the Arbitration Act 1996 should not apply generally to emergency arbitrators. Do you agree?

Agree

Please share your views below.:

Consultation Question 19: 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?

Agree

Please share your views below.:

Consultation Question 20: Do you think that section 44(5) of the Arbitration Act 1996 should be repealed, and why?

Yes

Please share your views below.:

To eliminate the uncertainty caused by Gerard Metals.

Consultation Question 21:

Permission under section 44

Please share your views below.:

Under option 1 a court would be required to enforce an order made by an emergency arbitrator and under a procedure which is likely not subject to the full rigour of the arbitration act 1996.

Consultation Question 22:

Agree

Please share your views below.:

Consultation Question 23: 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?

Yes

Please share your views below.:

Consultation Question 24: We provisionally conclude that our proposed change to section 67 of the Arbitration Act 1996 would not require any similar change to section 103. Do you agree?

Agree

Please share your views below.:

Fine to have a more detailed review at the s103 level.

Consultation Question 25: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 26: 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?

Agree

Please share your views below.:

Consultation Question 27: 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?

Agree

Please share your views below.:

Consultation Question 28: Do you think that section 7 of the Arbitration Act 1996 (separability of arbitration agreement) should be mandatory, and why?

Not Answered

Please share your views below.:

Consultation Question 29: 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?

Agree

Please share your views below.:

Consultation Question 30: 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?

Yes

Please share your views below.:

Consultation Question 31: 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?

No

Please share your views below.:

Consultation Question 32: Do you think that section 39 of the Arbitration Act 1996 should be amended to refer to "orders" (rather than "awards"), and why?

Yes

Please share your views below.:

Consultation Question 33: Do you think that section 39(1) of the Arbitration Act 1996 should be amended to refer to “remedies” (rather than “relief”), and why?

Yes

Please share your views below.:

Consultation Question 34: 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 appellants was notified of the result of that request. Do you agree?

Agree

Please share your views below.:

Consultation Question 35: 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?

Agree

Please share your views below.:

Consultation Question 36: We provisionally propose that sections 85 to 87 of the Arbitration Act 1996 (on domestic arbitration agreements) should be repealed. Do you agree?

Agree

Please share your views below.:

Consultation Question 37: Do you think that any of the suggestions discussed in Chapter 11 needs revisiting in full, and if so, why?

Please share your views below.:

Yes. The law of the arbitration agreement should be the law of the seat of the Arbitration where a seat is specified. Where it is not specified then the law governing the arbitration agreement may well be the law governing the substantive obligations, the rest of the contract. The recent supreme Court decision that holds the opposite of this should be over or by statute.

This Supreme Court ruling could have many unintended consequences – it is not yet sufficiently clear why English arbitrations are confidential. Is it because there is a term implied into the arbitration agreement? If this is so then that term should only be implied into the arbitration payment with the arbitration agreement is governed by English law. It is generally assumed that Arbitration in England is confidential. To make this axiomatic phrase true we need to reverse the effects of the recent Supreme Court decision, such that where the seat is specified as England, then the law governing the arbitration agreement is English.

Consultation Question 38: 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?

Please share your views below.:

See above.

Response ID ANON-PT57-RUKW-S

Submitted to Law Commission Consultation: Review of the Arbitration Act 1996
Submitted on 2022-12-13 18:30:56

About you

What is your name?

Name:
Stuart Dutson

What is the name of your organisation?

Enter the name of your organisation:
Simmons & Simmons LLP

Are you responding to this consultation in a personal capacity or on behalf of your organisation?

Personal response

If other, please state::

What is your email address?

Email:
[REDACTED]

What is your telephone number?

Telephone number:
[REDACTED]

If you want the information that you provide in response to this consultation to be treated as confidential, please explain to us why you regard the information as confidential. As explained in our privacy notice, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

Please explain to us why you regard the information as confidential:

Consultation questions

Consultation Question 1: 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?

Agree

Please share your views below.:

The commission must review this in conjunction with the Enka case issue and the law governing the arbitration agreement. Does confidentiality arise because England is the seat? Or does it arise as a term implied into the arbitration agreement? If the latter then in a contract governed by a foreign law with an arbitration seated in London then there will be no confidentiality. The Commission should provide in the Act that if the seat is England then, subject to the parties providing otherwise, the law governing the arbitration agreement shall be English law.

Consultation Question 2: We provisionally conclude that the Arbitration Act 1996 should not impose a duty of independence on arbitrators. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 3: 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. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 4: Should the Arbitration Act 1996 specify the state of knowledge required of an arbitrator's duty of disclosure, and why?

Not Answered

Please share your views below.:

Consultation Question 5: 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?

Not Answered

Please share your views below.:

Consultation Question 6:

Not Answered

Please share your views below.:

Consultation Question 7:

Not Answered

Please share your views below.:

Consultation Question 8: Should arbitrators incur liability for resignation at all, and why?

Not Answered

Please share your views below.:

Consultation Question 9: Should arbitrators incur liability for resignation only if the resignation is proved to be unreasonable?

Not Answered

Please share your views below.:

Consultation Question 10: 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. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 11: 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. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 12: 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. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 13: We provisionally propose that the Arbitration Act 1996 should stipulate the threshold for success in any summary procedure. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 14: 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. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 15: 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. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 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?

Not Answered

Please share your views below.:

Consultation Question 17: 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. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 18: We provisionally conclude that the provisions of the Arbitration Act 1996 should not apply generally to emergency arbitrators. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 19: 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?

Not Answered

Please share your views below.:

Consultation Question 20: Do you think that section 44(5) of the Arbitration Act 1996 should be repealed, and why?

Not Answered

Please share your views below.:

Consultation Question 21:

Not Answered

Please share your views below.:

Consultation Question 22:

Not Answered

Please share your views below.:

Consultation Question 23: 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?

Not Answered

Please share your views below.:

Consultation Question 24: We provisionally conclude that our proposed change to section 67 of the Arbitration Act 1996 would not require any similar change to section 103. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 25: 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. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 26: 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?

Not Answered

Please share your views below.:

Consultation Question 27: 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?

Not Answered

Please share your views below.:

Consultation Question 28: Do you think that section 7 of the Arbitration Act 1996 (separability of arbitration agreement) should be mandatory, and why?

Yes

Please share your views below.:

Given the risks created by the Enka case where the law governing the contract is not English, it is safer to provide that every arbitration seated in London has separability. The laws of some foreign countries does not include separability such that a claim of fraud etc will undermine the arbitration agreement as well as the main contract.

Consultation Question 29: 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?

Not Answered

Please share your views below.:

Consultation Question 30: 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?

Not Answered

Please share your views below.:

Consultation Question 31: 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?

Not Answered

Please share your views below.:

Consultation Question 32: Do you think that section 39 of the Arbitration Act 1996 should be amended to refer to "orders" (rather than "awards"), and why?

Not Answered

Please share your views below.:

Consultation Question 33: Do you think that section 39(1) of the Arbitration Act 1996 should be amended to refer to "remedies" (rather than "relief"), and why?

Not Answered

Please share your views below.:

Consultation Question 34: 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?

Not Answered

Please share your views below.:

Consultation Question 35: 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?

Not Answered

Please share your views below.:

Consultation Question 36: We provisionally propose that sections 85 to 87 of the Arbitration Act 1996 (on domestic arbitration agreements) should be repealed. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 37: Do you think that any of the suggestions discussed in Chapter 11 needs revisiting in full, and if so, why?

Please share your views below.:

Consultation Question 38: 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?

Please share your views below.:

There should be a hurdle to accessing s68 to prevent unmeritorious cases from proceeding. Leave of the court a la s.69 should be a requirement for a s.68 challenge proceeding. At the moment a recalcitrant award debtor can launch a claim under section 68 which can delay, or potentially scupper, enforcement of the award. While the High Court rules now include some mechanisms designed to allow a judge to get rid of an unmeritorious challenge, those rules are far from perfect. In fact, a decision to seek to have a section 68 challenge dismissed on the papers can, if the decision goes against the applicant, result in higher costs and further delays to the final s.68 hearing.

If this suggestion were not accepted then some of the individual subsections of s.68(2) should be amended for example s.68(2)(d) should be amended to include a word such as "essential" or "major" before issues. As section 68 (2) (d) is currently drafted, a recalcitrant award Debtor is able to mount an unmeritorious challenge under section 68, that can waste considerable time and money on both the award creditor and the courts.

The act should include a provision that provides that where a seat is specified, unless the contrary appears, the law governing the arbitration agreement shall be the law of the seat. Given the decision in Enka, this is necessary. Otherwise if the main contract is governed by a foreign law which provides that the entire contract including the arbitration agreement falls with fraud, and fraud is alleged then the dispute would not be able to be arbitrated. Similarly, if the contract is governed by a foreign law which has a limited view of arbitrability, many disputes which English law would allow to be determined in an arbitration would not be arbitrable (for example corporate disputes are not arbitrable in many countries).

Submitted to Law Commission Consultation: Review of the Arbitration Act 1996
Submitted on 2022-12-09 14:31:25

About you

What is your name?

Name:

[REDACTED]

What is the name of your organisation?

Enter the name of your organisation:

Falcon Chambers

Are you responding to this consultation in a personal capacity or on behalf of your organisation?

Response on behalf of organisation

If other, please state::

What is your email address?

Email:

[REDACTED]

What is your telephone number?

Telephone number:

[REDACTED]

If you want the information that you provide in response to this consultation to be treated as confidential, please explain to us why you regard the information as confidential. As explained in our privacy notice, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

Please explain to us why you regard the information as confidential:

Consultation questions

Consultation Question 1: 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?

Other

Please share your views below.:

We generally agree (noting that all the matters addressed in the DAC Report of February 1996 remain persuasive), subject to one observation to the contrary. We agree with the Authors' views in paragraphs 2.2 and 2.40 that arbitration should not be confidential by default. Building on this, we argue in favour of a provision providing transparency in the case of certain classes of domestic arbitration. We explain our thinking below.

The members of our Chambers specialise in property law. It is common for leases and development agreements to include arbitration clauses. [REDACTED]

[REDACTED] we propose that, in the context of domestic property arbitrations, the default position should be that awards are published, with only significantly prejudicial confidential information redacted by the arbitrator (unless the party to whom such confidential information relates consents to its publication).

This approach was adopted for the bespoke covid rent arrears legislation – see section 18 of the Commercial Rent (Coronavirus) Act 2022 - and we believe it should be replicated in the Arbitration Act 1996 in relation to domestic property arbitrations.

The benefits of this approach would be that: (a) those involved in the field could see how the often knotty points of law involved in such disputes are resolved in practice, allowing the law to develop and for consistency of outcome (both being in the public interest); and (b) parties would be encouraged to settle their differences were they to see how other similar disputes are resolved (as has been our experience in the many arbitrations we have conducted under the 2022 Act).

We understand that some awards under the Arbitration (Scotland) Act 2010 are published in this way, and have found those awards to be informative (notwithstanding the criticism made in footnote 50 of the Paper). It is bizarre that the same approach is not adopted in this jurisdiction, particularly since awards are usually discussed in detail, without apparently deleterious effect, on the occasions of applications to court under sections 68 and 69 of the 1996 Act.

Lastly, while we note the premium placed on confidentiality reflected in paragraph 2.6 of the Paper, we suspect that most of this is attributable to

international arbitration (as paragraph 2.6 itself indicates), where different considerations apply. In our considerable experience of the domestic property market, we have not encountered the same widespread sentiment in favour of confidentiality; rather, the important considerations for those concerned are speed, cost and determination by a professional practising in the field.

Moreover, we would not agree with the proposition (advanced in paragraph 2.26 of the Paper) that, if confidentiality is little prized in domestic property arbitrations, it should be left to the parties to decide whether to lift confidentiality in any given case. Our experience is that, once parties come to arbitration, they will already be in a state of hostility, and will be unlikely agree on any such proposal. Better, therefore, to make publication the default, subject only the redaction of information which would significantly harm a party's commercial interests.

Consultation Question 2: We provisionally conclude that the Arbitration Act 1996 should not impose a duty of independence on arbitrators. Do you agree?

Agree

Please share your views below.:

We very much agree. Our practice in domestic property law often calls for surveyor-arbitrators to be appointed to decide contested valuation matters on a discrete topic or in a narrow field, in which few experienced professionals practise. Connections with the parties are expected, as an inevitable aspect of involvement and expertise in the field (something which is itself generally welcomed by the parties, and sometimes even prescribed by the arbitration agreement). Were parties able to object on the grounds of lack of independence, many areas of the domestic property arbitration market would become unworkable (as paragraph 3.41 of the Paper rightly observes).

We are aware that different institutions treat the two concepts of impartiality and independence in different ways, and that in an ideal world, independence would be (and sometimes is) insisted upon. Our view is that lack of independence is not a problem, provided that the arbitrator is able to remain impartial. In a small pool, which we commonly encounter with property arbitrators, we think that any other approach would be impracticable.

Consultation Question 3: 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. Do you agree?

Agree

Please share your views below.:

We agree, noting that the traffic light system employed in both the International Bar Association guidelines and the RICS practice statement and guidance note on Conflicts of Interest go further in their disclosure recommendations.

Consultation Question 4: Should the Arbitration Act 1996 specify the state of knowledge required of an arbitrator's duty of disclosure, and why?

Yes

Please share your views below.:

We consider that the proposed disclosure requirement canvassed in Q.3 should make the extent of disclosure clear by adding "known to the arbitrator" after "circumstances". We do not consider that it would be appropriate for arbitrators to be penalised for something of which they were wholly ignorant, even if they might perhaps have discovered the matter through investigation. This would only encourage satellite issues concerning the extent to which the arbitrator should have been aware of a purported conflict and what inquiries should have been made.

Consultation Question 5: 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?

Actual knowledge

Please share your views below.:

See our answer to Q.4. Actual, not constructive, knowledge should be the touchstone in order to avoid collateral disputes in relation to the extent of the inquiries made.

Consultation Question 6:

Only if necessary

Please share your views below.:

We do not feel strongly about this, but respect the test applied in the Supreme Court.

Consultation Question 7:

Agree

Please share your views below.:

In our field, we have not come across arbitration agreements which provide for the appointment of an arbitrator in potentially discriminatory terms (of the nature outlined). However, it is plainly right that arbitral appointments should be free from discrimination and that discriminatory challenges or agreements to the contrary are prohibited/unenforceable (unless justifiable in line with the Equality Act).

Consultation Question 8: Should arbitrators incur liability for resignation at all, and why?

No liability for resignation

Please share your views below.:

The immunity of arbitrators is a critical matter and should be strengthened. We propose that, just as judges have full immunity from suit (including costs), so should arbitrators. In our view, an arbitrator should not bear the risk of potential exposure to liability for costs in any circumstances or for any reason – save in the event of bad faith (as per s.29). We thus favour blanket immunity in the event of resignation or removal (which may be triggered for a variety of reasons), subject only to the bad faith qualification.

Alternatively, if the decision is taken to afford only qualified immunity in the event of resignation, the Act should still be amended to confer greater protection for arbitrators by providing that any liability for resignation is limited to situations to where the resignation was unreasonable. However, we consider that this is very much a fallback option which still leaves arbitrators in peril of facing liability which is not shouldered by judges. It is hard to see why an arbitrator should be exposed to costs unless they have acted in bad faith (which, to our minds, connotes a higher threshold than mere unreasonableness), when a judge is not liable at all.

Consultation Question 9: Should arbitrators incur liability for resignation only if the resignation is proved to be unreasonable?

Other

Please share your views below.:

See our answer to Q.8 above.

Consultation Question 10: 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. Do you agree?

Agree

Please share your views below.:

Yes. As the Paper points out, the parties can always agree to revoke the authority of the arbitrator. If one party refuses, the application for removal will have to be brought against that party, against whom any order for costs should be made, and not against the arbitrator.

Consultation Question 11: 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. Do you agree?

Other

Please share your views below.:

It is appropriate and desirable to give an arbitral tribunal an express power to adopt a summary procedure and make a summary disposal in suitable cases, in order to: (a) focus parties' minds and so deter frivolous positions; (b) remove any doubts as to the existence of the power, and to encourage the greater use of such a power/approach where appropriate.

We tend to disagree with the proposal that such a provision be non-mandatory. Although (unlike court proceedings) arbitration is consensual, we do not see justification for the parties being entitled to exclude the power of the tribunal from effecting summary disposal where appropriate. The parties cannot jointly so limit the court's hands and we consider that the same should apply in the context of arbitration. Furthermore, if (as proposed) the summary procedure can only be adopted on the application by a party (rather than on the tribunal's own initiative), this itself provides a safety net against a trigger-happy arbitrator.

Consultation Question 12: 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. Do you agree?

Agree

Please share your views below.:

We agree.

Consultation Question 13: We provisionally propose that the Arbitration Act 1996 should stipulate the threshold for success in any summary procedure. Do you agree?

Agree

Please share your views below.:

We agree.

Consultation Question 14: 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. Do you agree?

Agree

Please share your views below.:

Yes: we favour the adoption of the established 'no real prospect of success' threshold.

Consultation Question 15: 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. Do you agree?

Other

Please share your views below.:

These points seldom arise in the context of domestic property arbitrations, and we make no comment.

Consultation Question 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?

Other

Please share your views below.:

See our answer to Q.15.

Consultation Question 17: 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. Do you agree?

Other

Please share your views below.:

See our answer to Q.15.

Consultation Question 18: We provisionally conclude that the provisions of the Arbitration Act 1996 should not apply generally to emergency arbitrators. Do you agree?

Other

Please share your views below.:

See our answer to Q.15.

Consultation Question 19: 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?

Other

Please share your views below.:

See our answer to Q.15.

Consultation Question 20: Do you think that section 44(5) of the Arbitration Act 1996 should be repealed, and why?

Other

Please share your views below.:

See our answer to Q.15.

Consultation Question 21:

Other

Please share your views below.:

See our answer to Q.15.

Consultation Question 22:

Agree

Please share your views below.:

Yes. We support the proposal that any s.67 challenge to a s.30 determination should be by appeal (by way of review) rather than a full rehearing. In the very few cases where it occurs, it limits inappropriate two bites at the cherry in such situations.

Consultation Question 23: 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?

Yes

Please share your views below.:

Yes. For similar reasons to those given in our answer to Q.22, and in the interests of overall consistency.

Consultation Question 24: We provisionally conclude that our proposed change to section 67 of the Arbitration Act 1996 would not require any similar change to section 103. Do you agree?

Agree

Please share your views below.:

Yes.

Consultation Question 25: 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. Do you agree?

Agree

Please share your views below.:

Yes.

Consultation Question 26: 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?

Agree

Please share your views below.:

Yes. The power for the arbitral tribunal to award costs if it determines it has no jurisdiction should be confirmed for the avoidance of doubt; the policy underlying the entitlement to make such an award is fairness as between the successful and unsuccessful parties.

Consultation Question 27: 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?

Agree

Please share your views below.:

We agree: s.69 is best left alone. As it stands, it allows for the correction of egregious mistakes whilst constraining appeals and so promoting the resolution of disputes without unnecessary delay or expense (as per s.1). This strikes an appropriate balance between the identified conflicting objectives.

Consultation Question 28: Do you think that section 7 of the Arbitration Act 1996 (separability of arbitration agreement) should be mandatory, and why?

Other

Please share your views below.:

No comment.

Consultation Question 29: 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?

Agree

Please share your views below.:

Yes.

Consultation Question 30: 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?

Yes

Please share your views below.:

Yes. In our experience of domestic property arbitrations, this procedure is seldom used in any event. If it is thought useful to make the procedure more streamline, in order to assist one party or other, that would appear to be beneficial.

Consultation Question 31: 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?

Yes

Please share your views below.:

Very much so, yes.

Consultation Question 32: Do you think that section 39 of the Arbitration Act 1996 should be amended to refer to "orders" (rather than "awards"), and why?

Other

Please share your views below.:

No comment.

Consultation Question 33: Do you think that section 39(1) of the Arbitration Act 1996 should be amended to refer to "remedies" (rather than "relief"), and why?

Other

Please share your views below.:

No comment.

Consultation Question 34: 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 appellants was notified of the result of that request. Do you agree?

Agree

Please share your views below.:

Very much agree: such an amendment to s.70(3) would be welcome to resolve the present potential incompatibility with the timeframe which results from following s.70(2).

Consultation Question 35: 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?

Agree

Please share your views below.:

Yes.

Consultation Question 36: We provisionally propose that sections 85 to 87 of the Arbitration Act 1996 (on domestic arbitration agreements) should be repealed. Do you agree?

Agree

Please share your views below.:

Yes.

Consultation Question 37: Do you think that any of the suggestions discussed in Chapter 11 needs revisiting in full, and if so, why?

Please share your views below.:

No thank you.

Consultation Question 38: 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?

Please share your views below.:

Nothing to add, thanks.

Dear Sir/Madam,

FCA Consultation response: review of the 1996 Arbitration Act

Gafta Chairs the Federation of Commodity Associations which was established in 1943. The FCA is made up of Associations, Federations and Organisations involved in commodity trades, to act together in a common cause. All the Associations maintain their own commodity contracts and offer Arbitration services under English Law <http://www.fcassoc.co.uk/>.

The following members of the FCA would like to submit this co-signed response to the Law Commission's Consultation into the review of the Arbitration Act 1996: Gafta, Global Pulses Confederation, Federation of Cocoa Commerce, FoSFA, The Rubber Trade Association of Europe, The Sugar Association of London, and The Refined Sugar Association.

We appreciated representatives from the Law Commission coming to address the Federation of Commodities Association meeting in December 2021 to discuss the initial scope of the consultation into the Review of the 1996 Arbitration Act, and we welcome this opportunity to respond to the consultation.

The undersigned members support the main recommendations of the review and the spirit of 'updating' rather than re-forming the legislation. We would like to make the following comments.

We do not support the introduction of a duty of Statutory Duty Disclosure for Arbitrators which was a key consideration with *Halliburton v Chubb* and was ultimately rejected by the Supreme Court. Arbitrators already have a statutory duty to act impartially. We do not believe that a move to create a statutory duty of disclosure would enhance this obligation or indeed, improve the perception of, and the confidence in, the impartiality of English law arbitration. Instead, we believe that it is likely to create an increase in challenges to Arbitral appointments, on spurious grounds. This would have the effect of creating unnecessary delay to Arbitration proceedings and ultimately impact the reputation of Arbitration under English law, in being able to conduct proceedings efficiently and without undue delay.

In particular, we are concerned about the impact that a new statutory duty of Disclosure would have on specialist arbitral bodies including trade commodity associations, marine, re-insurance and others, where there is necessarily a comparatively small pool of specialist arbitrators. In these instances, repeat appointments and overlapping common parties are a common occurrence, and yet this is not considered by the users of the service to be a concern. By contrast, it is considered an advantage, with arbitrators being able to acquire considerable experience and expertise in the field. In Gafta arbitration, for example, an arbitrator may accept many potential appointments by parties for a future arbitration, which may, in fact, never come to fruition, because the parties settle their dispute. Again, this is regarded and understood by users of the service as common practice. This is exacerbated by the fact that it is possible for a potential dispute under Gafta arbitration to be kept 'live' with a nominated arbitrator for up to 6 years. Also, under Gafta arbitration it is not just the Arbitral proceedings which are confidential, but *the very fact of going to arbitration*- which is

The Grain and Feed Trade Association

9 Lincoln's Inn Fields | London | WC2A 3BP | United Kingdom |

T: +44 (0) 20 7814 9666 | F: +44 (0) 20 7814 8383 | E: post@gafta.com | W: gafta.com

known only to Gafta and the two parties concerned. This enables the vital trade in Agricultural Commodities which is key to global Food Security to continue, without rumours or knowledge of potential trade disputes, to affect the willingness of commercial parties to contract. A statutory duty of disclosure would fundamentally alter the confidentiality of our arbitral proceedings, and potentially create a situation where the number of arbitral nominations required (on annual basis, let alone an extended period) would greatly exceed the numbers of arbitrators available, effectively grinding the whole system to a halt.

Both the International Bar Association guidelines on ‘Conflicts of Interest in International Arbitration’ and the Supreme Court (2020) recognised the necessity of treating commodity and other specialist arbitral bodies, in a different way. **Therefore, we ask that should a statutory duty of disclosure be recommended, then an explicit exemption is made these bodies.**

Discrimination:

We agree with the Law Commission “*that arbitration benefits when free from prejudice*”. As such, we support their proposals to increase diversity in the appointment of arbitrators and to resist challenges to arbitral appointments on discriminatory grounds. We also believe it is good practice for Arbitral institutions to develop their own codes of practice in this regard. Gafta, for example, does not appoint Arbitrators over the age of 75 to ensure that all its arbitrators are still active within the Grain Trade, and are up-to-date with current trade knowledge and practice, to maintain the strong commercial focus which is the hallmark of Gafta arbitration. We believe that this would be considered acceptable under the Law Commission’s proposal:

“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. Consultation question 7”

We note that a Private Members bill seeking to apply the 2010 Equality Act to Arbitration did not succeed and the Law Commission also notes that

“the Supreme Court decision in Hashwani v Jivraj has received criticism from some commentators, but it has been welcomed by others. There is no consensus that the decision itself should be reversed. Indeed, the conclusion that an arbitrator is not an employee seems sound.”

However, in the Consultation Summary paper, the Law Commission also goes on to say:

“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.”

We disagree with this view. We are concerned that if the Equality Act 2010 did apply to Arbitration, it risks Arbitrators then being regarded as ‘workers’ under the law. This could have the unwelcome consequence of changing the employment and tax status of Arbitrators and undermining the independence of Arbitral Institutions through an inability to work at ‘arms-length’ with self-employed Arbitrators.

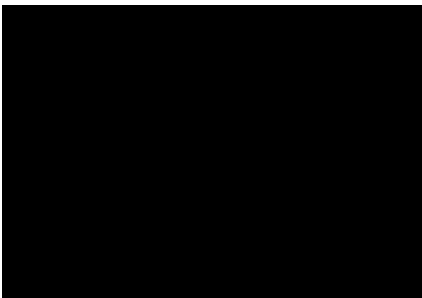
We agree with the proposal of the Law Commission to extend the immunity of arbitrators who have acted in ‘good faith’ in situations where they resign or where there is an application to the Courts to remove an arbitrator, which impugns them. The Law Commission notes that Professional Indemnity insurance may not cover an arbitrator in either situation.

Gafta would like to note that the war in Ukraine has (amongst other things) given rise to array of new sanctions being imposed by the UK, EU, US and UN. We are certainly aware of situations where an arbitrator may wish to decline or resign from an appointment because they are concerned that a party to the arbitration is, or may become, subject to international sanctions, and that that could give rise to potential personal liability to the arbitrator. In addition, many Professional Indemnity insurance policies are now specifically excluding *any* claims that arise from exposure to Russia, Ukraine and other sanctioned countries. This may therefore, increase the risk noted by the Law Commission :

“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.” Therefore we strongly support the proposal to extend the immunity of Arbitrators.

We hope these comments are helpful and look forward to hearing from you.

Yours faithfully



Signatures of FCA:

GPC



The Sugar Association of London, and The Refined Sugar Association



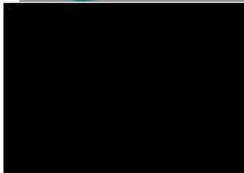
THE SUGAR
ASSOCIATION
OF LONDON



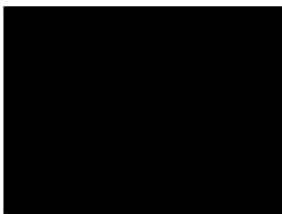
THE REFINED
SUGAR
ASSOCIATION



FoSFA International



The Rubber Trade Association of Europe

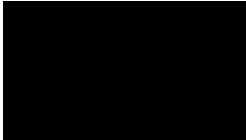




Federation of Cocoa Commerce



**FEDERATION OF
COCOA COMMERCE**



Response to the Law Commission's
consultation paper containing provisional
law reform proposals for the Arbitration
Act 1996

December 2022

1. Introduction

- 1.1 Fieldfisher is a European law firm with market-leading practices in key sectors including energy and natural resources, technology, financial services and life sciences.
- 1.2 Our network spans over 1,500 people across 25 offices. We are based in Belgium, China, France, Germany, Italy, Luxembourg, the Netherlands, Ireland, Spain, the UK and the US.
- 1.3 Fieldfisher's International Arbitration Group ("**IAG**") is a market leading team that consists of over 25 partners and 80 fee earners across Europe and beyond.
- 1.4 Fieldfisher's arbitration team is ranked for commercial and investor-state arbitration by the UK's leading directories, The Legal 500 and Chambers and Partners. This year, we have been recognised once again in the Global Arbitration Review's top 100, which lists the most respected international arbitration practices in the world. Our inclusion in these publications is based on detailed research verifying the reputation, experience and amount of work undertaken by each firm.
- 1.5 Our IAG is a joined up European team and collectively, the members of our arbitration team are qualified to practice law in more than 17 jurisdictions, including the UK, France, Belgium, Germany, Turkey, Spain, Italy, Ireland, India, Netherlands, Luxembourg, US, Russia, Armenia, Ukraine, Uzbekistan, USA and the United Arab Emirates.
- 1.6 Members of our international arbitration team are recognised as global leaders in their fields and remain in leadership positions with various arbitral institutions and organisations. These include: Member of UNCITRAL, Working Committee for Belgium, Member of the ICC Court of Greece, alternate membership of the International Court of Arbitration, the peer review editorial board for ICSID Review, faculty of the HKIAC Tribunal Secretary Accreditation Programme, the Global Advisory Board for ICDR Young & International, the ICCA Publications Committee, CIArb Committee member (Singapore Branch), RCAN, and the Oil & Gas Arbitration Group (OGAC).
- 1.7 Our International arbitration work involves significant cross-office and cross-firm work driven by increased collaboration across jurisdictions. Fieldfisher has particular strength and depth across our key jurisdictions in investor-state, commercial, energy, commodities, tech, WIPO and other types of arbitration.
- 1.8 We are instructed by states for commercial international arbitration work. Our institutional clients in the Banking, Commodities and Oil and Gas sectors (in particular) also continue to provide us with a regular stream of significant disputes.
- 1.9 Should the Law Commission wish to explore any part of our responses further then we are happy to assist further where we can.

2. General Core Response Themes

- 2.1 Fieldfisher agrees with the indications within the Consultation Paper, that the Arbitration Act 1996 (the "**Act**") is a successful piece of legislation. The Act codified ad hoc legislative development, and is an effective operating guide to arbitrations with a seat in England.
- 2.2 We also agree that the arbitration landscape has developed significantly over the last 25 years, and that the Commission's review of the Act is timely. There are certain areas within the substantive field of arbitration that would benefit from legislative review, for example independence and impartiality of arbitrators, and summary disposal of arbitral proceedings. Fieldfisher's comments in response to the consultation are detailed below.

Responses to Consultation

Issue 1: Confidentiality

Summary: *In our view, it would not be practical for confidentiality in arbitral proceedings to be stipulated in the Act. As the Law Commission has identified, confidentiality in arbitral proceedings is determined on a case by case basis, and is informed by (inter alia) the arbitration agreement, requirements of the parties and governing rules. The principle of confidentiality is subject to exceptions. That being the case, it is our view that any question of confidentiality should be decided on a case-by-case basis, by the tribunal / sole arbitrator, or court if necessary, and should not be set out in a legislative framework.*

In our experience, confidentiality is a key factor for clients entering into arbitration agreements. Clients are often under the mistaken impression that bringing a dispute under the ambit of arbitration provides 'blanket' confidentiality over both the fact and substance of a dispute. This assumption may be a result of the over emphasis on confidentiality as a distinctive advantage of arbitration over litigation.

The reality is that confidentiality in arbitration is nuanced. It can be stipulated within the arbitration agreement, incorporated by the provisions of governing rules, or it can be implied by law. Further, as the Law Commission notes, there are exceptions to confidentiality.¹ Although our view is that more should be done to displace the assumption of confidentiality in arbitral proceedings, it would not be necessary nor effective for the Act to legislate on this matter.

Our reasoning takes into account the following considerations:

1. Case law has demonstrated that identified exceptions to confidentiality are not exhaustive. Further, applying those exceptions may require a degree of discretion. That being the case, it would be impractical to codify the scope of confidentiality, and any exceptions, within legislation. Tribunals should retain flexibility in analysing and ruling on confidentiality on a case by case basis.
2. Allowing for confidentiality in arbitral proceedings is consistent with the principle of access to justice. Transparency is a key feature of dispute resolution. Whilst the need for transparency in arbitration is finely balanced against the imperative for confidentiality of, for example, sensitive commercial information that may be the subject of arbitration, it is becoming an increasingly common feature of arbitration. This can be seen in investor-state arbitration,² and the increased number of Awards that are being published in commercial arbitrations.
3. In view of the increased use of third party funding in arbitration, transparency is even more important to the fair disposal of proceedings, to allow arbitral institutions and Tribunal members to ensure that they are not conflicted. It is also important to avoid challenges to arbitrators based on conflicts of interests. A number of institutional rules, including ICC, SIAC and HKIA allow for tribunals to order disclosure of any third party funding requirements. Although leading commercial funders have adopted the Code of Conduct for Litigation Funders in the UK, this code is not intended to apply to arbitration proceedings. As such, there is no statutory regulation of third party funding in arbitration. Whilst we do not suggest that the Act regulates the disclosure of third party funding in arbitration, our view is that it is preferable not to include provisions on confidentiality within the Act that may impede any disclosure of third party funding in arbitration.

¹ *Emmott v Michael Wilson & Partners Ltd* [2008] 2 All ER (Comm) 193; endorsed in *Halliburton v Chubb* [2020] UKSC 48

² UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration

Issue 2: Arbitrator independence and disclosure

Summary: *We agree that impartiality should be the primary consideration when assessing the suitability of an arbitrator's appointment. Whilst independence is important, it is hard to achieve, especially in certain fields of arbitration. We agree that there should be disclosure of circumstances which may justifiably give rise to doubts as to arbitrators' impartiality.*

If we understand 'independence' to mean that an arbitrator has no connection to the arbitrating parties, we agree that this is difficult to achieve. The international arbitration community is a relatively small one, and repeat appointments of arbitrators is common. This is especially the case in certain fields where there is a relatively small pool of industry-focused arbitrators. For the purposes of reviewing the Act, we agree that it is difficult to achieve complete independence.

We also agree that independence alone is not determinative of whether an arbitrator may deal with proceedings fairly. It is possible for an arbitrator to have a connection to a party (i.e. not be independent), and yet remain impartial.

The Law Commission appreciates the impact of *Halliburton Co v Chubb Bermuda Insurance Ltd*³ on the test for justifiable doubt as to impartiality: whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased. The Judgment also ruled on disclosure of connections which may impact that impartiality: if there are circumstances known to the arbitrator which might reasonably give rise to doubts as to their impartiality, these should be disclosed. The Court found that disclosure in itself is a demonstration of impartiality, and at a premium in arbitrations that are private and confidential. At a minimum, that disclosure should include the fact that the arbitrator has been appointed by the same party in a separate arbitration, and whether the arbitrations are in any connected.

For these reasons, we agree with the Law Commission's proposal to codify a duty of disclosure within the Act. We agree that the duty imposed within the Act should be a general duty, allowing room for institutional rules to regulate the detailed requirements of disclosure, together with professional rules such as the International Bar Association's Guidelines on Conflicts of Interest in International Arbitration.

Our view is that the Act should mirror the test in the *Haliburton* Judgment, and impose a continuing duty to disclose any circumstances which *might reasonably give rise* to justifiable doubts as to an arbitrator's impartiality.

The Law Commission asks for views on whether the Act should specify the state of the arbitrator's knowledge in making a disclosure; it queries whether the test should be based on actual knowledge, or on what the arbitrator ought to know after making reasonable enquiries. Although the *Haliburton* Judgment suggested that the state of knowledge might best be left for the Courts to develop by way of common law, our view is that the Law Commission should take the opportunity, in this review of the Act, to impose a duty of disclosure in accordance with what is considered best practice. A duty to make reasonable inquiries is stipulated by the International Bar Association,⁴ and is expected of professionals. We therefore suggest that arbitrators should be required to disclose what they ought to know after making reasonable inquiries.

³ [2021] AC 1083

⁴ Guidelines on Conflicts of Interest in International Arbitration, Standard 7(d)

Issue 3: Discrimination

Summary: *We agree that diversity within the arbitration community is a continuing challenge. We agree that the Act should protect arbitrators from challenge on the basis of protected characteristics. However, we query whether the proposed wording will be effective in promoting diversity within the field.*

The Law Commission refers to conflicting standards imposed by the Court of Appeal and Supreme Court, respectively, in *Hashwani v Jivraj*.⁵ The Court of Appeal suggested that an arbitration agreement that required an arbitrator to have a protected characteristic should be enforceable only if it is necessary to the effective resolution of the dispute. The Supreme Court held that such an arbitration agreement will be enforceable if the requirement to have a protected characteristic can be more broadly justified.

The wording proposed by the Law Commission bridges the gap between the respective Courts' rulings, by providing the following:

(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.** (Emphasis added).*

Although this wording appears to find a compromise between the approaches adopted by the Courts, we query whether it will result in a myriad of challenges that require judicial intervention. Taking the phrase "means of achieving a legitimate aim." In the context of arbitrating a dispute, it would seem that the legitimate aim must be restricted to achieving a fair resolution of a dispute between the parties. It is not immediately obvious what other legitimate aim can be intended.

Similarly, the meaning of "proportionate" is often highly contentious.

We agree that the prohibition of discrimination is a first step to promoting diversity within arbitration, and should be codified in the Act. On the other hand, we recognise that one of the attractions of arbitration is that a tribunal / sole arbitrator has expertise relevant to the subject in dispute. This expertise not be restricted in the sense of a professional qualification, or experience in a certain field. It may be, as was the case in *Hashwani*, a cultural affinity. Provided that expertise or experience is *justifiable* in the context of the dispute, the parties should be at liberty to agree to appoint an arbitrator who has a protected characteristic.

Our view is therefore that the approach adopted by the Supreme Court in *Hashwani* is preferable in codifying the prohibition of discrimination in the Act.

⁵ [2011] UKSC 40, [2011] 1 WLR 1872

Issue 4: Immunity of Arbitrators

Summary: *Arbitrators should incur liability for resignation only if the resignation is proved to be unreasonable. We also agree that it is logical that arbitrator immunity should extend to the costs of court proceedings arising out of the arbitration, such as applications to remove an arbitrator.*

Arbitrators should recognise that the duties imposed on them are to be carefully considered before accepting an appointment. If a conflict of interest, lack of necessary availability, inability to perform his / her duties or any other ground for resignation is foreseeable, or ought to be foreseeable at the time of accepting an appointment, then the arbitrator should refuse the appointment. If he / she accepts and resigns on one of these foreseeable grounds during the proceedings, it is likely that the resignation will cause prejudice to the parties. In this case, the arbitrator should be liable for costs.

Conversely, in circumstances where resignation is the correct course of action, and in the best interests of justice and the parties, an arbitrator should not be discouraged from resigning for fear of incurring a costs liability. Including a provision in the Act that an arbitrator will not incur costs if his or her resignation was reasonable, will assist in promoting the importance of impartiality and transparency in arbitration.

Issue 5: Summary disposal

Summary: *we consider this proposal to be one of the most significant proposals in the Consultation Paper. The option to summarily dispose of an arbitration claim or defence may be crucial to achieving a fair resolution of a dispute, whilst avoiding unnecessary delay or expense in doing so.*

Whilst some arbitration institutions provide for an equivalent summary process in their rules⁶, it would be an innovative step for summary disposal to be provided for in the Act.

By the procedure envisaged by the Act, both parties will have a reasonable opportunity to present their case for, and objection to, summary disposal. This preserves the procedural due process stipulated under section 33(1)(a) of the Act. At the same time, it provides a solution where a tribunal / arbitrator may be inclined to a party's request for summary disposal of a claim or defence, but avoids doing so to avoid a challenge on the grounds of procedural irregularity under section 68 of the Act.

The threshold proposed by the Law Commission mirrors the test for summary judgment in England and Wales: a claim, defence or issue in dispute 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. We appreciate the Law Commission's consideration of the standard "manifestly without merit," which is adopted in several institutional arbitration rules. However, we are of the view that the test stipulated under English law is well tested and closely defined; it will provide tribunals / arbitrators with a wealth of case-law to assist in decisions, and provides for consistency and certainty in England-seated arbitrations. The same cannot be said for the test "manifestly without merit" which is a fairly novel concept in English law.

⁶ Including the LCIA, ICC and ICSID

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?

Recent experience by members of Fieldfisher's IAG has flagged a question relating to post-Brexit amendment to Civil Procedure Rules 6.33(2B)(b) ("the **CPR Rule**").

The question arose in the context of section 68 of the Act (challenging an Award on the ground of serious irregularity). However, the issue may arise in relation to any provision where a party is required to "apply to the Court."

Post-Brexit, the Law Commission will be aware that permission to serve outside the UK Courts' jurisdiction is required in all but the few exceptions stated in the amended Civil Procedure Rule 6.33. The CPR Rule relates to a particular exception and states:

"(2B) The claimant may serve the claim form on a defendant outside the United Kingdom where, for each claim made against the defendant to be served and included in the claim form...

(b) a contract contains a term to the effect that the court shall have jurisdiction to determine that claim."

If a party based outside the UK Courts' jurisdiction enters into an arbitration agreement, which provides for the procedural law of the arbitration to be the Law of England and Wales, is the requirement under the CPR Rule satisfied? Does the arbitration agreement qualify as "a contract contain[ing] a term to the effect that the court shall have jurisdiction to determine that [arbitration] claim?"

From our research and consultations with King's Counsel on this point, there has been no judicial ruling to provide clarity. However, our firm view is that an arbitration agreement stipulating that the law of England and Wales applies to all matters relating to an arbitration, does meet the requirement under the CPR Rule, and the Court's permission should not be required to serve an arbitration claim form outside the jurisdiction.

The 11th Edition of the Chancery Guide supports this view by stating "In any given case, it may be that the arbitration claim form can be served out of the United Kingdom without permission under rule 6.33(2B)(b)..."⁷

We query whether a review of the Act is an opportunity to clarify whether an arbitration agreement qualifies as a contract containing a term to the effect that the court shall have jurisdiction to determine a claim before the English Courts.

**Fieldfisher LLP
December 2022**

⁷ Appendix 9 Paragraph 11 (Arbitration matters)

Louis Flannery KC (by email)

My response is limited to section 67, but I support ALL of the Law Commissions proposals for amending the Act (including under s.67).

As to s.67, on any view, it MUST be amended to cure the following two lacunae:

Awards on the merits that are successfully challenged under s.67 are only susceptible to a declaration of non-effect (s.67(1)(b)), whereas awards on jurisdiction have the panoply of remedies under s.67(3): confirmation, variation, setting aside. Why? No explanation was given in the DAC Report. This point was first picked up as long ago as 2003, by (who else?) Rix LJ in *Husmann (Europe) Ltd v Pharaon* [2003] 1 CLC 1066 at [81]. There is absolutely no reason for the different treatment. (In *Republic of Kazakhstan v Istil Group* [2006] 2 Lloyd's Rep 270, David Steel J appears to have varied an award in relation to costs – see his later judgment reported at [2008] 1 Lloyd's Rep 382 at [25].)

Unlike in relation to s.68, there is no provision for remission of awards back to tribunals as a remedy, especially in cases where the tribunal's NEGATIVE ruling on jurisdiction is successfully challenged, as happened in *GPF GP Sarl v Republic of Poland* [2018] 1 Lloyd's Rep 410 (Bryan J). See also *Union of India v Reliance Industries* [2020] EWHC 263 (Comm) at [81], where it was common ground that an award successfully challenged under s67 could be remitted to the tribunal). In both cases, remission was ordered, but it is not a remedy available under s.67(3) – and again no explanation given. It's an obvious lacuna.

But the bigger question – do we limit the scope of appeals? Obviously, the nay-sayers are concerned that ANY jurisdictional issue should be the final preserve of the Court, which should have an unfettered discretion to admit new material that was not before the Tribunal. But is that really the case? And is

it really a satisfactory policy? It is not, in my view. And to those that say it puts s.67 out of kilter with s.103 – based on *Dallah v Pakistan*. *Dallah* is quite obviously wrong and a bad decision – it is not for an enforcing court to consider the jurisdiction of a tribunal when the same issue is before the courts of the seat (it will be recalled that the Paris Cour d'appel reached the polar opposite conclusion to the Supreme Court, only three months later). It was embarrassing at the time and it is embarrassing now. But it is a different issue...Far worse is the fact that with a complete rehearing with oral evidence before the Court, the approach puts the UK (including Scotland, which adopts the same approach) out of kilter with most of the world's jurisdictions.

And those that say that other countries have a rehearing approach? Some say that France adopts a rehearing approach. Not quite: never in the history of French arbitral jurisprudence has a challenge on jurisdiction involved fresh hearing of oral evidence before the court. It is all on the papers and all by submissions. In France a hearing lasting longer than a day is long. So while the court "reviews" facts afresh, it rarely receives fresh evidence.

In Austria, similarly – there is very little chance to put in fresh oral evidence, and findings of fact by the tribunal are not challengeable, even if made in a jurisdictional context. In Switzerland, there is also very little opportunity to put in fresh evidence, and the Award is given far greater deference.

Even Singapore, which has adopted the "rehearing" approach, has ruled judicially that a modified *Ladd v Marshall* test applies (*Govt of the Lao People's Democratic Republic v Sanum Investments* [2020] SGHC 15) quite obviously if you want to put in evidence that was not before the Tribunal, you must explain why. There is no such rule here – just everyone blindly following from where Vernon Flynn QC (as he was) persuaded Rix J (as he was) to admit new evidence in *Azov v Baltic*. The tide has turned only slightly and only more recently in *Central Trading & Exports Ltd v Fioralba Shipping Co*, the *Kalisti* [2014] EWHC 2397 (Comm), and very recently (in November 2022) by Males LJ in *DHL Project and*

Chartering Ltd v Gemini Ocean Shipping Co Ltd [2022] EWCA Civ 1555: the Courts have started making ad hoc rulings on applications for disclosure, because they see the unsatisfactory nature of the rehearing approach in every s.67 challenge (see in particular DHL at [16]).

Of those to whom I have spoken about the rehearing issue, most say they want to preserve the position in cases where they say – "my client did not sign up to the arbitration agreement. So I want my right to challenge that in front of the tribunal, and yes I want my right to challenge the tribunal if they get it wrong."

Although this sort of case might perhaps be considered the strongest candidate for a rehearing approach (and I don't agree it is), most jurisdictional challenges involve issues of the scope of the arbitration agreement. [REDACTED]

[REDACTED]

If (and it's a big IF) that route were followed, how could it be legislated? The problem lies with the definition of jurisdiction in the Act. The 1996 Act is the only statute on the planet (other than Scotland) that actually defines – the cases say exhaustively – "substantive [what does that word add?] jurisdiction". (Most of the rest of the world simply leaves it undefined, or refers to e.g. validity of the arbitration agreement only.

Section 30(1) defines it in terms of:

Validity of the arbitration agreement.

Whether the tribunal is properly constituted.

What matters have been submitted to arbitration in accordance with the arbitration agreement.

Leaving aside the silly pigeon-holing that occasionally takes place (to squeeze square pegs into round holes), it seems that the "I was not a signatory" case must fall within (a). So one possible solution is to hold that where the challenge falls into (a), there is a presumption – rebuttable - that the appeal takes place by way of a re-hearing, but that in all other cases it takes place as a review. In both cases, there should be a rule – better in the statute I think – that limits new evidence, i.e.

"Section 67(4): In any challenge brought under this section:

there shall be a presumption that the court dealing with the matter may, if the issue of substantive jurisdiction is, or includes, any question as to the validity of the arbitration agreement, deal with the challenge by way of a rehearing;

in any other case the court shall deal with the challenge by way of a review of the tribunal's award;

no evidence or documents adduced by a party may be considered by the court unless and to the extent it is shown that they could not have been produced in the arbitral proceedings. "

I have not offered drafting to cover the two lacunae identified at the start of this submission, but would be happy to do so.

**RESPONSE ON BEHALF OF THE BUSINESS & PROPERTY COURTS TO
LAW COMMISSION CONSULTATION PAPER “REVIEW OF THE
ARBITRATION ACT 1996”**

1. Introduction.....	1
2. Law governing, and separability of, arbitration agreements.....	2
3. Jurisdiction challenges to arbitration awards.....	7
4. Interim measures and section 44.....	11
5. Summary disposal.....	12
6. Arbitrator immunity.....	13
7. Discrimination.....	14
8. Other matters.....	14

1. Introduction

1. This response is sent on behalf of the judges of the Business & Property Courts (“*B&PC*”) in London, comprising the High Court judges sitting in the Commercial & Admiralty Court, Chancery Division and Technology and Construction Court in London. Arbitration matters that reach the courts of England & Wales are almost invariably dealt with by B&PC judges at first instance.
2. We take the opportunity to congratulate the Law Commission on a thorough and well-written Consultation Paper, and welcome the opportunity to contribute our comments.
3. As the Commission sets out in §§ 1.1-1.3 of the Consultation Paper, arbitration is a major and still growing area of activity, making a significant contribution to the economy, and London is the most popular seat for international arbitration. Arbitrations seated in England & Wales, and the supporting and supervisory role which the B&PC provide in relation to them, are also a

keystone of the English legal system's prestige internationally. We echo the Commission's wish to seek to ensure that London remains the world's first choice for international commercial arbitration, and that our arbitration law remains 'best in class', providing for the arbitration of disputes in a way that is transparent, efficient and fair, and which meets the parties' expectations and intentions. The views we set out below are expressed with those considerations in mind. There are many proposals in the Consultation Paper with which we agree. The Commission has set out the case for those clearly and persuasively, and so we do not dwell on them. Instead we highlight certain discrete but important areas where we respectfully invite the Commission to modify the approach currently proposed.

2. Law governing, and separability of, arbitration agreements

(CP §§ 10.3-10.10 and 11.8-11.12; Consultation Questions 28 and 37)

4. We begin with these topics because they seem to us to be questions of importance that do not currently form part of the positive proposals set out in the Consultation Paper ("*CP*").
5. A convenient starting point is the example given in CP § 10.5 of an arbitration about whether a contract is void for illegality, and where the arbitrators conclude that it is. If the arbitration clause is not separable from the contract as a whole, then the award is a nullity. To state the obvious, that outcome may follow enormous expenditure of time and money. Alternatively, a party anticipating the problem may instead seek to resort to the court, rather than arbitration, at the outset: a course which may itself lead to controversy and litigation. Either way, the parties' reasonable expectation of being able to resolve their disputes by arbitration will have been frustrated. There is perhaps an element of understatement in the Commission's observation that separability is a useful principle.
6. If the law governing the arbitration agreement does not recognise separability, then the above consequence cannot be avoided by applying s.7 of the Act. Thus significant potential problems arise whenever (a) the dispute includes an allegation which, if successful, would render void or voidable an otherwise

validly formed main contract, and (b) the law governing the main contract does not recognise separability. (We leave aside the very rare cases where there is a specific express choice of law for the arbitration agreement itself.)

7. This is far from being a theoretical problem. It is exceedingly common for arbitrations to involve allegations of bribery, misrepresentation or repudiatory breach which go to the existence of the main contract. Equally, the case law and our experience show that London-seated arbitrations often concern contracts governed by a foreign law. Indeed, an important role for London arbitration is to provide a dispute resolution process regarded as neutral and reliable even where the main contract is governed by a foreign law (by choice, or because it has to be, e.g. in contracts linked to property abroad, or where as in India nationals may be unable to select a governing law other than their own).
8. However, such foreign laws may well not apply separability. The Supreme Court of Pakistan, for example, recently declared that separability would not apply, in the context of a dispute where bribery was alleged (see *Province of Balochistan v Tethyan Copper Company* [2021] EWHC 1884 (Comm) § 311). (*Balochistan* is also an example of a case where the complications arising from *Enka v Chubb* [2020] UKSC 38 were such that the issue had to be deferred to a later stage of the proceedings: see § 31.) In *National Iranian Oil Company v Crescent Petroleum* [2016] EWHC 510 (Comm) one of the issues in dispute was whether Iranian law applied separability (see § 14).
9. We believe the current position, as well as creating the problems identified above, also puts us out of step with other leading arbitration jurisdictions. For example, Switzerland has a clear separability rule applied to Swiss-seated arbitrations (Swiss Private International Law, article 178(3)) as does France (*autonomie de la clause d'arbitrage*). The same is true in Singapore, where Article 16(1) of the UNCITRAL Model Law is incorporated via the International Arbitration Act 1994 (as amended).
10. A change to make separability under s.7 of the Act mandatory in UK-seated arbitrations (unless the parties specifically and explicitly agreed otherwise)

might alleviate these problems but would leave related problems unresolved. These arise from the *Enka* presumption that the law governing the main contract governs the arbitration agreement.

11. First, applying the main contract law to determine arbitrability removes the parties' ability to secure, by London arbitration, a binding neutral decision on a dispute which (as they knew) would or might be regarded as non-arbitrable under the main contract law (as in *Tamil Nadu Electricity Board v ST-CMS Electric Company* [2007] EWHC 1713 (Comm)). We doubt that parties who agree to arbitrate in London nonetheless intend to import into their arbitration agreement limitations from the main contract's governing law as to what disputes can be arbitrated. Indeed the very fact that one jurisdiction attaches a particular strategic importance to disputes concerning particular industry sectors, such that they are not regarded by the law of that country as being capable of being resolved in arbitration, might well be a reason why the parties wish to submit disputes to arbitration in a neutral seat. We would expect that parties who agree to arbitration in London, pursuant to an arbitration clause of (typically) broad and unrestricted scope, wish thereby to be able to resolve all disputes capable under English law of being arbitrated in London. If that is not the parties' wish, then they would remain free, under the approach we propose below, to choose to have the arbitration agreement governed by the law governing the main contract. Insofar as concerns might arise about consistency with any public policy principles under the main contract law, (a) it is in any event already open to the parties to make an express agreement that the arbitration agreement shall be governed by the law of the seat; (b) the arbitrators will, of course, remain obliged to apply the rules of the main contract law (whether relating to bribery or any other issue) to the substance of the dispute and (c) under the validation principle discussed in *Enka*, if the arbitration agreement would be void under the main contract law, that would provide a basis for determining that English law is the applicable law in any event.
12. Secondly, applying the main contract law to determine the scope of the arbitration agreement removes the certainty hitherto provided by the 'one stop' adjudication approach in *Fiona Trust v Privalov* [2007] UKHL 40. The contrast

here between the current position in England and France, so far as concerns which law to apply, has recently been highlighted to the market by well-known current dispute between Kabab-Ji and Kout Food. The Cour de Cassation on 28 September 2022 held that where parties choose arbitration seated in Paris, French arbitration law governs the validity, effectiveness, transfer or extension of the arbitration clause; and on that basis upheld the arbitration award (Decision no. 20-20.260). That followed the UK Supreme Court, applying *Enka*, having reached the opposite conclusion (*Kabab-Ji SAL (Lebanon) v. Kout Food Group (Kuwait)* [2021] UKSC 48).

13. It is also true that some widely used institutional rules make provision for the law of the seat to govern the arbitration agreement (CP § 11.9, referring to the LCIA and LMAA rules). Those rules are valuable when they apply, and are a useful pointer to the likely real intentions (and expectations) of parties to arbitration agreements in general, but are of far from universal application (*Enka* itself and the Kout Foods dispute being two illustrations). Non-UK institutions such as the ICC seem unlikely to alter their rules to address the problems that arise here. Equally, although in principle it is open to parties to avoid these problems by expressly agreeing which law should (specifically) govern the arbitration agreement, such agreements are rare. Commercial parties, particularly those located abroad who wish to have their disputes arbitrated in London, may well be oblivious to the risk of their agreement to arbitrate being ineffective in the ways outlined above.
14. We consider that the best solution to these problems would be a presumption that an agreement to arbitrate in London will be governed by English law, unless the parties have expressly and specifically agreed that a different law (whether the law of the main contract or some other law) shall govern it. The position would then be similar to that under Scottish law (as noted in CP § 11.11) while avoiding any element of circularity arising from reference back to the parties' agreement. Such a provision would remove the problems we discuss in this section, and have the further, practical, advantage of reducing the scope for dispute and need for foreign law evidence on applications under ss. 9, 44, 67 and 72. However, it would do so in a way which was consistent with the

principle of party autonomy which underpins English arbitration law, by allowing the parties to choose to apply another law if they wished to do so. This approach does not involve any implicit assertion of the desirability or superiority of English arbitration law. Rather, it aims as a matter of policy to give effect to the parties' wish, at the broadest level, to resolve disputes by an arbitration process leading to a valid, binding award. In addition, unless the parties have made a specific contrary choice, there is an inherent logic in applying to an arbitration agreement the law of the place where the parties have chosen to arbitrate, thus treating the dispute resolution provisions of their contract as a single, coherent unit collateral to the main contract provisions.

15. Finally, the Commission is correct to say this is a matter of conflict of laws. However, it is a rule pertaining the very specific instance of an arbitration agreement, under which (as Lord Mustill noted when the 1996 Act was formulated) the parties have at least presumptively opted into a framework of principles and rules set out in the Act. The Commission notes the cautious approach to conflicts issues taken by the Departmental Advisory Committee in 1996 (DAC report, 1997, p.7). The 1996 Act did, as the DAC noted, address issue of conflicts of law to a degree, but the Committee was disinclined to go further because the principles were still being developed in the case law. 25 years later, it can now be seen that, in the particular respect we discuss here, further provision is necessary. For completeness, we do not consider that our proposed change would involve any inconsistency with Article V(1)(a) of the New York Convention, under which recognition or enforcement of an arbitration award can be refused upon proof that 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*". The presumption will simply mean that the parties will not be assumed (artificially, in our view) to have subjected the arbitration agreement to the main contract law purely by virtue of their choice of that law. If anything, the importance which Article V(1)(a) attaches to the seat as a potential identifier of the applicable law of the arbitration agreement supports the change we propose.

3. Jurisdiction challenges to arbitration awards

(CP §§ 8.22-8.57; Consultation Questions 22-24)

16. We do not favour a provision to the effect that a challenge to arbitrators' substantive jurisdiction, where the challenging party has participated in a jurisdiction challenge in the course of the arbitration, should be limited to a review of the tribunal's decision. That is because, briefly, (a) in general, we do not consider that a challenge by way of rehearing involves unfairness; (b) such cases as may arise of opportunism, as well as practical problems, can be alleviated by case management methods whereby the court may (for example) in appropriate cases avoid a full repeat of any relevant oral evidence or determine a weak application on paper; and (c) a 'review only' provision is wrong in principle and will produce greater unfairness than the perceived unfairness which it would be designed to address.
17. By way of context, the Commission notes the very small numbers of jurisdiction challenges made, probably amounting to fewer than 0.5% of English-seated arbitrations each year. Any problem is on a small scale, suggesting that very good reasons should be identified in order to justify fundamental change.
18. Turning to principle, it follows from the consent principle that a party should not be bound by findings of fact made by an arbitral tribunal to which he/she has not agreed to submit the dispute. Findings of primary fact may be highly relevant to issues of jurisdiction, for example where the jurisdictional question is whether the alleged contract has been formed at all (as, for example, in a case about offer and acceptance, or lack of intent to form legal relations). Findings as to the effect of a (non-English) applicable law may also be very significant. Further, arbitral tribunals may well adopt a different approach to courts as to the admissibility of evidence or the process by which it is tested. While there can be no objection to this course in those cases where the parties have agreed to arbitrate their dispute, the contrast between the evidential and procedural rules in arbitration and court would become much more significant if the s.67 challenge process were limited to a review.

19. To deem a party who has challenged jurisdiction before the tribunal thereby to have elected to submit to it the question of jurisdiction will generally be unfair. Questions of jurisdiction frequently overlap heavily with the substantive merits, a straightforward example being a case where the one of several matters in dispute is whether the alleged contract was made at all. It is usually convenient for tribunals to determine such questions in a single process, leading to a single hearing, as part and parcel of resolving the substantive issues of which they form part.
20. If any challenge were limited to a review, then a party with an arguable case both that no contract was made and, in any event, that no breach occurred would then have the invidious choice of (a) non-participation in the arbitration, thereby abandoning their arguments on the merits and staking everything on the jurisdiction issue, or (b) participating in the arbitration in the knowledge that the court might be unable to interfere with factual findings by the tribunal, even if the court would (on a rehearing) have concluded that the tribunal lacked jurisdiction. To put a party to such an election would in our view be unfair, and may infringe their Article 6 right (on the basis that, in truth, the party never waived, in favour of arbitration, its right to court determination).
21. We do not understand the suggestion in CP § 8.42 that a full right to challenge jurisdiction entails a ‘head I win, tails it does not count’ approach. The present law allows a section 67 challenge whether the tribunal has held that it has jurisdiction or that it lacks jurisdiction. There is no question of the tribunal’s decision being binding on one outcome but not the other.
22. The possibility of a challenge under s.32 or s.72 does not meet the point. S.32 (at least as currently framed) is unavailable unless the other parties or the tribunal itself agree. In our experience, court hearings under s.32 are extremely rare. S.72 is unavailable unless the party has refrained from participation in the arbitration, leading back to the unfair choice referred to in § 19 above. We would not favour creating a right for a party to apply (without the consent of the other party or tribunal) to the court under s.32 for a ruling on jurisdiction before the arbitrators consider the issue. We believe that would be seen as promoting greater court intervention in arbitrations; and, in practice, the resulting delay in

the substance of the case moving forward would tend to reduce the prospects of settlement and play into the hands of parties seeking to impede the whole process.

23. We recognise there are cases where parties may seek to take advantage of a second run at the evidence, particularly oral evidence. However:
- i) the point cuts both ways: a rehearing may (occasionally) provide either side with the chance to address problems in its case;
 - ii) any attempt to present oral evidence substantively different on rehearing from that adduced before the tribunal is unlikely to succeed: after all, any witnesses heard on a rehearing would be open to cross-examination on any significant discrepancies, and appropriate inferences may be drawn; and
 - iii) in any event, such problems can be addressed by case management methods. A rehearing need not automatically mean that the court will hear live evidence from all, or necessarily any, of the witnesses who appeared before the tribunal on the issue relevant to jurisdiction. The court may conclude, on analysis, that the witness evidence is of limited or no relevance, or that to the extent it is relevant, the court can safely rely on transcripts of the evidence given to the tribunal. (We understand, for example, that courts in Singapore undertaking a jurisdiction rehearing may have regard to transcripts rather than hearing live witnesses.) Evidence may be excluded if in all the circumstances it would be unfair to admit it (see, e.g., *Central Trading & Exports v Fioralba Shipping Company (The "Kalisti")* [2014] EWHC 2397 (Comm)). Summary judgment may be available, as CP § 8.21 notes. The court has powers to direct resolution of preliminary issues, security for costs, and payment into court of the amount of the award pending the outcome of a jurisdiction challenge.
24. We find it hard to see how the envisaged reform could be desirable in relation to English-seated arbitrations but not overseas awards being enforced under ss.101-103 (which might, after all, be made by the same arbitrators under the

same procedures). Further, limiting the court's power to review an English-seated tribunal's jurisdiction under s.67 may have the undesirable consequences of (a) making an overseas court less willing to stay a challenge before it, pending the English court's decision, pursuant to New York Convention Art VI, and (b) preventing the English court's decision from creating a binding issue estoppel in enforcement proceedings abroad. That in turn would cast London arbitration in an unfavourable light compared to other leading jurisdictions who continue to allow a rehearing as to jurisdiction, such as Singapore (see e.g. *PT First Media TBK v Astro Nusantara International* [2014] 1 SLR(R) 372 and *AKN v ALC* [2015] SGCA 18 § 112) and Hong Kong (*S CO v B CO* [2014] HKCU 1886).

25. More generally, we sense that the availability of an effective jurisdiction challenge is seen in the market as an important safeguard against wrongful assumption of jurisdiction by a tribunal, and hence part of the package of features of English arbitration law that makes it attractive to international parties.
26. We note that in investment treaty cases, the English court when asked to enforce an award will likely have to resolve the jurisdiction issue for itself anyway, in order to decide whether state immunity is disapplied by the arbitration agreement pursuant to s.9 of the State Immunity Act 1978.
27. For these reasons, we suggest that any reform in this area should be limited to clarification that in hearing a jurisdiction challenge the court can exercise case management powers of the kind mentioned above. It would be logical for the same to apply where jurisdiction is questioned pursuant to s.32 or s.103. The inclusion of an express statement in the Act about the court's powers in this respect would serve the useful purpose of making clear to potential challengers that abusive tactics are likely to be resisted, and emboldening courts to take a firm line where appropriate. The Act might, for example, usefully underline the court's powers to dispose of applications or issues summarily where a party has no realistic prospect of success; of controlling evidence (including deciding what evidence is needed to resolve issues and what form it should take, including the use of transcripts of evidence given to the tribunal); to require

security for costs or for the amount of the award in appropriate cases; and, more generally, to ensure that arbitration applications are dealt with justly and at proportionate cost in accordance with the CPR overriding objective.

28. Finally, we agree with the clarifications proposed in Consultations Questions 25 (court power to declare wholly or partly ineffective) and 26 (arbitrators' power to award costs having ruled that they lack jurisdiction).

4. Interim measures and section 44

(CP chapter 7; Consultation Questions 15-21)

29. We broadly support the measures discussed in this chapter.
30. In particular, we 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. We also agree that such third parties should have full appeal rights, since they have neither agreed to arbitrate nor participated in the arbitration (Consultation Question 17).
31. If any change is made to the relative scope of ss.43 and 44(2)(a) (Consultation Question 15), it would be desirable to make clear that the court can, under one provision or the other, order a witness to give evidence, remotely from a location in England & Wales, to a tribunal sitting elsewhere (cf *A v C* [2020] EWHC 258 (Comm), where the court at first instance considered itself to have such a power).
32. We agree that the Act should not apply generally to emergency arbitrators, and that the court should not administer a scheme of emergency arbitrators (Consultation Questions 18 and 19). On balance, we favour extending ss. 41 and 42 to emergency arbitrators, on the basis that there may be situations where it is appropriate for such an arbitrator to make a peremptory order and for the

court to be able to enforce it (Consultation Question 21). We are less persuaded of the benefit of extending s.44(4) to emergency arbitrators: the situation giving rise to their appointment is more likely to result in either (a) the emergency arbitrator wishing him/herself to make an order under s.41, enforced through the court, if necessary, via s.42, or (b) a need for urgent court under s.44(3) rather than s.44(4).

33. 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.

5. Summary disposal

(CP Chapter 6; Consultation Questions 11-14)

34. We believe that s.33(1)(b) already empowers arbitrators to dispose of claims and issues summarily, and question whether a new legal provision is necessary.
35. If an amendment were made, then the procedure to be adopted should be a matter for the arbitrators, subject to any relevant provisions in the arbitration agreement (including any institutional rules thereby incorporated) and, of course, the general s.33 duty. We agree that the threshold for success should then be addressed. However, we doubt whether incorporating the test applied in the English courts is necessarily appropriate for international arbitrations, and expressly incorporating it might suggest an assimilation of court and arbitration procedures which would be neither appropriate or welcome. We would suggest the use instead of perhaps more widely recognised language, such as “manifestly without merit” (reflecting wording used in, for example, Art. 41(5) of the ICSID Arbitration Rules, the ICC Practice Note, Art. 22.1(viii) of the LCIA rules and Art. 43.1 of the HKIAC Administered Arbitration Rules). In addition, we doubt that the “other compelling reason” limb of the English test will be useful in arbitrations, and it may lead to unnecessary disputes.

6. Arbitrator immunity

(CP Chapter 5; Consultation Questions 8-10)

36. We would not favour complete immunity for resignation. It appears to us that there may be cases where resignation can be seen to be clearly unreasonable (e.g. resignation in order to take up a more lucrative appointment, or a tactical resignation in order to favour the interests of an appointor). We would not oppose an amendment pursuant to which liability would be limited to cases in that category.
37. We do not agree that lack of merit in a challenge to the arbitrator's position necessarily makes resignation unreasonable in this sense, nor that *Halliburton* [2017] EWCA 137 (Comm) so decides. It must all depend on the facts. Circumstances may arise where resignation is reasonable even though a challenge would ultimately fail: see e.g. the circumstances in *C Ltd v D* [2020] EWHC 540 (Comm) §§ 42 and 64-68. At the same time, the risk of liability for a clearly unreasonable resignation may reduce the risk of an antagonistic party being able to secure a change of arbitrator simply by mounting a forceful but unmeritorious challenge (a common feature when "guerrilla" tactics are adopted in international arbitration).
38. It would be logical for a similar approach to be taken to cases of removal, as regards any liabilities/losses other than the costs of the removal application itself. Otherwise, an arbitrator might have an inappropriate incentive to resign when faced with a challenge that he/she considered on balance to be unmeritorious but which the court might, again on balance, uphold.
39. As to the costs of the removal application itself, it is open to debate whether an arbitrator who chooses to take an active role (in effect as litigant, as distinct from providing evidence or a statement of his/her position) is acting "*in the discharge or purported discharge of his functions as arbitrator*" within s.29. In any event, we believe the court should retain the power to make a costs order against an arbitrator who has taken that course, at least if he/she has done so in a clearly unreasonable manner, potentially thereby increasing the costs of the removal application for the parties to the arbitration.

7. Discrimination

(CP chapter 4; Consultation Questions 6 and 7)

40. We agree that arbitration agreements should not, without justification, specify protected characteristics. However, we think two matters would need to be considered if there were to be change in the Act.
41. First, experience suggests that this issue is most likely to arise, if at all, in relation to arbitration agreements or institutional rules relating to nationality: specifying, for example, that an arbitrator should not be of the same nationality as either of the parties; or, perhaps, should be of a specified nationality, chosen by the parties. Parties may agree this in an attempt to secure a degree of perceived impartiality in general, rather than by reference to any particular features of the contract containing the arbitration agreement (still less any particular characteristic of the dispute, which *ex hypothesi* will not yet have arisen). A provision requiring necessity “*in the context of that arbitration*” would give rise to controversy about whether such a clause remained permissible: a point on which views may legitimately differ.
42. Secondly, the Commission rightly mentions the need to consider the impact on enforcement under the New York Convention, which may have to be undertaken in a wide range of overseas jurisdictions. The B&PC have very limited visibility on this aspect of international arbitration. It would be interested in the views of the stakeholders in international arbitration, from both the legal and commercial communities, as to whether they are concerned that this amendment might make awards of arbitral tribunals seated in this jurisdiction more difficult to enforce, and thereby reduce the attractiveness of England and Wales as a seat.

8. Other matters

43. (CP chapter 1) We agree that the risks of further legislation about confidentiality outweigh the extent of any problems that might exist.

44. (CP chapter 2) We agree that it is unnecessary to add a statutory duty of independence on arbitrators. Legitimate concerns can be properly addressed under the existing provisions. As to disclosure, we think it is already open to the court to attach significance to any failure to make relevant enquiries, in an appropriate case. It may be difficult and unwise to attempt to set out a statutory test for independence (and any associated duty to enquire), in circumstances where market expectations as to independence may evolve over time, and may also differ depending on the type of arbitration involved (e.g. rent disputes vs international commercial arbitrations). However, if statute were to define the duty, then we would favour a reasonable enquiries duty, leaving the court nonetheless free to attach different evidential significance to failure to disclose a known fact vs failure to disclose a fact that reasonable enquiries would have revealed. It would be desirable to avoid any suggestion that the court's role has thereby increased beyond its current limited role, which arises mainly in relation to s.24 removal applications (CP chapter 2, Consultation Questions 2-5).
45. (CP chapter 9) We agree that no change is necessary here. The “obviously wrong” test in s.69(3)(c)(i) may seem difficult to surmount in a context where, necessarily, the court has to take a view on limited materials and without hearing argument. However, provided that is clearly understood to be the context of any finding (when granting permission) that an award is “obviously wrong”, the problem is not insuperable. We would have some concern that any change would be viewed as a move to increase court intervention in London-seated awards.
46. (Chapter 10/ section 39): We agree that the heading and text of section 39 should be made consistent. As the Commission identifies, there is an underlying question about whether orders of this kind should be enforceable as awards or only as orders. There is a particular problem with orders for interim payments, which if made by a court would constitute an enforceable court judgment. Conventional means of enforcing orders, such as striking out or contempt sanctions, are inappropriate ways to enforce an interim order by an arbitral tribunal. The Commercial Court concluded *in EGF v HVF* [2022] EWHC 2470

(Comm) that an interim payment order could be made as a binding award, but clarification would be useful.

Sir Julian Flaux (Chancellor of the High Court)
**Mrs Justice O'Farrell DBE (Judge in Charge of the Technology and
Construction Court)**
Mr Justice Foxton (Judge in Charge of the Commercial Court)
Mr Justice Henshaw (Commercial Court)

on behalf of the Business & Property Courts

13 December 2022

Sent by email to arbitration@lawcommission.gov.uk

Dear Sir/Madam,

Response to Consultation Paper on the Arbitration Act 1996.

1. Introduction:

FOSFA International is a London-based Trade Association with 1,200 Members in 90 countries, all engaged in one way or another in the international trade and distribution of edible oils, seeds and fats. FOSFA publishes standard form contracts which are regularly used in the vast majority of worldwide sale transactions for these commodities, including standard provisions for English governing law and for disputes to be resolved in London under the FOSFA Rules of Arbitration and Appeal.

We understand that some individual FOSFA members (traders and/or arbitrators) may be responding directly to the Law Commission's consultation paper on the Arbitration Act 1996. This letter contains comments from FOSFA in its capacity as one of the principal bodies providing arbitration services in the specialised commodity trading sector.

We do not propose to respond to each of the consultation questions but will make our general comments with reference to those questions, as appropriate.

2. Confidentiality:

The requirement of confidentiality is well-established and those involved in commodity trade arbitration understand their duty not to discuss or divulge information about their cases except between the parties and the tribunal. This is considered particularly important in commodity trade arbitration, to avoid any potential impact on markets in case rumours about specific commodities or destinations are spread in the trade, affecting the willingness of parties to enter into contracts.

However, we agree with the Commission's view that the requirement of confidentiality does not need to be codified in the Act, and that exceptions to the rule should not be codified. These are matters which can, if necessary, be clarified in the Arbitration Rules.

3. Independence and Disclosure:

In response to Question 2, we agree that the Act should not specify a duty of independence. However, in response to Question 3 we also believe that the Act should not attempt to codify arbitrators' duty of disclosure.

In our view, the decision made by the Supreme Court in Halliburton v Chubb has provided sufficient clarification on the existence and scope of the legal duty of disclosure by arbitrators, retaining flexibility according to the context of each case. The Supreme Court judgment recognised that in maritime and commodity trade arbitration conducted by GAFTA, FOSFA and similar trade bodies, it is considered a common practice for an arbitrator to accept several appointments made by one party and/or in relation to the same set of circumstances, and it is therefore not considered to be in contravention of the duty of independence and impartiality. On the contrary, this is well understood by parties entering into FOSFA arbitration as a well-established practice in compliance with the Arbitration Act and providing a cost-effective system to resolve disputes without any delays.

Contd.

**FOR THE TRADE
BY THE TRADE
WITH THE TRADE**

We consider that the codification proposed by the Law Commission would have a negative impact on the dispute resolution service in agri-commodities, where the pool of specialist arbitrators is smaller than other industries, partly explained by the special requirements of this trade. For example, under the FOSFA Rules a minimum of 10 years of experience is required (amongst other things) and should be demonstrated.

Another layer of complexity we face in FOSFA is that we currently have two sections which members can join: Oilseeds and/or Oils and Fats. Arbitrators may be experienced in beans but not have any experience in oils. This reduces even more the options the parties and FOSFA have when appointing arbitrators under FOSFA Rules. A blanket duty of disclosure, codified in the Act, would therefore impose an excessive and unnecessary burden on arbitrators acting under FOSFA Rules or those of similar trade associations.

In addition, there is serious concern amongst FOSFA arbitrators that if a new duty of disclosure were to be introduced this could be abused by parties to arbitrations as a way of creating delay and increased cost in an arbitration system which, as already mentioned, is well established, and recognised as a cost-effective system of resolving disputes without delay.

We therefore propose that if the Act is to be amended to codify a duty of disclosure, there should be an explicit exemption for commodity trade arbitration.

In any event, any codification of the duty of disclosure should be consistent with the way that this duty was defined in *Halliburton v Chubb*, where it was expressly stated that it only arises “*unless the parties to the arbitration otherwise agree*” (paragraph 136) and that “*in line with the principle of party autonomy, the parties to an arbitration can contract to limit the arbitrator’s obligation of disclosure*” (paragraph 135). Any corresponding duty specified in the Act should therefore be capable of being excluded or modified contractually in any applicable Rules of Arbitration.

As to Questions 4 and 5, we would propose that (if the duty applies to commodity trade arbitration at all) it should be limited to actual knowledge and should not impose on arbitrators any further duty to make inquiries.

4. Discrimination:

We wish to make it clear that the proposal to include into the Arbitration Act a provision prohibiting discrimination in the appointment of arbitrators, with a view to increasing overall diversity and in particular gender diversity, is welcomed and supported by us in general terms.

However, we suggest that the wording, function, and consequences of any anti-discrimination provision governing arbitral appointments merit careful consideration. For example, under the FOSFA Rules of Arbitration and Appeal, arbitrators cannot perform as such if they are 75 years old or over. There is a legitimate reason behind this requirement, because FOSFA has the duty to provide an arbitration service through commercial people, still active in the trade. The industry is constantly evolving, and we must make sure that FOSFA Arbitrators are up to date with the customs and practices of the trade in order to provide a fair resolution to a dispute.

Contd.

With reference to Questions 6 and 7 in the consultation paper, we would therefore wish to preserve the possibility to include in a contract or in arbitral Rules a requirement which is legitimate and justified in broad terms, taking into account the commercial context. We would add that in our view the words *"in the context of that arbitration"* in Question 7 (and in paragraph 4.19 of the paper) are excessively restrictive, and it would be preferable to use broader terms such as *"in the context of the arbitration agreement or applicable arbitral rules"*.

5. Immunity

FOSFA supports the Law Commission's proposal not only to uphold Arbitrators' immunity, but also to strengthen it.

We believe that arbitrators' resignation could become a more common issue in view of the volatility, uncertainty, and ambiguity that the trade in agricultural commodities is currently facing, from a world pandemic that affected the normal trade of commodities to armed conflicts between countries that have a relevant role in the supply chain of commodities.

We have learnt in the past couple of years that the same situation can give rise to completely different measures depending on the country, and sometimes it goes further than this and local restrictions are applied. FOSFA's arbitration service involves arbitrators from more than 17 countries in many different parts of the world, who might be hindered or prevented from performing their duty as arbitrator for many reasons. We therefore consider that they should be free to resign without incurring any liability (including any liability for legal costs), provided that they act in good faith. Similarly, if an arbitrator is removed as a result of a Court application, they should not have to bear the costs of such action.

Regarding Question 10 in the consultation paper, we agree with the proposal to extend the immunity to cover costs of court proceedings arising out of an arbitration. Furthermore, although the paper refers only to arbitrators' immunity under section 29 of the Act, we believe that the logic of the Commission's approach should also lead to a corresponding amendment to section 74, extending the same immunity to arbitral bodies or institutions (such as the commodity trade associations).

6. Other Issues

We have no particular comments on the balance of the consultation paper.

Yours Faithfully,



Response ID ANON-PT57-RUKT-P

Submitted to Law Commission Consultation: Review of the Arbitration Act 1996
Submitted on 2022-12-10 19:17:31

About you

What is your name?

Name:
Robert Gay

What is the name of your organisation?

Enter the name of your organisation:

I am a Supporting Member (seeking appointments as arbitrator) of the London Maritime Arbitrators Association ("LMAA")

Are you responding to this consultation in a personal capacity or on behalf of your organisation?

Personal response

If other, please state::

[REDACTED]

What is your email address?

Email:
[REDACTED]

What is your telephone number?

Telephone number:
[REDACTED]

If you want the information that you provide in response to this consultation to be treated as confidential, please explain to us why you regard the information as confidential. As explained in our privacy notice, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

Please explain to us why you regard the information as confidential:

Consultation questions

Consultation Question 1: 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?

Disagree

Please share your views below.:

As I understand (and compare para 3.46 -- all references in this form are to the paragraphs of the Consultation Paper) one aim of the 1996 Act was to set out English law with regard to arbitration in non-technical language, so that it would be possible to conduct an arbitration seated in England and Wales (henceforth, with apologies, "a London arbitration" without consulting an English lawyer. This matters particularly in maritime arbitrations, where many small LMAA arbitrations are conducted on written evidence and written submissions only ("documents only") with at least one party represented by a person whose primary qualification is as a lawyer in another jurisdiction and who has as a secondary qualification an LLM in English maritime law from a university in England or Wales, so that the person knows English substantive maritime law, but not English procedural law. It is desirable that this continue to be possible, and that the Arbitration Act should provide guidance as to how to conduct a London arbitration which will be sufficient unless unusual complications arise. From that point of view "flagging up" that (para 2.31) the default position is that arbitration proceedings are confidential would be helpful. It would also be helpful to provide a non-exhaustive list, in general terms, of the exceptions to this default position. I would suggest also making it clear that exception (3) in para 2.32 allows a company to make disclosures in its accounts as required by accepted accounting practice in the jurisdiction where it is incorporated and to a stock exchange as required by the exchange's listing rules.

Consultation Question 2: We provisionally conclude that the Arbitration Act 1996 should not impose a duty of independence on arbitrators. Do you agree?

Agree

Please share your views below.:

Consultation Question 3: 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. Do you agree?

Agree

Please share your views below.:

I agree with the general approach in paras 3.45-3.50 but (i) although I accept that the test for removal should continue to be in terms of a fair-minded and well-informed observer rather than the perception of the parties, I think that the duty of disclosure should be in terms of what might reasonably lead either of the parties to doubt the arbitrator's impartiality and (ii) that a failure to disclose should itself, as such, be a ground for removal, rather than the possibility of removal being only by way of failure to disclose giving rise to possible removal on the ground of reasonable doubt by the fair-minded observer about impartiality. I think that (i) is important so that possible issues are out on the table where the parties can decide what to do about them. I think that (ii) is needed to give teeth to (i). For the avoidance of doubt, I think that an arbitrator's immunity from suit should extend to failures to disclose (other than in bad faith) but if the arbitrator chooses to take part in court proceedings to resist being removed on this ground then the arbitrator should potentially be liable for the costs of those court proceedings.

Consultation Question 4: Should the Arbitration Act 1996 specify the state of knowledge required of an arbitrator's duty of disclosure, and why?

Not Answered

Please share your views below.:

Consultation Question 5: 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?

Not Answered

Please share your views below.:

Consultation Question 6:

Other

Please share your views below.:

With respect, I find it noticeable that the quality of the discussion in this chapter is not of the same standard as in other chapters -- for example, with regard to para 4.5 I am sure that under the law as it already is "commercial men" would be interpreted as including commercial women, and at paras 4.30-4.31 "this Law" (that is, the UNCITRAL Model Law) is not the same as any mandatory provision of the law of the seat. Q6 as printed in the Consultation Document appears to take it for granted that the requirement of a protected characteristic must be unenforceable in some cases. I am uneasy about this, because it will lead to satellite litigation in this jurisdiction and also will certainly allow the courts in some other jurisdictions to not to enforce some London arbitration awards. (With respect, what is said at paras 4.25-4.27 does not engage with the point here. This is a question of fact about what some foreign courts will do, not a question about what they should do. And it is well-known (and compare footnote 35 to this chapter of the Consultation Paper) that the use of the default procedure under s.17 of the 1996 Act can lead to refusals of enforcement; for this reason it is prudent for arbitration clauses themselves to include the Act's default procedure, or another default procedure, either directly or for example by incorporating the LMAA Terms.) These consequences are undesirable in themselves, and in terms of arbitration as an export industry will lead to London being less attractive as a seat. However, I recognise the strength of feeling expressed at one seminar I attended [REDACTED] and I am not expressing a view either way as to whether a requirement of a protected characteristic should be unenforceable in some cases. However, I would VERY STRONGLY suggest (i) that there should be no attempt to make requirements which are indirectly discriminatory (such as being a member of the Baltic Exchange, if the majority of members of the Baltic are men, or having seafaring experience if the majority of seafarers and ex-seafarers are men) unenforceable, but only requirements which are directly discriminatory (ii) that the requirement of a protected characteristic should be enforceable not only if it is necessary but if it can be more widely justified (iii) in order to reduce satellite litigation the amending legislation should include a list of examples (non-exhaustive) where the requirement of a protected characteristic is deemed justified (iv) that the list should include the case where the requirement is for persons to practise a particular religion or be ministers of that religion or a particular sect (for example, Orthodox rabbis) and the the tribunal is directed or authorised to apply a religious law (for example, the Beth Din, or a sharia court), and also the case where an arbitrator is required to be of a nationality other than the nationalities of the parties.

Consultation Question 7:

Other

Please share your views below.:

Please see my answer to Q6

Consultation Question 8: Should arbitrators incur liability for resignation at all, and why?

Liability for resignation

Please share your views below.:

I think that in principle arbitrators should be liable if they resign for clearly bad reasons, for instance simply if they want to accept a more lucrative assignment or wish to take an extended holiday.

Consultation Question 9: Should arbitrators incur liability for resignation only if the resignation is proved to be unreasonable?

Yes

Please share your views below.:

I agree that the default position should be that an arbitrator is not liable for resigning and that a party wishing to claim against an arbitrator who has resigned should have to apply to the court, and that the burden should be on the party to show that the resignation was unreasonable (not on the arbitrator to show that the resignation was reasonable).

Consultation Question 10: 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. Do you agree?

Disagree

Please share your views below.:

I suggest that it should be made explicit in the legislation that an arbitrator will not be liable for costs of court proceedings if the arbitrator only writes to the court to explain their position. However, I think that if an arbitrator takes part in court proceedings to resist their removal (that is, enters an appearance as a party, as distinct from just writing a letter to the court) they should be potentially liable for the costs of the proceedings.

Consultation Question 11: 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. Do you agree?

Other

Please share your views below.:

I believe that arbitrators may already have the power to dispose of cases summarily under s33(1)(b) of the 1996 Act, but I agree fully that in practice except where there is an express provision, arbitrators generally are not willing to exercise any such power. (This is not only for the reasons stated in para 6.21, but because arbitrators may be reluctant to offend the lawyers representing the party whose case is without merit.) So I agree that an express power should be introduced to (as said in para 6.22) remove doubt and reassure.

However, I would be inclined to say that this should be expressly a clarification of s.33 and should be mandatory as s.33 is mandatory. (Parties when agreeing arbitration clauses may not foresee that the other party may seek to spin out arbitration proceedings.)

Consultation Question 12: 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. Do you agree?

Other

Please share your views below.:

After consulting the parties, but the arbitration tribunal should take the decision

Consultation Question 13: We provisionally propose that the Arbitration Act 1996 should stipulate the threshold for success in any summary procedure. Do you agree?

Agree

Please share your views below.:

Consultation Question 14: 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. Do you agree?

Disagree

Please share your views below.:

I think the test should be "manifestly without merit", both because it seems to be wording accepted outside the UK and so may be less likely to appear parochial, and because it is not desirable that the caselaw in relation to the words in the CPR should be carried over into the arbitration context (for instance, in Court "other compelling reason" may be that it is in the public interest that there be a trial at which the press can report the evidence, but arbitration is by default private). Nor is it desirable that there should be satellite litigation about just how much of the CPR caselaw be carried over into the arbitration context. If possible, arbitrators should be guided by the simple meaning of "manifestly without merit" and by the practice of those institutions which already have this threshold in their rules.

Consultation Question 15: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 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?

Other

Please share your views below.:

What is said in for examples paras 7.14-7.15, 7.17 and 7.34-7.35 is not what the caselaw has said, and the amending legislation should make it clear that s.44 is to be interpreted in the way stated in the Consultation Paper.

Consultation Question 17: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 18: We provisionally conclude that the provisions of the Arbitration Act 1996 should not apply generally to emergency arbitrators. Do you agree?

Agree

Please share your views below.:

I agree but subject to what I say at Q20

Consultation Question 19: 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?

Agree

Please share your views below.:

Consultation Question 20: Do you think that section 44(5) of the Arbitration Act 1996 should be repealed, and why?

Other

Please share your views below.:

I have to admit that I have found it very hard to follow the discussion in this section of the Consultation Paper. But I do believe that s.44(5) and the perceived effect of Gerald Metals have created undesirable difficulties in practice. I believe it should be enacted that the existence of a power in a body to appoint an emergency arbitrator is never a bar to applying to the court under s.44. I believe it should also be enacted, to make it clear, that the fact that an emergency arbitrator has been appointed is not a bar to applying to the court under s.44 if the emergency arbitrator is not able to act effectively (for example, because of a need to bind third parties or to apply ex parte) or in practice not able to act speedily enough.

Consultation Question 21:

Other

Please share your views below.:

I think the best option is what is described in para 7.46 as the position in Hong Kong. (It seems to me simpler and more suited to situations of real urgency not to have to go back to the emergency arbitrator for a second, peremptory, order). If the emergency arbitrator's order is temporary only, then when the Court converts it into a judgment it may be converted into an interim injunction from the Court, or an order in the same form as an order for an interim payment in a court action.

Of the two options given, I prefer (1) because option (2) might involve having to present over again to the Court the case which has already been presented to, and accepted by, the emergency arbitrator to whose interim jurisdiction the parties have agreed to submit.

Consultation Question 22:

Other

Please share your views below.:

I find this complicated. I accept the argument as to fairness at paras 8.31 and 8.41, But I am concerned, as a matter of principle, that a party should not be compelled to choose between losing the right to have the court rather than an arbitration tribunal hear ab initio the case whether the party has agreed an arbitration agreement and not taking part in the arbitration on the merits, so that if it is held that there is an arbitration agreement the party will be

bound by an award on the merits where the party has not put forward any defence. I would suggest that there might be a statutory right to take part on the merits without prejudice to the right to have jurisdiction determined by the court under s.72

Consultation Question 23: 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?

Not Answered

Please share your views below.:

Consultation Question 24: We provisionally conclude that our proposed change to section 67 of the Arbitration Act 1996 would not require any similar change to section 103. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 25: 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. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 26: 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?

Agree

Please share your views below.:

Consultation Question 27: 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?

Agree

Please share your views below.:

Consultation Question 28: Do you think that section 7 of the Arbitration Act 1996 (separability of arbitration agreement) should be mandatory, and why?

Other

Please share your views below.:

I think that s7 should only be capable of being excluded by express agreement and not by way of the choice of a foreign law.

Consultation Question 29: 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?

Agree

Please share your views below.:

Consultation Question 30: 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?

Yes

Please share your views below.:

Consultation Question 31: 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?

Other

Please share your views below.:

In general, Yes, but I think that there should be an express right for either party to require a hard copy award with "wet" signatures (which may be necessary for enforcement in some jurisdictions, or at least make enforcement a lot easier)

Consultation Question 32: Do you think that section 39 of the Arbitration Act 1996 should be amended to refer to "orders" (rather than "awards"), and why?

Yes

Please share your views below.:

Consultation Question 33: Do you think that section 39(1) of the Arbitration Act 1996 should be amended to refer to "remedies" (rather than "relief"), and why?

Not Answered

Please share your views below.:

Consultation Question 34: 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 appellants was notified of the result of that request. Do you agree?

Agree

Please share your views below.:

As I have said previously, I think that points which have been decided in the caselaw should be stated in the Act so that persons who are not English lawyers can have guidance which is sufficient to conduct a London arbitration in normal cases.

Consultation Question 35: 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?

Agree

Please share your views below.:

Consultation Question 36: We provisionally propose that sections 85 to 87 of the Arbitration Act 1996 (on domestic arbitration agreements) should be repealed. Do you agree?

Disagree

Please share your views below.:

My understanding is that ss85-87 were not brought into effect because of difficulties in relation to EU law. I think that now that the UK has left the EU the question of bringing these sections into effect should be reconsidered. I understand that Singapore arbitration legislation makes a distinction between domestic and international arbitrations. I think there was something to be said for the position prior to the 1996 Act by which if there were allegations of fraud a stay of court proceedings in favour of arbitration would not necessarily be granted: the court has power to be more robust with witnesses and in some such cases publicity may be in the public interest.

Consultation Question 37: Do you think that any of the suggestions discussed in Chapter 11 needs revisiting in full, and if so, why?

Please share your views below.:

First, with regard to "the law governing the arbitration agreement" and *Enka v Chubb*. I think the question of "the law governing the arbitration agreement" is a mistaken question, and it should be enacted by way of clarification that the arbitration agreement is only to be treated as a separate contract for the specific purpose stated in s7 of the 1996 Act. (The *reductio ad absurdum* of treating an arbitration agreement as a separate contract for all purposes is the decision of the British Columbia Court of Appeal in *Peace River v Petrowest*, where the Court held that a liquidator could disclaim the arbitration agreement while retaining the main (or "matrix") contract.) The effect of enacting this should be that the system of law to determine a specific question should be determined by whether the question is more closely connected with the law governing the main contract or with the curial law (the law of the seat), so that for instance questions as to who are the parties (as in *Kabab-Ji*) should be determined by the law governing the main contract but questions of arbitrability should be governed by the law of the seat.

Secondly, I feel strongly that the opportunity should be taken to deal with third-party funding of cases in arbitration. In my view, parties should be required to disclose if they are being funded, and arbitrators should be empowered to require, as a condition of a party being allowed to accept third-party funding on terms which provide that the funder has no recourse other than to the proceeds of the arbitration, that the funder should submit to the arbitrators' jurisdiction so that the arbitrators can make a costs order against the funder. It is just and proper that the Courts are able to make costs orders against litigation funders and it is not just that such orders cannot be made against funders of cases brought in arbitration.

Consultation Question 38: 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?

Please share your views below.:

I would suggest that the judge giving permission to appeal against an arbitration award should have power, if the point of law is of "general public importance", to direct that the appeal be dealt with not by a single judge of the High Court but by the Court of Appeal or by a divisional court (a partial adoption of the practice in Paris, where arbitration proceedings go straight to the Cour d'Appel).



Bar Council response to the Law Commission Review of the Arbitration Act 1996 consultation paper

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Law Commission consultation paper entitled Review of the Arbitration Act 1996¹.
2. The Bar Council represents over 17,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.
3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.
4. We welcome the opportunity to comment on this well considered and balanced Consultation Paper by the Law Commission. We are generally of the view that the Arbitration Act 1996 is a clearly drafted piece of legislation which has operated successfully for many years. We are of the view that there is a strong case in favour of taking a minimal approach to making any changes to the Act because it has stood the test of time, has been the subject of a large and internationally understood and respected body of caselaw, and is a cornerstone of the arbitral system which makes London one of the most important and attractive centres for arbitration in the world. We have considered the Law Commission's proposals in detail but

¹ <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jxou24uy7q/uploads/2022/09/Arbitration-Consultation-Paper.pdf>

have given relatively short answers, especially where we are of the same view as is expressed in the Consultation Paper. We do note that it cannot be said that there is unanimity amongst members of the Bar in relation to a number of the issues raised. We appreciate that some of the answers given in this response differ from those of other respondees from the Bar, including COMBAR, but recognise that they may also be tenable views. We can expand on our own reasoning if that would be helpful to the Law Commission.

Q1. 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?

5. We agree. We consider that confidentiality should be developed by the courts and by the parties through their adopted arbitration rules or as part of the arbitral procedure.

Q2. We provisionally conclude that the Arbitration Act 1996 should not impose a duty of independence on arbitrators. Do you agree?

6. We agree that the Arbitration Act should not impose a duty of independence. We consider that this is not necessary in view of the way that the traditional doctrine of impartiality in the common law has been developed by the judiciary.

Q3. 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. Do you agree?

7. We agree.

Q4. Should the Arbitration Act 1996 specify the state of knowledge required of an arbitrator's duty of disclosure, and why?

8. We do not think that the Arbitration Act should specify the state of knowledge required of an arbitrator's duty of disclosure.

Q5. 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?

9. We are of the view that the Arbitration Act should not attempt to specify the state of knowledge required of an arbitrator's duty of disclosure.

Q6. 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 by the House of Lords)?

10. We welcome the Law Commission's intention to stamp out discrimination. We take the view that the requirement that an arbitrator possess a particular protected characteristic in any agreement should only be enforceable where it effectively meets the threshold set out in the obiter comments of the Supreme Court in *Hashwani* (given that the appeal turned on whether the arrangement fell within the meaning of now repealed Regulations or Equality Act 2010 directed at preventing discrimination by reason of religion or belief in an employment context and the Court held it did not) which is that it must be a genuine requirement which is objectively justified having regard to whether the requirement is legitimate and proportionate in all the circumstances.

Q7. We provisionally propose that:

(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. Do you agree?

11. We strongly oppose discrimination and see the force in making the provisions in s.4 of the Equality Act 2010 applicable when it comes to the appointment of arbitrators. We have considered the Law Commission's provisional proposal but wondered whether consideration might be given to an alternative formulation, which would be as follows:

"(1) the appointment of an arbitrator should not be susceptible to challenge on the basis of the arbitrator's protected characteristic(s), save for the purposes of enforcing an agreement between the parties satisfying the conditions in (2); 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 genuine, legitimate and objectively justified occupational requirement".

Q8. Should arbitrators incur liability for resignation at all, and why?

12. We are of the view that arbitrators should not incur liability for resignation as they act in a quasi-judicial capacity. There may be circumstances in which the arbitrator may have little option but to resign and should be able to do so without the fear of incurring liability for resigning.

Q9. Should arbitrators incur liability for resignation only if the resignation is proved to be unreasonable?

13. As stated in answer to Question 8, we take the view that arbitrators should not incur liability for resignation. We consider that it would be undesirable to have protracted disputes and potential further litigation on whether an arbitrator's resignation was unreasonable.

Q10. 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. Do you agree?

14. We agree that arbitrator immunity should extend to the costs of court proceedings arising out of the arbitration.

Q11. 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. Do you agree?

15. We agree with this proposal. We favour the Arbitration Act being amended to provide that an arbitral tribunal may adopt a summary procedure unless the parties agree otherwise.

16. Providing expressly for summary procedure in the Act may encourage some arbitrators to take this approach more readily. Provided the arbitral tribunal acts fairly when conducting the summary procedure and the threshold test is met (as set out under Question 14 below), we do not anticipate that adopting such a procedure should fall foul of the recognition and enforcement provisions of the New York Convention on the basis of a contention that a party was not given a reasonable opportunity to present their case.

Q12. 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. Do you agree?

17. We agree.

Q13. We provisionally propose that the Arbitration Act 1996 should stipulate the threshold for success in any summary procedure. Do you agree?

18. We agree. It would be desirable for there to be a set threshold for success as that would promote consistency.

Q14. 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. Do you agree?

19. We agree with this test being adopted as it has been tried and tested by the courts for some time and there is useful guidance from the case law that has developed.

Q15. 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. Do you agree?

20. We agree that it should be confirmed by amendment that s.44(2)(a) applies to the taking of evidence of witnesses by deposition only.

Q16. 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?

21. Yes, we agree, for the sake of clarity.

Q17. 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. Do you agree?

22. We agree.

Q18. We provisionally conclude that the provisions of the Arbitration Act 1996 should not apply generally to emergency arbitrators. Do you agree?

23. We agree. There is no universally accepted definition of the term “emergency arbitrator”.

Q19. 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?

24. We agree.

Q20. Do you think that section 44(5) of the Arbitration Act 1996 should be repealed, and why?

25. We agree

Q21. 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.

26. We prefer the second option because it is simpler and neater.

Q22. We provisionally propose that:

(1) where a party has participated in arbitral proceedings, and has objected to the jurisdiction of the arbitral tribunal; and

(2) 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.

Do you agree?

27. We agree. However, it should be noted that this was the view of the majority, but not all, of those compiling this response, and we note that a similar divergence of views has been expressed by other respondees, including COMBAR, although in their case, the majority do not agree with this proposal. The following responses on section 67 and the related questions therefore represent the majority view of those compiling this response on behalf of the Bar Council, but we appreciate that others legitimately take the contrary view.

28. There are competing considerations implicated in the proposed reform of section 67.

29. On the one hand, there are arguments against the proposed reform. For a start, arbitration is a consensual process. The right to challenge an arbitral award by way of a full rehearing offers an important safeguard to a party that maintains that they did not consent to that process in the first place. Further, empirical data and experience suggest that section 67 applications tend to be rare, and they are mainly decided without hearing witnesses. The Law Commission points to only four reported section 67 cases annually, with most of those cases being decided on the basis of documentary evidence that was submitted in the arbitration.²

30. On the other hand, there are arguments supporting the proposed reform. Under the current law, a party can participate in the arbitration proceedings and challenge the arbitral tribunal's jurisdiction at a full hearing which can include witnesses, documentary evidence and expert opinions. If that party is successful in its challenge before the tribunal, it will obtain a favourable award and foreclose arbitration. However, if that party is unsuccessful in its challenge before the tribunal, it can have another bite of the cherry: it can challenge the arbitral award before the English courts under section 67 and benefit from a full rehearing which may include fresh witnesses, documents and expert opinions.

31. In our view, it is an important principle of fairness that a party should not have the right to a full hearing to challenge jurisdiction on two occasions, once before tribunal and then in a *de novo* hearing before a court. We agree with the point made by the Law Commission that a party who challenges the jurisdiction before the arbitral tribunal is, on the current law, entitled to treat it as a 'dress rehearsal', in which the award becomes a sort of 'coaching' tool for that party in its subsequent challenge before the courts of law.³ In our view, this should not be the case.

² Although note that other commentators point to a higher number of section 67 cases. See for example Louis Flannery, listing fifteen section 67 cases in 2021: 88(4) *International Journal of Arbitration, Mediation and Dispute Management*.

³ See paragraph 8.31.

32. Furthermore, the proposed reform of section 67 is supported by considerations of finality of an arbitral tribunal's decision which is an important public policy in English law. In litigation it is common for issues in a case, including dispositive issues, to be subject to challenge by way of an appeal only. It is not clear that there is a principled basis for adopting a different approach in relation to arbitration.⁴

33. There are also good practical considerations supporting the proposed reform of section 67. Hearing the same jurisdictional issue twice, before the arbitral tribunal and the courts of law, will significantly impact on the length of the proceedings and the costs of resolving the dispute. This is especially the case where the tribunal decides on the jurisdictional challenge in the same award with the merits and the unsuccessful party subsequently challenges the award before the court. If the court decides to set the award aside, the time and costs that the parties have spent arbitrating the merits of the dispute will be wasted.

34. Finally, it must be noted that the proposed reform (rightly in our view) maintains an important safeguard for non-participating parties. Specifically, under section 72 (which the Law Commission does not propose to amend), if a party does not participate in the arbitral process, it will still be entitled to challenge the arbitral award by way of a full hearing.

35. On balance, and subject to considering amending sections 32 and 103 too (see below), we favour the proposed reform of section 67 both on the basis of fairness and finality, and for practical reasons.

Q23. 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?

36. As regards section 32, we have to distinguish between the case where a party applies to the court before the tribunal has ruled on its jurisdiction and the case where a party applies to the court after the tribunal has ruled on its jurisdiction. While there are different considerations involved in these cases, they are currently treated identically under section 32.

37. In our view section 32 should distinguish between these two cases. Specifically, in respect of the case where a party applies to the court after the tribunal has ruled on its jurisdiction, the same considerations apply as in respect of the case where a party applies to the court to challenge the jurisdiction of the tribunal under section 67. Clearly, therefore, if

⁴ Ali Malek, Christopher Harris and Paul Bonner Hughes: 88(4) *International Journal of Arbitration, Mediation and Dispute Management*.

section 67 is amended, section 32 should also be amended so that a party who applies to the court after the tribunal has ruled on its jurisdiction will not be entitled to a rehearing.

38. However, the case where a party applies to the court before the tribunal has ruled on its jurisdiction should be treated differently. Asking a court to decide a jurisdictional question as a preliminary matter can save time and costs and reduce uncertainty. If the court decides that the tribunal has jurisdiction, the route to challenging the tribunal's jurisdiction under section 67 will be foreclosed. If the court decides that the tribunal lacks jurisdiction, the parties will no longer need to spend time and costs in arbitration. In either way, parties will know where they stand. Therefore, when a party applies to the court before the tribunal has ruled on its jurisdiction, there are sound policy considerations for a law reform to incentivise the use of section 32 over the use of section 67, especially given the typically quick fashion in which preliminary applications are dealt with by English courts.

39. Thus, when a party applies to the court before the tribunal has ruled on its jurisdiction, the Law Commission should consider relaxing the current stringent procedural requirements set out in section 32, including the requirement that an application be made with the agreement in writing of all the other parties to the proceedings or permission of the tribunal. In practice, it is very rare that a party will obtain the other parties' agreement or the tribunal's permission to apply to the court. Section 32 can be amended to allow a party to bypass the other parties and the tribunal and be allowed to directly ask the court for leave to apply. In deciding whether to grant leave for a preliminary determination of the tribunal's jurisdiction, the court will of course ensure that section 32 is not abused.

Q24. We provisionally conclude that our proposed change to section 67 of the Arbitration Act 1996 would not require any similar change to section 103. Do you agree?

40. We do not agree.

41. We are of the view that any amendment of section 67 should not disturb the delicate balance between the scope of review when an award is challenged and when a foreign award is enforced in England and Wales. Currently, a party resisting the enforcement of a foreign award in England and Wales can challenge the tribunal's jurisdiction under section 103 and benefit from a full rehearing, even if the jurisdictional question was raised and decided in the arbitration in the first place.

42. If the right to a rehearing is abolished for jurisdictional challenges in the context of section 67, the right to a rehearing should be abolished for jurisdictional challenges in the context of section 103 too. There are neither practical considerations nor any principled basis

to distinguish between these two circumstances. This is particularly the case since section 103 of the Arbitration Act covers *foreign* arbitral awards, which enjoy the benefit of the New York Convention on Enforcement of Foreign Arbitral Awards. New York Convention awards are presumed enforceable in accordance with the presumption of enforceability under Article V of the New York Convention (*“Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that”* (emphasis added)).

43. Therefore, we are of the view that section 103 should also be amended along the lines of the proposed amendment of section 67, so that where a party participated in the arbitral process and objected to the substantive jurisdiction of the arbitral tribunal, any challenge to the tribunal’s ruling on jurisdiction the context of section 103 should be by way of an appeal and not a rehearing.

Q25. 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. Do you agree?

44. We agree with the proposed amendment and the reasons provided by the Consultation Paper in paragraphs 8.58 – 8.63.

Q26. 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?

45. We agree with the proposed amendment. In practice, there is nothing problematic in allowing a tribunal which has ruled that there is no substantive jurisdiction, to have the power to make an award of costs. In fact, this is preferable as it saves parties from applying to court after the award and spending additional time and expense. In our view, it makes good sense that the current practice is expressly provided for in the Arbitration Act.

Q27. 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?

46. We agree. We would be strongly opposed to a default position which removed the right of appeal on a point of law.

47. We agree that the present position strikes a broadly appropriate balance between having a right of appeal and, on an opt-out basis, constraining the circumstances in which it can be exercised. Given that the balance is at least broadly right, it should not be changed, because it is well-established and well understood. Individuals and arbitral institutions who wish there to be a different regime are at liberty to (and in practice often do) contract for a different regime.

Q28. Do you think that section 7 of the Arbitration Act 1996 (separability of arbitration agreement) should be mandatory, and why?

48. Yes, we think it should be mandatory. While acknowledging that, as a general principle, the parties should be free to choose the terms of their agreement, we see no reason why they would not want the arbitration agreement to be separable. Given the obvious risk of them inadvertently ending up with an inseparable arbitration agreement when foreign law is chosen, we think it is desirable that it be mandatory.

Q29. 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?

49. Yes, we agree.

Q30. 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?

50. Yes, we agree, for the reasons given in the Consultation Paper.

Q31. 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?

51. We question whether there is a need to make express reference to remote hearings and electronic documentation, as arbitral tribunals have wide procedural powers and have used remote hearings and electronic documentation in practice. If there is to be any such express reference, then we should suggest that its wording be “future proofed” as far as possible to cover future technological developments.

Q32. Do you think that section 39 of the Arbitration Act 1996 should be amended to refer to “orders” (rather than “awards”), and why?

52. Yes. The current wording of the section and its heading is confusing and should be changed. We think that rulings under section 39 should be treated as orders and enforceable as such by means of sections 41 and 42: we agree that it is not desirable to subject a ruling under section 39 to the full range of challenges available against awards, as it could introduce unnecessary complexity, expense and delay into the interim stage of proceedings.

Q33. Do you think that section 39(1) of the Arbitration Act 1996 should be amended to refer to “remedies” (rather than “relief”), and why?

53. Yes, but only for consistency. We see no practical difference between the words in their context.

Q34. 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?

54. Yes, we agree.

Q35. 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?

55. Yes, we agree.

Q36. We provisionally propose that sections 85 to 87 of the Arbitration Act 1996 (on domestic arbitration agreements) should be repealed. Do you agree?

56. Yes, we agree.

Q37. Do you think that any of the suggestions discussed in Chapter 11 needs revisiting in full, and if so, why?

57. No.

Q38. 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?

58. No.

Bar Council⁵

15 December 2022

[Redacted content]

⁵ Prepared by the Law Reform Committee

Response ID ANON-PT57-RUBB-U

Submitted to Law Commission Consultation: Review of the Arbitration Act 1996
Submitted on 2022-12-14 23:33:38

About you

What is your name?

Name:
Ben Giaretta

What is the name of your organisation?

Enter the name of your organisation:
Fox Williams LLP

Are you responding to this consultation in a personal capacity or on behalf of your organisation?

Personal response

If other, please state::

What is your email address?

Email:
[REDACTED]

What is your telephone number?

Telephone number:
[REDACTED]

If you want the information that you provide in response to this consultation to be treated as confidential, please explain to us why you regard the information as confidential. As explained in our privacy notice, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

Please explain to us why you regard the information as confidential:

Consultation questions

Consultation Question 1: 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?

Agree

Please share your views below.:

There are difficulties in drafting a suitable confidentiality provision to cover the requirements of all users of arbitration. This is therefore best left to individual parties to prepare a confidentiality agreement that suits their needs. Further, often what parties want is privacy and limitations over access to documents and to the hearing-room, rather than a duty of confidentiality (noting that confidentiality/secretcy can sometimes give the wrong impression to third parties). To the extent that a general implied duty of confidentiality is needed, this can be left to the courts to work out.

Consultation Question 2: We provisionally conclude that the Arbitration Act 1996 should not impose a duty of independence on arbitrators. Do you agree?

Disagree

Please share your views below.:

While impartiality is the more important of the two, the duties of independence and impartiality are now so commonly found in arbitral laws and rules across the world that the Arbitration Act 1996 is clearly out of step. Further, the requirement for independence does not create any real obstacle in sectors such as commodities and maritime disputes: any issue that arises can be dealt with via disclosure to the parties (and it would be consistent with party autonomy that the parties be given the choice whether to waive any such issue or not).

Consultation Question 3: 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. Do you agree?

Agree

Please share your views below.:

While arguably such an express duty is not needed, this might provide useful clarification in an area where there has been debate and caselaw in recent years, as identified in the Law Commission's report.

Consultation Question 4: Should the Arbitration Act 1996 specify the state of knowledge required of an arbitrator's duty of disclosure, and why?

No

Please share your views below.:

This is a difficult area which might best be left to the courts to develop, as noted in *Halliburton v Chubb*.

Consultation Question 5: 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?

What they ought to know

Please share your views below.:

Again, this is a nuanced issue, but a duty to make reasonable inquiries would be consistent with other duties required of professionals, as noted in the Law Commission's report.

Consultation Question 6:

More broadly justified

Please share your views below.:

This will likely depend on the particular circumstances of a case, so a broader test is probably needed.

Consultation Question 7:

Agree

Please share your views below.:

While this might have limited application in practice, such a provision may be appropriate (and appropriately symbolic, demonstrating the values that should underpin arbitration).

Consultation Question 8: Should arbitrators incur liability for resignation at all, and why?

No liability for resignation

Please share your views below.:

Liability for resignation, even to a limited degree, may entail arbitrators having to account for their resignation, and the parties investigating all the circumstances. While parties should be told why an arbitrator is resigning, such investigations might lead to ancillary litigation (even if, at the end of the day, litigation in individual cases may be unjustified) which could deter people from accepting appointments as arbitrator.

Consultation Question 9: Should arbitrators incur liability for resignation only if the resignation is proved to be unreasonable?

Other

Please share your views below.:

See answer to question 8 above.

Consultation Question 10: 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. Do you agree?

Agree

Please share your views below.:

This follows on from the immunity that is granted to arbitrators.

Consultation Question 11: 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. Do you agree?

Disagree

Please share your views below.:

There are disadvantages as well as advantages to summary procedures (particularly when there is no possibility of appealing an arbitrator's award); while arbitrators already have powers to adopt the procedure in an individual case to suit the particular circumstances. This should be left to arbitrators to decide.

Consultation Question 12: 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. Do you agree?

Other

Please share your views below.:

See answer to question 11 above.

Consultation Question 13: We provisionally propose that the Arbitration Act 1996 should stipulate the threshold for success in any summary procedure. Do you agree?

Other

Please share your views below.:

See answer to question 11 above.

Consultation Question 14: 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. Do you agree?

Other

Please share your views below.:

See answer to question 11 above.

Consultation Question 15: 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. Do you agree?

Agree

Please share your views below.:

This is a useful clarification of the Act, as noted in the Law Commission's report.

Consultation Question 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?

Yes

Please share your views below.:

This would be another useful clarification, as noted in the Law Commission's report.

Consultation Question 17: 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. Do you agree?

Agree

Please share your views below.:

Third parties should have their usual rights of appeal, as noted in the Law Commission's report.

Consultation Question 18: We provisionally conclude that the provisions of the Arbitration Act 1996 should not apply generally to emergency arbitrators. Do you agree?

Agree

Please share your views below.:

This is appropriate, given that the Arbitration Act 1996 was written before emergency arbitration was created and there would be unintended consequences if there was a general application of the provisions of the Act to emergency arbitration. However, I do not consider that a limited

"tweaking" of the Act, such as has been done in Singapore and Hong Kong, would be appropriate either. Now that there is considerable experience of emergency arbitration and an awareness of the issues that it presents, it would be better to have a properly drafted, separate part of the Act which is dedicated to emergency arbitration.

Consultation Question 19: 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?

Agree

Please share your views below.:

One of the main attractions of emergency arbitration for users is that it is separate from the courts.

Consultation Question 20: Do you think that section 44(5) of the Arbitration Act 1996 should be repealed, and why?

Yes

Please share your views below.:

For the reasons set out in the Law Commission's report, section 44(5) does not add anything of value; and on the other hand it can create confusion and uncertainty, now that there is the possibility of emergency arbitration (which, again, did not exist when the Act was drafted).

Consultation Question 21:

Permission under section 44

Please share your views below.:

This would be aligned with the position as regards tribunals.

Consultation Question 22:

Agree

Please share your views below.:

There are arguments both ways on this, as the Law Commission has recognised. But the problem that is most often encountered is the repetition of arguments, which would be reduced if there was an appeal rather than a rehearing. This approach also gives due weight to the findings of the arbitrators on jurisdictional questions.

Consultation Question 23: 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?

Yes

Please share your views below.:

This would ensure consistency.

Consultation Question 24: We provisionally conclude that our proposed change to section 67 of the Arbitration Act 1996 would not require any similar change to section 103. Do you agree?

Disagree

Please share your views below.:

It would be consistent to treat awards made in England and in other countries in the same way (and it would send a strong message about the approach of England to arbitration to do this). The factors mentioned in the Law Commission report do not distinguish this situation sufficiently.

Consultation Question 25: 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. Do you agree?

Agree

Please share your views below.:

This would be appropriate for the reasons set out in the Law Commission's report.

Consultation Question 26: 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?

Agree

Please share your views below.:

The tribunal is often in the best position to make a ruling on costs in these circumstances.

Consultation Question 27: 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?

Agree

Please share your views below.:

Section 69 is now an outlier in international arbitration across the world. However, parties are sufficiently familiar with it to be able to choose whether to exclude it or not.

Consultation Question 28: Do you think that section 7 of the Arbitration Act 1996 (separability of arbitration agreement) should be mandatory, and why?

Yes

Please share your views below.:

This would be consistent with arbitration laws across the world.

Consultation Question 29: 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?

Agree

Please share your views below.:

This would be a useful clarification.

Consultation Question 30: 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?

No

Please share your views below.:

It does not seem necessary to change these sections of the Act.

Consultation Question 31: 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?

No

Please share your views below.:

While the factors such as climate change identified in the Law Commission's report are undoubtedly important, it does not seem necessary to change section 34 of the Act for this reason. Also, any references to particular types of technology carry the risk of the reference becoming outdated (perhaps in ways we cannot yet comprehend). It would be better to leave the Act as it is.

Consultation Question 32: Do you think that section 39 of the Arbitration Act 1996 should be amended to refer to "orders" (rather than "awards"), and why?

Yes

Please share your views below.:

The use of the word "award" in different contexts can cause confusion, particularly among those who are unfamiliar with arbitration. It would be best to clarify and simplify this.

Consultation Question 33: Do you think that section 39(1) of the Arbitration Act 1996 should be amended to refer to "remedies" (rather than "relief"), and why?

Yes

Please share your views below.:

This would ensure consistency.

Consultation Question 34: 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?

Agree

Please share your views below.:

This brings the Act into line with caselaw.

Consultation Question 35: 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?

Agree

Please share your views below.:

The Law Commission's interpretation as set out in its report appears correct.

Consultation Question 36: We provisionally propose that sections 85 to 87 of the Arbitration Act 1996 (on domestic arbitration agreements) should be repealed. Do you agree?

Agree

Please share your views below.:

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.

Consultation Question 37: Do you think that any of the suggestions discussed in Chapter 11 needs revisiting in full, and if so, why?

Please share your views below.:

No

Consultation Question 38: 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?

Please share your views below.:

The Law Commission has deferred consideration of the arbitration of trust disputes to the review of trust law. That might not be appropriate: it might be more appropriate to address it here, with changes to the Arbitration Act, so that arbitration is addressed in one law. While the issues involved are complex, the amendments to the Act required to address the points might be limited.

[REDACTED]

From: [REDACTED]
Sent: 15 December 2022 17:55
To: arbitration
Cc: [REDACTED]
Subject: Consultation on Arbitration Act 1996 - Gowling WLG's response

Dear Law Commissioners,

Gowling WLG's response to the Consultation on Reform of the Arbitration Act 1996

We are grateful for the opportunity to respond to the Law Commission's consultation on its review of the Arbitration Act 1996. This response is provided on behalf of Gowling WLG (UK) LLP, an international law firm. To contextualise this response, Gowling WLG represents clients in both domestic and international arbitrations, whether ad hoc or under the rules of arbitral institutions, and seated in various jurisdictions. It acts on both commercial and investment treaty disputes. In particular, the firm regularly represents clients in arbitral proceedings in the construction, energy and natural resources and intellectual property sectors.

We reviewed the Law Commission's consultation paper with interest, and are broadly supportive of its provisional proposals for reform (or not) of the Arbitration Act 1996. Both in those areas where the Commission proposes reform, and in those where it does not, the Commission's provisional conclusions are generally persuasive. Whether or not reform is proposed (or ultimately implemented), the very fact of the review, and the Commission's "reasoned decision" gives confidence that the Arbitration Act remains fit for purpose and supportive of arbitration in this jurisdiction.

Against that general backdrop, we make the following comments on select areas of the consultation:

Q1. We agree with the Commission's conclusion that the Act should not address confidentiality, which can be addressed by the courts. Moreover, if confidentiality is of particular concern to the parties, appropriate wording can be included within the arbitration agreement.

Q.2. The Commission's view on the utility of adding a duty of independence (in addition to the existing duty of impartiality) is highly persuasive and we agree in principle with its provisional proposals. However, we question whether it may nonetheless be desirable to impose a duty of independence if only for optical reasons when compared to the arbitration laws of competing jurisdictions which require both independence and impartiality.

Q3. We agree that it makes sense to provide for a continuing duty to disclose circumstances which might reasonably give rise to justifiable doubts as to an arbitrator's impartiality - particularly where the arbitration has no institutional rules. This is also in keeping with the codification principle which underlay the enactment of the 1996 Act.

Q5. Further on the topic of the duty of disclosure, we see no reason why an arbitrator should not make reasonable enquiries given the seriousness of the arbitrator's role and the wasted costs which may follow if it is later discovered there was a conflict which could reasonably have been disclosed.

Q7. We strongly agree with the proposed prohibition on discrimination in arbitral appointments and challenges. This sends a strong message about arbitration in this jurisdiction.

Q.11-14. We strongly agree with the proposals as regards the introduction of an express summary procedure. The lack of a true summary procedure has often been seen as a reason to elect for litigation rather than arbitration, and making express provision for this in national law will abate the "due process paranoia" which may have prevented arbitrators adopting such procedures.

Q.22 – we agree. Whilst s.67 is an important safeguard mechanism, allowing a party a full rehearing gives two bites at the cherry and is prone to abuse, causing delay and additional expense.

Q.27 – we strongly agree.

Q.31. No. We consider that the Act gives wide latitude which allows for the appropriate use of technology to support the expressed object of arbitration (i.e. the fair resolution of disputes without unnecessary delay or expense). Specific provision as to the use of technology is best left to the parties and will always depend on the nature of the dispute. Moreover, assuming another 25 year review cycle, introducing specificity as regards the use of technology risks also introducing obsolescence.

Gowling WLG (UK) LLP

The information in this email is intended only for the named recipient and may be privileged or confidential. If you are not the intended recipient please notify us immediately and do not copy, distribute or take action based on this email. If this email is marked 'personal' Gowling WLG is not liable in any way for its content. E-mails are susceptible to alteration. Gowling WLG shall not be liable for the message if altered, changed or falsified.

Gowling WLG (UK) LLP is a member of Gowling WLG, an international law firm which consists of independent and autonomous entities providing services around the world. Our structure is explained in more detail at

<https://gowlingwlg.com/en/legal-information>

References to 'Gowling WLG' mean one or more members of Gowling WLG International Limited and /or any of their affiliated businesses as the context requires.

Gowling WLG (UK) LLP is registered in England and Wales as a Limited Liability Partnership, Registered No. OC304378. Registered Office: 4 More London Riverside, London, SE1 2AU. Gowling WLG (UK) LLP is regulated and authorised by the Solicitors Regulation Authority (www.sra.org.uk). A list of members of Gowling WLG (UK) LLP is open to inspection at the registered office.

Gowling WLG has offices in Beijing, Birmingham, Brussels, Calgary, Dubai, Guangzhou, Hamilton, London, Montreal, Munich, Paris, Singapore, Stuttgart, Toronto, Vancouver and Waterloo Region (Canada).



Law Commission
London
SW1H 9AG
arbitration@lawcommission.gov.uk

Monday 5 December 2022

Dear Sir/Madam,

Gafta Consultation response: review of the 1996 Arbitration Act

Gafta is an International trade association which represents almost 2000 member companies in 100 countries who trade in Agri-Commodities. Gafta designs and maintains the standard forms of contract on which it is estimated that 80% of the world's trade in Grain is shipped. We also run an international arbitration service, based on English Law, to deal with disputes, which averages between 300-1000 cases a year. The value of a typical Gafta arbitration case is US\$914,731.41 and the aggregate damages awarded for Gafta arbitration for 2021-22 was US\$92,775,506.01. Gafta also carries out arbitration services for other Agri-trade associations including ANEC in Brazil, and the Global Pulses Confederation (GPC). Gafta were given permission to intervene as an interested party in the 2020 Supreme Court decision in *Halliburton v Chubb*.

Gafta appreciated representatives from the Law Commission coming to address Gafta's Annual Arbitration Masterclass in December 2021 and the Federation of Commodities Association meeting (chaired by Gafta) in December 2021 to discuss the initial scope of the consultation into the Review of the 1996 Arbitration Act, and welcomes this opportunity to respond to the consultation.

Gafta supports the main recommendations of the review and the spirit of 'updating' rather than reforming the legislation. We would like to make the following comments.

Gafta does not support the introduction of a duty of Statutory Duty Disclosure for Arbitrators which was a key consideration with *Halliburton v Chubb* and was ultimately rejected by the Supreme Court. Arbitrators already have a statutory duty to act impartially. We do not believe that a move to create a statutory duty of disclosure would enhance this obligation or indeed, improve the perception of, and the confidence in, the impartiality of English law arbitration. Instead, we believe that it is likely to create an increase in challenges to Arbitral appointments, on spurious grounds. This would have the effect of creating unnecessary delay to Arbitration proceedings and ultimately impact the reputation of Arbitration under English law, in being able to conduct proceedings efficiently and without undue delay.

In particular, we are concerned about the impact that a new statutory duty of Disclosure would have on specialist arbitral bodies including trade commodity associations, marine, re-insurance and others, where there is necessarily a comparatively small pool of specialist arbitrators. In these instances, repeat appointments and overlapping common parties are a common occurrence, and yet this is not considered by the users of the service to be a concern. By contrast, it is considered an advantage, with arbitrators being able to acquire considerable experience and expertise in the field.

The Grain and Feed Trade Association

9 Lincoln's Inn Fields | London | WC2A 3BP | United Kingdom |

T: +44 (0) 20 7814 9666 | F: +44 (0) 20 7814 8383 | E: post@gafta.com | W: gafta.com

Promoting international trade

In Gafta arbitration, an arbitrator may accept many potential appointments by parties for a future arbitration, which may, in fact, never come to fruition, because the parties settle their dispute. Again, this is regarded and understood by users of the service as common practice. This is exacerbated by the fact that it is possible for a potential dispute under Gafta arbitration to be kept ‘live’ with a nominated arbitrator for up to 6 years. Also, under Gafta arbitration it is not just the Arbitral proceedings which are confidential, but *the very fact of going to arbitration*- which is known only to Gafta and the two parties concerned. This enables the vital trade in Grain – which is key to global Food Security – to continue, without rumours or knowledge of potential trade disputes, to affect the willingness of commercial parties to contract. A statutory duty of disclosure would fundamentally alter the confidentiality of Gafta’s arbitral proceedings, and potentially create a situation where the number of arbitral nominations required (on annual basis, let alone an extended period) would greatly exceed the numbers of arbitrators available, effectively grinding the whole system to a halt.

Both the International Bar Association guidelines on ‘Conflicts of Interest in International Arbitration’ and the Supreme Court (2020) recognised the necessity of treating commodity and other specialist arbitral bodies, in a different way. **Therefore, we ask that should a statutory duty of disclosure be recommended, then an explicit exemption is made for Gafta and similar bodies.**

Discrimination:

Gafta agrees with the Law Commission “that arbitration benefits when free from prejudice”. As such, we support their proposals to increase diversity in the appointment of arbitrators and to resist challenges to arbitral appointments on discriminatory grounds. We also believe it is good practice for Arbitral institutions to develop their own codes of practice in this regard. Gafta does not appoint Arbitrators over the age of 75 to ensure that all its arbitrators are still active within the Grain Trade, and are up-to-date with current trade knowledge and practice, to maintain the strong commercial focus which is the hallmark of Gafta arbitration. We believe that this would be considered acceptable under the Law Commission’s proposal:

“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. Consultation question 7”

We note that a Private Members bill seeking to apply the 2010 Equality Act to Arbitration did not succeed and the Law Commission also notes that

“the Supreme Court decision in Hashwani v Jivraj has received criticism from some commentators, but it has been welcomed by others. There is no consensus that the decision itself should be reversed. Indeed, the conclusion that an arbitrator is not an employee seems sound.”

However, in the Consultation Summary paper, the Law Commission also goes on to say:

“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.”

Promoting international trade

Gafta disagrees with this view. We are concerned that if the Equality Act 2010 did apply to Arbitration, it risks Arbitrators then being regarded as ‘workers’ under the law. This could have the unwelcome consequence of changing the employment and tax status of Arbitrators and undermining the independence of Arbitral Institutions through an inability to work at ‘arms-length’ with self-employed Arbitrators.

Gafta agrees with the proposal of the Law Commission to extend the immunity of arbitrators who have acted in ‘good faith’ in situations where they resign or where there is an application to the Courts to remove an arbitrator, which impugns them. The Law Commission notes that Professional Indemnity insurance may not cover an arbitrator in either situation.

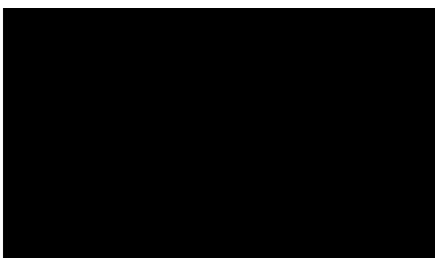
Gafta would like to note that the war in Ukraine has (amongst other things) given rise to array of new sanctions being imposed by the UK, EU, US and UN. We are certainly aware of situations where an arbitrator may wish to decline or resign from an appointment because they are concerned that a party to the arbitration is, or may become, subject to international sanctions, and that that could give rise to potential personal liability to the arbitrator. In addition, many Professional Indemnity insurance policies are now specifically excluding any claims that arise from exposure to Russia, Ukraine and other sanctioned countries. This may therefore, increase the risk noted by the Law Commission:

“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.”

Therefore, we strongly support the proposal to extend the immunity of Arbitrators.

We hope these comments are helpful and look forward to hearing from you.

Yours faithfully



Response ID ANON-PT57-RURX-1

Submitted to Law Commission Consultation: Review of the Arbitration Act 1996
Submitted on 2022-12-14 14:01:22

About you

What is your name?

Name:

[REDACTED]

What is the name of your organisation?

Enter the name of your organisation:

Greenberg Traurig, LLP

Are you responding to this consultation in a personal capacity or on behalf of your organisation?

Response on behalf of organisation

If other, please state::

What is your email address?

Email:

[REDACTED]

What is your telephone number?

Telephone number:

[REDACTED]

If you want the information that you provide in response to this consultation to be treated as confidential, please explain to us why you regard the information as confidential. As explained in our privacy notice, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

Please explain to us why you regard the information as confidential:

Consultation questions

Consultation Question 1: 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?

Disagree

Please share your views below.:

We would suggest codifying this area of law on a non-mandatory basis to enable the parties to opt out either directly or by adopting institutional rules that permits a certain level of disclosure, such as the rules of the International Chamber of Commerce as the positive effect of institutions publishing awards, albeit anonymised, on the pursuit of justice and on the creation of the body of precedents in International Commercial Arbitration is an important consideration.

Consultation Question 2: We provisionally conclude that the Arbitration Act 1996 should not impose a duty of independence on arbitrators. Do you agree?

Agree

Please share your views below.:

We agree with the Consultation Group, 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.

Consultation Question 3: 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. Do you agree?

Agree

Please share your views below.:

It is noted that the case law requires an arbitrator to make such disclosure. We agree with the Consultation Group that provisionally propose that the case law should be codified. They 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.

Consultation Question 4: Should the Arbitration Act 1996 specify the state of knowledge required of an arbitrator's duty of disclosure, and why?

Yes

Please share your views below.:

If Consultation Question 3 is to be codified, then it is logical that the state of knowledge required of an arbitrator's duty of disclosure also be specified. We recommend that the test be an objective one and so that it is looked at from the reasonable man's perspective.

Consultation Question 5: 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?

What they ought to know

Please share your views below.:

An objective test for the conduct of reasonable inquiries should be set in the legislation so that the arbitrator would know what he has to do in order to comply with his duties.

Consultation Question 6:

More broadly justified

Please share your views below.:

Yes, this can be more broadly justified provided the justification could be directly linked to an arbitrator's duty under the law of seat or the institutional rules chosen by the parties.

Consultation Question 7:

Agree

Please share your views below.:

Yes, a challenge or parties' agreement in relation to the arbitrator's protected characteristic should only be permitted in respect of achieving a proportionate legitimate aim, i.e., the expedient resolution of the dispute/ proceedings, it should be prudent to allow some degree of discrimination as to the appointment i.e., age (in a particularly complex matter that could last a number of years it would be prudent to restrict the age of an arbitrator).

Consultation Question 8: Should arbitrators incur liability for resignation at all, and why?

Liability for resignation

Please share your views below.:

Due to incurred costs, it would be necessary for some degree of liability to be apportioned. Whether this comes from the arbitrator or the arbitration body is to be determined.

Consultation Question 9: Should arbitrators incur liability for resignation only if the resignation is proved to be unreasonable?

Yes

Please share your views below.:

As outlined in our response to question 8 above, the parties will have incurred costs, and therefore, if an arbitrator resigns then liability will need to be apportioned. If the reason for the resignation is "unreasonable" then such liability should rest solely with the arbitrator. As suggested above, apportionment between arbitrator and/or other arbitrators/ arbitration body should be set out in the terms of the agreement.

Consultation Question 10: 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. Do you agree?

Disagree

Please share your views below.:

We disagree as it seems unfair that such costs would rest with the parties to the arbitration for no fault of their own. Being an arbitrator is a lucrative profession and therefore it seems reasonable that there be some element of liability involved should they have to pull.

Consultation Question 11: 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. Do you agree?

Agree

Please share your views below.:

International arbitration is often described as inefficient and expensive, criticisms that can be alleviated through the introduction of a summary judgment procedure. Granting tribunals the power to award summary judgement means claimants and defendants can obtain a quick determination of the case on the merits, saving both parties time and money.

Tribunals may be hesitant to grant summary judgment for fear that they do not have jurisdiction or that the summary award will be unenforceable or set aside. Any summary judgment given in favour of the claimant may be met by a jurisdiction or other claim by the respondent.

However, we assume the courts face the same risks when issuing summary judgment in litigation, and it's clear here that the parties' ability to apply for summary judgment is a right they should be entitled to.

Consultation Question 12: 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. Do you agree?

Agree

Please share your views below.:

Both parties should propose their own procedures but on a short timetable, applicant first followed by respondent, then Tribunal shall decide the appropriate procedure based on all circumstances.

We don't think you can have a uniform procedure because the nature and substance of all summary procedure applications will differ substantially.

Consultation Question 13: We provisionally propose that the Arbitration Act 1996 should stipulate the threshold for success in any summary procedure. Do you agree?

Agree

Please share your views below.:

We agree as it would be better for certainty.

Two suitable thresholds could be 'manifestly without merit' or 'no real prospect of succeeding on the claim or issue/successfully defending the claim or issue'.

The latter is preferred as it requires the respondent to show that they have a realistic prospect of success with an argument that carries some degree of conviction. This would bring the procedure in line with CPR 24.

Consultation Question 14: 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. Do you agree?

Agree

Please share your views below.:

We agree for the same reasons that we have provided in our responses to Consultation Questions 11, 12 and 13.

Consultation Question 15: 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. Do you agree?

Disagree

Please share your views below.:

This could unduly limit the party's ability to get material witness evidence in the arbitration.

Consultation Question 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?

Yes

Please share your views below.:

Since 2014, on several occasions English courts have held that their powers to make orders in support of arbitral proceedings under section 44 of the English Arbitration Act 1996 (save for the specific power under section 44(2)(a)) are not exercisable against third parties to arbitration.

Such position of English courts undermines the supportive role of the courts in arbitration, leaving a gap in a regime, as most tribunals lack power against third parties to arbitration.

Consultation Question 17: 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. Do you agree?

Agree

Please share your views below.:

We agree that it would be unfair to require all third parties to receive the leave of the court for the appeal, given that such third parties did not enter into the arbitration agreement and, therefore, did not provide their consent to such procedure for the appeal of court orders in support of arbitration.

Consultation Question 18: We provisionally conclude that the provisions of the Arbitration Act 1996 should not apply generally to emergency arbitrators. Do you agree?

Disagree

Please share your views below.:

If the parties agreed to the arbitration rules, which allow emergency arbitrators, it makes sense to cover them and their orders by the Arbitration Act, unless certain sections of the Arbitration Act cannot be applicable to the emergency arbitrators (i.e., appointment of arbitrators and failure to appoint the arbitrators). The orders issued by the arbitral tribunals similarly to the orders of emergency arbitrators can be cancelled by the same arbitral tribunal or automatically expire. Hence, there is no clear justification for such a difference.

Consultation Question 19: 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?

Agree

Please share your views below.:

The procedure for the appointment of emergency arbitrators shall be determined by institutional arbitration rules, agreed by the parties.

Consultation Question 20: Do you think that section 44(5) of the Arbitration Act 1996 should be repealed, and why?

No

Please share your views below.:

The same comment applies here as it does to question 18, while Section 44(5) of the Arbitration Act might be read as allowing the court to 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 (emergency arbitrator might be considered as such person), has no power or is unable for the time being to act effectively. At the same time, this clause would also allow the court to intervene even if the parties agreed to the emergency arbitrator under the arbitration rules if it the matter of urgency, i.e., "is unable for the time being to act effectively" (order which shall be issued by the court within several hours).

Consultation Question 21:

Peremptory order

Please share your views below.:

Option 1 (order of emergency arbitrator > peremptory order > court order) looks more reasonable.

Therefore, a new provision might be added to the Arbitration Act 1996 providing that, where a party fails to comply with any order or directions of the emergency arbitrator, without showing sufficient cause, then the emergency arbitrator may make a peremptory order to the same effect. If the peremptory order is ignored, then an application might be made to court for the court to order compliance with the peremptory order.

Option 2 would mean that the parties will waste time and costs by first receiving the order of the emergency arbitrator and, in case of its non-compliance, referring to the court with the same application. This can also mean that the emergency arbitrator and the court could issue conflicting orders, while both of them will be considered effective.

Consultation Question 22:

Agree

Please share your views below.:

The concept of a de novo re-hearing under section 67 seems unfair and risks undermining the very concept of 'competence-competence.' It allows a participating party dissatisfied with an adverse award on jurisdiction two bites of the cherry in what is essentially a dry rehearsal for a section 67 challenge before the court. This not only causes said unfairness, but it also increases costs and time. In my view it is the antitheses of arbitral finality. Despite this, we agree that it is useful for the court to retain some ability to rule on jurisdiction under section 67, though this should, as suggested, be by way of appeal rather than de novo. The court should only look at what was presented to the tribunal and not allow fresh-evidence and arguments, which can be changed and upgraded by the parties to address any issues flagged by the tribunal.

Consultation Question 23: 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?

No

Please share your views below.:

We do not think the same limitation should apply given the fundamental differences of party consent and/or court/tribunal permission between sections 32 and 67. A section 32 challenge can only be brought with party permission and/or court or tribunal consent. In such circumstances, we do not see any reason why the parties and/or tribunal/court cannot agree to a de novo hearing in such circumstances. This is unlike section 67, where a participating party can apply unilaterally to the court, without party agreement or prior tribunal/court permission, to potentially have a de novo re-hearing.

Consultation Question 24: We provisionally conclude that our proposed change to section 67 of the Arbitration Act 1996 would not require any similar change to section 103. Do you agree?

Agree

Please share your views below.:

Consultation Question 25: 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. Do you agree?

Agree

Please share your views below.:

In circumstances such as those listed, i.e., when the court decides that a tribunal has no jurisdiction and sets aside a tribunal's decision regarding same, it does not make sense that the tribunal could technically re-start arbitration because of the effect of set-aside. Rather, it makes sense to declare a tribunal's award on jurisdiction of no effect, so said tribunal does not have the ability to re-start arbitration despite a ruling by the court that the tribunal lacks jurisdiction.

Consultation Question 26: 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?

Agree

Please share your views below.:

It seems from experience that this power already exists. From practice, tribunals often award costs to the successful party following an award declining jurisdiction. It would make little sense in such circumstances for the court to award costs despite the tribunal having heard the matter and made its decision. It only increases costs and wastes time, as the court would need to review the issues and decision and thereafter make its additional decision on costs, adding an unnecessary extra layer which the tribunal could easily deal with itself.

Consultation Question 27: 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?

Agree

Please share your views below.:

It seems that the protections afforded by section 69 ensure that the section cannot be abused by overzealous parties (through party agreement or court permission) while simultaneously allowing the common law to be applied somewhat consistently through appeal to the court, particularly in circumstances where a decision by a tribunal on the law is obviously wrong.

Consultation Question 28: Do you think that section 7 of the Arbitration Act 1996 (separability of arbitration agreement) should be mandatory, and why?

No

Please share your views below.:

We have not come across any instances of many major problems with section 7. As such, we think the status quo should be maintained: parties should have the option to opt-out of section 7 if they so choose. We do not see any real benefit to making it mandatory, given party autonomy is paramount in

arbitration. In other words, those parties who want to apply section 7 can do so expressly and they will not be prejudiced. However, making it mandatory will prejudice those that wish to opt-out. It makes sense therefore to give parties the choice.

Consultation Question 29: 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?

Agree

Please share your views below.:

Consultation Question 30: 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?

Yes

Please share your views below.:

We think this for two primary reasons, as stated: (i) it is odd that permission from a tribunal is not sufficient in and of itself to allow the court to consider the action (i.e., if the tribunal gives permission, there should be no real reason why the court would not consider the action); and (ii) discretion of the court is already included in both sections 32 and 45 by use of the word 'may' – allowing vexatious applications to be rejected. In addition, the fact that both sections are non-mandatory is also important, meaning parties can ultimately exclude their application if wanted.

Consultation Question 31: 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?

No

Please share your views below.:

This issue as the procedural one is under the discretion of the arbitral tribunal as per section 34 of the Arbitration Act 1996.

Consultation Question 32: Do you think that section 39 of the Arbitration Act 1996 should be amended to refer to "orders" (rather than "awards"), and why?

Yes

Please share your views below.:

This would help to avoid the confusion and differences of the court practice with regard to enforcement of the peremptory orders. Then it would have to be enforced as per Section 42 of the Arbitration Act (Enforcement of peremptory orders of tribunal).

Consultation Question 33: Do you think that section 39(1) of the Arbitration Act 1996 should be amended to refer to "remedies" (rather than "relief"), and why?

Yes

Please share your views below.:

It would make the terminology of the Arbitration Act consistent.

Consultation Question 34: 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?

Agree

Please share your views below.:

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.

Consultation Question 35: 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?

Agree

Please share your views below.:

Consultation Question 36: We provisionally propose that sections 85 to 87 of the Arbitration Act 1996 (on domestic arbitration agreements) should be repealed. Do you agree?

Agree

Please share your views below.:

The regime for domestic and international arbitration should be the same. This is in line with the goal of the UNCTRAL Model Law – creating a global unified body of rules for commercial arbitration.

Consultation Question 37: Do you think that any of the suggestions discussed in Chapter 11 needs revisiting in full, and if so, why?

Please share your views below.:

Yes. *Enka v Chubb*, as that interferes with the principal reason parties choose London as a seat. It is also inconsistent with international practice.

Consultation Question 38: 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?

Please share your views below.:

To introduce more High Court like powers to enable tribunals to deal with parties' bad conduct without upsetting due process and the parties' rights to present their case. We would suggest a two-step process, starting with an unless order being issued when parties fail to comply with the tribunal's directions or misleads the tribunal followed by an order on costs to be paid immediately by that party into escrow as a security to be distributed as part of the awards on costs at the end of the arbitration.

Response ID ANON-PT57-RU19-1

Submitted to Law Commission Consultation: Review of the Arbitration Act 1996
Submitted on 2022-09-29 09:56:22

About you

What is your name?

Name:
Jan Grimshaw

What is the name of your organisation?

Enter the name of your organisation:
Davies and Partners Solicitors

Are you responding to this consultation in a personal capacity or on behalf of your organisation?

Personal response

If other, please state::

What is your email address?

Email:
[REDACTED]

What is your telephone number?

Telephone number:
[REDACTED]

If you want the information that you provide in response to this consultation to be treated as confidential, please explain to us why you regard the information as confidential. As explained in our privacy notice, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

Please explain to us why you regard the information as confidential:

Consultation questions

Consultation Question 1: 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?

Disagree

Please share your views below.:

Consultation Question 2: We provisionally conclude that the Arbitration Act 1996 should not impose a duty of independence on arbitrators. Do you agree?

Disagree

Please share your views below.:

Consultation Question 3: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 4: Should the Arbitration Act 1996 specify the state of knowledge required of an arbitrator's duty of disclosure, and why?

Yes

Please share your views below.:

Consultation Question 5: 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?

Actual knowledge

Please share your views below.:

Consultation Question 6:

More broadly justified

Please share your views below.:

Consultation Question 7:

Agree

Please share your views below.:

Consultation Question 8: Should arbitrators incur liability for resignation at all, and why?

Liability for resignation

Please share your views below.:

Consultation Question 9: Should arbitrators incur liability for resignation only if the resignation is proved to be unreasonable?

Yes

Please share your views below.:

Consultation Question 10: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 11: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 12: 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. Do you agree?

Agree

Please share your views below.:

Risks becoming a costly side show- length of submissions and timescale for decision on the summary procedure to be adopted needs to be controlled by the tribunal.

Consultation Question 13: We provisionally propose that the Arbitration Act 1996 should stipulate the threshold for success in any summary procedure. Do you agree?

Agree

Please share your views below.:

Gives parties better certainty

Consultation Question 14: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 15: 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. Do you agree?

Disagree

Please share your views below.:

Consultation Question 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?

Yes

Please share your views below.:

arbitration is often provided for in contracts involving projects with multiple parties

Consultation Question 17: 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. Do you agree?

Disagree

Please share your views below.:

prefer to see court control over whether appeal is made

Consultation Question 18: We provisionally conclude that the provisions of the Arbitration Act 1996 should not apply generally to emergency arbitrators. Do you agree?

Disagree

Please share your views below.:

Consultation Question 19: 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?

Agree

Please share your views below.:

Consultation Question 20: Do you think that section 44(5) of the Arbitration Act 1996 should be repealed, and why?

Not Answered

Please share your views below.:

Consultation Question 21:

Permission under section 44

Please share your views below.:

Consultation Question 22:

Agree

Please share your views below.:

Consultation Question 23: 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?

Not Answered

Please share your views below.:

Consultation Question 24: We provisionally conclude that our proposed change to section 67 of the Arbitration Act 1996 would not require any similar change to section 103. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 25: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 26: 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?

Agree

Please share your views below.:

Consultation Question 27: 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?

Agree

Please share your views below.:

Consultation Question 28: Do you think that section 7 of the Arbitration Act 1996 (separability of arbitration agreement) should be mandatory, and why?

Yes

Please share your views below.:

Consultation Question 29: 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?

Agree

Please share your views below.:

Consultation Question 30: 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?

Yes

Please share your views below.:

Consultation Question 31: 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?

Yes

Please share your views below.:

cost effective and no issue as to validity of such directions

Consultation Question 32: Do you think that section 39 of the Arbitration Act 1996 should be amended to refer to "orders" (rather than "awards"), and why?

Not Answered

Please share your views below.:

Consultation Question 33: Do you think that section 39(1) of the Arbitration Act 1996 should be amended to refer to "remedies" (rather than "relief"), and why?

Not Answered

Please share your views below.:

Consultation Question 34: 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?

Agree

Please share your views below.:

Consultation Question 35: 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?

Agree

Please share your views below.:

Consultation Question 36: We provisionally propose that sections 85 to 87 of the Arbitration Act 1996 (on domestic arbitration agreements) should be repealed. Do you agree?

Agree

Please share your views below.:

Consultation Question 37: Do you think that any of the suggestions discussed in Chapter 11 needs revisiting in full, and if so, why?

Please share your views below.:

Consultation Question 38: 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?

Please share your views below.:

Submission to the Law Commission of England and Wales
Consultation Paper 257: Review of the Arbitration Act 1996

Dr Uglješa Grušić

Associate Professor
Faculty of Laws, University College London

1. I would like to respond to the **Law Commission's Consultation Paper 257: Review of the Arbitration Act 1996 (September 2022)** by addressing **Questions 22-26 and 28-30**. These questions concern the review by the courts of the jurisdiction of arbitral tribunals (Questions 22-26), section 7 of the 1996 Act concerning the separability doctrine (Question 28), section 9 of the 1996 Act concerning the stay of legal proceedings (Question 29) and sections 32 and 45 of the 1996 Act concerning court determination of preliminary matters (Question 30). What binds all these questions together is that they (with the exception of Question 30 to the extent to which it concerns section 45) directly or indirectly concern review of arbitral jurisdiction.

Consultation Questions 22, 23 and 24

2. I would like to address Questions 22, 23 and 24 together because they concern the nature of the courts' review of arbitral jurisdiction.
3. The Law Commission's Consultation Paper notes that:

'section 67 is only invoked in a tiny percentage of cases. There were only 15 applications in 2020 to 2021, and 19 in 2019 to 2020. This is down from 56 in 2017 to 2018. This is probably fewer than 0.5% of all English-seated arbitrations in those years. The current position is therefore unlikely to be having any significant negative impact on users of arbitration or cause significant additional costs or delays to arbitrations overall.'¹
4. If the current position is 'unlikely to be having any significant negative impact...or cause significant additional costs or delays', the starting point for any potential reform in this field should be that the burden of proof that the law is in need of change is relatively high. It is my opinion that the Law Commission fails to meet this burden in its Consultation Paper and that, consequently, its proposed changes to section 67 should be rejected.
5. I will give my reasons under the following four headings: (1) it is unclear what the Law Commission means by 'appeal'; (2) the Law Commission's arguments for changing section 67 fail to persuade; (3) it is unclear why there should be a difference in the nature of the courts'

¹ Law Commission, *Review of the Arbitration Act 1996* (Law Com CP 257, 2022) para 8.33 (footnotes omitted).

review of arbitral jurisdiction under sections 67 and 103; (4) a lack of general acceptance of the negative Kompetenz-Kompetenz doctrine in English law² does not support the proposed changes to section 67.

I It Is Unclear What the Law Commission Means by 'Appeal'

6. The Law Commission states the following:

'the application [to the court under section 67] should instead, by default, take the form of an appeal. In other words, the court hearing should be limited to a review of the decision of the tribunal. In such circumstances, the court would not ordinarily receive oral evidence or new evidence which was not before the tribunal, although the court could draw any inference of fact which it considers justified on the evidence. In this way, *the application under section 67 would mirror an appeal in court proceedings*.³

7. This statement appears to suggest that the proposed appeal under section 67 is either identical or similar to (ie 'mirrors') an appeal in court proceedings. But although there are some similarities, the proposed appeal under section 67 is different from an appeal in court proceedings. One can compare the two by asking the following questions. Is an appeal available as of right? Can oral evidence or new evidence be admitted? Who selects the issues to be decided? Can new issues be introduced? Can new arguments be introduced? Is there any flexibility regarding the admissibility of evidence and conducting a rehearing?
8. Section 67 is available as of right. This is recognised by the Law Commission,⁴ which does not propose any changes in this respect. By contrast, an appeal in court proceedings is, with some limited exceptions, not available as of right.⁵ The proposed appeal under section 67 can also be contrasted with section 69 (Appeal on point of law), where an appeal can be brought under this section only with the agreement of all the other parties to the proceedings, or with the leave of the court.⁶
9. The current approach under section 67 allows a repeat of the oral evidence and allows the parties to introduce new evidence. By contrast, the appeal court will not ordinarily receive oral evidence or evidence which was not before the lower court.⁷ The proposed appeal under section 67 aims to 'mirror' an appeal in court proceedings in this respect.
10. There is some uncertainty as to whether a new point can be taken in a section 67 application by a party that has participated in arbitral proceedings. As the Law Commission notes, 'In *GPF GP Sarl v Republic of Poland* [2018] EWHC 409 (Comm), [2018] 2 All ER (Comm) 618 at [72], Bryan J said that any new point can be taken in a s 67 application. However, this particular

² References to 'England' and 'English' in this submission should be read as references to 'England and Wales' and 'English and Welsh'.

³ Law Commission, *Review of the Arbitration Act 1996* (Law Com CP 257, 2022) para 8.23 (emphasis added).

⁴ *Ibid* para 8.50.

⁵ Civil Procedure Rules, r 52.3; exceptions are listed in r 52.3(1).

⁶ Arbitration Act 1996, s 69(2). For conditions that have to be met for the court to grant leave, see s 69(3).

⁷ Civil Procedure Rules, r 52.21(2).

point does not appear to be supported by authority, and has been otherwise contradicted'.⁸ The current approach under section 67 is that it is the party challenging the jurisdiction of the tribunal who decides which of the admissible jurisdictional points will be reviewed by the courts. By contrast, an appeal in court proceedings is limited to the issues for which permission to appeal has been granted.⁹ The proposed appeal under section 67 can also be contrasted with section 69, where an appeal is limited to the issues that meet certain criteria.¹⁰ The proposed appeal under section 67 does not appear to aim to change the law in this respect: it appears that the party appealing the jurisdictional award has the power to decide which part of the award will be reviewed by the courts.

11. The current approach under section 67 allows the parties to make all arguments with respect to the admissible jurisdictional points raised under a section 67 challenge. An appeal in court proceedings and an appeal under section 69 are similar in this respect. It is unclear how the Law Commission envisages the proposed appeal under section 67 to operate in this respect. The Law Commission, for example, writes the following:

'[Section 67] raises a basic question of fairness. It allows a party to raise a jurisdiction 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 a dress rehearsal; the arbitral award (by effect, not design) becomes a form of "coaching" for the losing party.'¹¹

This paragraph raises the question of what it is that the Law Commission envisages would not be allowed under the proposed appeal under section 67: only receiving oral evidence and new evidence which was not before the tribunal *or* both receiving oral evidence and new evidence which was not before the tribunal and making new arguments with respect to the admissible jurisdictional points?

12. The proposed appeal under section 67 does not provide for any flexibility regarding the admissibility of evidence and conducting a rehearing. By contrast, there is flexibility in an appeal in court proceedings in this respect. The appeal court can hold a rehearing if it considers in the circumstances of an individual appeal that it would be in the interests of justice to hold a rehearing.¹² The appeal court can order to receive oral evidence or evidence which was not before the lower court.¹³
13. As this discussion shows, the proposed appeal under section 67 is not identical to an appeal in court proceedings. It is in fact quite different in some respects. By not explaining in more detail the nature of the proposed appeal, the Law Commission fails to address two important questions. First, is the proposed appeal that is available as of right, where the party appealing the jurisdictional award has the power to decide which part of the award will be reviewed by the courts and where that party can introduce new arguments with respect to the admissible

⁸ Ibid para 8.8, fn 5, referring to *Russell on Arbitration* (24th ed 2015) para 8-070.

⁹ Civil Procedure Rules, r 52.6 and r 52.7.

¹⁰ Arbitration Act 1996, s 69(3).

¹¹ Law Commission, *Review of the Arbitration Act 1996* (Law Com CP 257, 2022) para 8.31 (emphasis added).

¹² Civil Procedure Rules, r 52.21(1)(a).

¹³ Civil Procedure Rules, r 52.21(2).

jurisdictional points fit for purpose? In other words, is it capable of reducing the number of section 67 proceedings and the costs and delays involved to such an extent to warrant a significant change? Second, should not the courts be given discretion to decide to conduct a rehearing and admit oral/new evidence, as they have in an appeal in court proceedings?

II Weaknesses in the Law Commission’s Arguments for Changing Section 67

14. The Law Commission’s arguments for changing section 67 fail to persuade.
15. I would like to start by reviewing the Law Commission’s rebuttal of what it calls ‘the theoretical objections to reform’.¹⁴
16. The Law Commission rebuts the ‘bootstrapping problem’¹⁵ by arguing that ‘if the hearing before the court is an appeal and not a rehearing [sic], the court nevertheless remains the “final arbiter” on the question of the tribunal’s jurisdiction’.¹⁶ The veracity of this statement depends on the nature of the proposed appeal under section 67 (discussed above). If the proposed appeal gives the courts no discretion to admit oral/new evidence, if it further limits the power of the courts to review the facts determined by the tribunal,¹⁷ if it does not allow new arguments with respect to the admissible jurisdictional points, and if it leaves the courts no flexibility regarding conducting a rehearing, then the very limited role of the courts might preclude them from effectively dealing with the ‘bootstrapping problem’ in some situations.
17. The Law Commission rebuts the second theoretical objection to reform, namely the fact that a ‘challenge to jurisdiction may well involve questions of fact as well as questions of law’ and that since ‘the arbitral tribunal cannot rule finally on its own jurisdiction, it follows that both its findings of fact and its holdings of law may be challenged’,¹⁸ by arguing that ‘it does not necessarily follow [from this objection] that the court should hear the evidence afresh, or entertain new evidence’.¹⁹ This is true. But it should be pointed out that the courts do not always hear the evidence afresh or entertain new evidence in the context of section 67 challenges. As the Law Commission correctly points out, the courts have mechanisms available to them to limit the scope of evidentiary inquiry, including summary proceedings,²⁰ adverse costs orders on an indemnity basis,²¹ controlling what evidence can fairly be adduced²² and abuse of process. It is regrettable that the Law Commission has not conducted an empirical analysis of the cases on section 67 challenges to determine to what extent the courts, on the one hand, hear the evidence afresh or entertain new evidence and, on the other, resort to the mechanisms available to them to limit the scope of evidentiary inquiry.

¹⁴ Law Commission, *Review of the Arbitration Act 1996* (Law Com CP 257, 2022) para 8.38.

¹⁵ Departmental Advisory Committee on Arbitration Law, *Report on the Arbitration Bill* (1996) para 138.

¹⁶ Law Commission, *Review of the Arbitration Act 1996* (Law Com CP 257, 2022) para 8.39.

¹⁷ *White Book* (2022) para 52.21.1: ‘where the judge’s evaluation of the facts or exercise of discretion is challenged, then the difference between a review and a rehearing will be of considerable importance’.

¹⁸ Departmental Advisory Committee on Arbitration Law, *Report on the Arbitration Bill* (1996) para 143.

¹⁹ Law Commission, *Review of the Arbitration Act 1996* (Law Com CP 257, 2022) para 8.40.

²⁰ *Ibid* paras 8.21 and 8.34.

²¹ *Ibid* para 8.34.

²² *Ibid* paras 8.35 and 8.36.

18. The Law Commission advances three positive arguments in favour of changing section 67. I will call these arguments the ‘party autonomy argument’, the ‘two bites at the cherry argument’ and the ‘practice run argument’.
19. The Law Commission relies on party autonomy to justify its proposed changes to section 67. It writes that 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 merits, subject to review by the court’.²³ This reasoning, however, is based on a misunderstanding of the Kompetenz-Kompetenz doctrine and the nature of a jurisdictional challenge.
20. The Kompetenz-Kompetenz doctrine, in its positive function, provides that the tribunal has jurisdiction to decide on its own jurisdiction. This doctrine is accepted in English law and is set out in section 30 (Competence of tribunal to rule on its own jurisdiction). In a legal system, like English, where there is a rule that provides for the positive Kompetenz-Kompetenz doctrine by default, it is wrong to say that by participating in arbitral proceedings in which a jurisdictional challenge is raised and defended the parties are conferring on the tribunal jurisdiction to decide on its own jurisdiction. The positive Kompetenz-Kompetenz doctrine is almost an inevitable consequence of arbitrations seated in England given that arbitration agreements rarely, if ever, provide for disapplication of section 30. Furthermore, if it were correct that by participating in arbitral proceedings in which a jurisdictional challenge is raised and defended the parties are conferring on the tribunal jurisdiction to decide on its own jurisdiction, then there would be a tacit arbitration agreement,²⁴ whose logical consequence would be that the courts are deprived of jurisdiction over the dispute as to whether the tribunal has jurisdiction over the merits.
21. A jurisdiction challenge is a right of a party who believes that there is not a valid or sufficiently broad arbitration agreement. That right can be exercised before the tribunal and, as long as the challenging party does not lose its right to object, before the courts in section 67 proceedings. The positive Kompetenz-Kompetenz doctrine does not abolish or limit that right. The positive Kompetenz-Kompetenz doctrine is a mechanism whose purpose is to increase the efficiency of arbitral proceedings. Without it, negative jurisdictional awards (absent an arbitration agreement conferring jurisdiction on the tribunal to decide on its own jurisdiction) would be logically difficult to defend – how can an arbitral tribunal have jurisdiction over anything if there is not a valid arbitration agreement?
22. Another positive argument advanced by the Law Commission in favour of changing section 67 is that what ‘a party should not be able to do, is ask a tribunal to issue an award, and for that party to insist that the award is binding, but only if the tribunal finds in its favour, and if not then to assert that the award can be ignored.’²⁵ This argument is based on the same misunderstanding of the positive Kompetenz-Kompetenz doctrine and the nature of a jurisdictional challenge as the ‘party autonomy’ argument. Furthermore, it disregards an important point made by Lord Mance about the ‘binding’ nature of jurisdictional awards: ‘An

²³ Ibid para 8.41.

²⁴ Either under section 5(5) of the Arbitration Act 1996 or under the common law.

²⁵ Law Commission, *Review of the Arbitration Act 1996* (Law Com CP 257, 2022) para 8.42.

arbitral tribunal's decision as to the existence of its own jurisdiction cannot...bind a party who has not submitted the question of arbitrability to the tribunal.'²⁶ If this is correct, then a party cannot 'insist that [a jurisdictional award] is binding'.

23. The Law Commission's 'two bites at the cherry argument' also ignores the fact that a party may have good reasons to make a jurisdictional challenge both before the tribunal and the courts of the seat. An award can lead to enforcement proceedings in a number of jurisdictions. The party disputing the tribunal's jurisdiction can resist enforcement in those jurisdictions by relying on the defence contained in Article V(1)(a) of the New York Convention. As the Law Commission indirectly confirms,²⁷ raising an Article V(1)(a) defence usually results in a rehearing. The Law Commission considers rehearings to be problematic because they cause significant additional costs and delays. Where there is an award that results in enforcement proceedings in a number of jurisdictions, the additional costs and delays are multiplied by a factor of X, X being the number of enforcement proceedings. The law provides for two ways to avoid these additional costs and delays. The first is to challenge the jurisdiction of the tribunal before the tribunal itself. If the jurisdictional challenge succeeds, the risk of multiple rehearings in enforcement proceedings is eliminated. The second is to challenge a positive jurisdictional award in the courts of the seat. Such challenge reduces the risk of multiple rehearings in enforcement proceedings because commencing setting aside proceedings in the courts of the seat can lead to a stay of foreign enforcement proceedings,²⁸ whereas commencing an enforcement proceeding does not have the same effect in relation to the other enforcement proceedings. If the courts of the seat can only perform a limited review of the jurisdiction of the tribunal, that increases the risk of multiple rehearings in foreign enforcement proceedings either because the party disputing the tribunal's jurisdiction is more likely to refrain from commencing section 67 proceedings or because section 67 proceedings cannot cover all the issues that may be raised in foreign enforcement proceedings (for example, English section 67 proceedings are not identical to foreign enforcement proceedings where new facts, new points or new arguments are raised abroad, so there is no *lis pendens* and any resulting English judgment cannot create an estoppel effect in the foreign jurisdiction). In other words, the proposed changes to section 67 may have the effect, at least in some cases, of externalising the inefficiencies involved and even exacerbating them.
24. The last positive argument advanced by the Law Commission in favour of changing section 67 is that 'the situation where a party feels that the court should make a full inquiry, but wishes to have a practice run first before the tribunal'²⁹ should be avoided. The effect of the proposed changes to section 67 is that the party disputing the tribunal's jurisdiction has to choose between two options, which are both relatively unattractive in comparison to the current position. The first option is to participate in arbitral proceedings, with the risk that an unfavourable jurisdictional award will have to be defended in one or more rehearings in foreign enforcement proceedings (for example because the commencement of a section 67 appeal does not create *lis pendens* and any resulting English judgment cannot create an estoppel effect in the foreign jurisdiction). The second option is to not participate in arbitral proceedings and thus not exercise the right to challenge the jurisdiction of the tribunal before

²⁶ *Dallah Real Estate & Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2010] UKSC 46, [2011] 1 AC 763 [26].

²⁷ Law Commission, *Review of the Arbitration Act 1996* (Law Com CP 257, 2022) paras 8.52-8.56.

²⁸ New York Convention, Art VI.

²⁹ Law Commission, *Review of the Arbitration Act 1996* (Law Com CP 257, 2022) para 8.44.

the tribunal itself, but preserve the right to challenge the jurisdiction of the tribunal before the courts of the seat in a rehearing. In other words, if the perceived deficiency of the current position is that it strikes an unequal balance between the party who is relying on an arbitration agreement and the party disputing the tribunal's jurisdiction in favour of the latter party, the proposed changes to section 67 can be criticised for striking an unequal balance in the other direction.

25. Finally, the Law Commission notes the growing popularity of domestic arbitration, including in areas like family law and rent reviews³⁰ and is proposing to repeal sections 85 to 87 of the Arbitration Act 1996.³¹ It is unclear if the proposed changes to section 67 are suitable for these kinds of arbitration and the Law Commission's paper does not raise this point.

III It Is Unclear Why There Should Be a Difference in the Nature of the Courts' Review of Arbitral Jurisdiction under Sections 67 and 103

26. The Law Commission does not suggest that the proposed changes to section 67 would require a matching change to section 103. It is unclear, though, why justifies the proposed difference in the nature of the courts' review of arbitral jurisdiction under sections 67 and 103.

27. The Law Commission provides several arguments in favour of its proposal, none of which fails to persuade.

28. The Law Commission relies on the fact that foreign awards are coming to England and Wales for the first time.³² This is said to be relevant because:

'The way in which [foreign awards] are handled might depend on a range of complicating factors, such as whether the party resisting enforcement objected before the arbitral tribunal, or before the courts at the seat of the arbitration, or indeed what options were even available under the law of seat.'³³

29. Whether the party challenging the jurisdiction of the tribunal objected before the tribunal should, in the Law Commission's view, be relevant for challenges to English awards. No reason is given as to why this should not be relevant under section 103.

30. It is unclear why the fact that a foreign arbitral award is objected before the courts of the seat is an argument for not aligning sections 67 and 103. Where a foreign arbitral award is objected before the courts of the seat, there are established rules on how the English legal system deals with those situations. Where setting aside proceedings are pending in the courts of the seat, the English courts have the power to stay enforcement proceedings.³⁴ Where the courts of the seat have decided on a jurisdictional challenge, the foreign judgment, if it satisfies the

³⁰ Ibid, paras 1.1, 1.14.

³¹ Ibid 10.65-10.69.

³² Ibid para 8.54.

³³ Ibid (footnote omitted).

³⁴ Arbitration Act 1996, s 103(5).

private international law requirements for recognition in England, will create an estoppel effect between the parties.³⁵ In other situations where the jurisdiction of a tribunal is challenged under section 103 in England, the fact that a foreign arbitral award can be or is objected before the courts of the seat does not support either a rehearing or an appeal of the jurisdictional dispute in England.

31. It is unclear why the fact that there may be multiple options available under the law of the seat is an argument for not aligning sections 67 and 103. In theory, there are only three options available in the courts of the seat: rehearing, appeal or no review. None of these options supports either a rehearing or an appeal of the jurisdictional dispute in England under section 103.
32. The Law Commission also correctly states that English awards 'will be enforced or challenged in the receiving foreign state also under the New York Convention'³⁶ and that the proposed changes to section 67 need have no effect on the treatment of foreign awards under the New York Convention because section 67 does not apply to such awards.³⁷ This is true. But it does not explain why there should be a difference in the nature of the courts' review of arbitral jurisdiction under sections 67 and 103.
33. This is not to say that I support extending the proposed changes to section 67 to section 103. This is to say that it is my opinion that the Law Commission did not sufficiently justify the proposed difference in the nature of the courts' review of arbitral jurisdiction under sections 67 and 103.

IV A Lack of General Acceptance of the Negative Kompetenz-Kompetenz Doctrine in English Law Does Not Support the Proposed Changes to Section 67

34. The Law Commission does not deal with the Kompetenz-Kompetenz doctrine in a systematic way in its Consultation Paper although this doctrine is highly relevant for the topic under review. As discussed above, the question of the need to change section 67 arises because of the positive Kompetenz-Kompetenz doctrine, ie the jurisdiction of the tribunal to decide on its own jurisdiction. Some countries also adopt the Kompetenz-Kompetenz doctrine in its negative function. The negative Kompetenz-Kompetenz doctrine provides that, when a jurisdictional dispute arises, it is ordinarily the tribunal that gets to decide first whether it has jurisdiction. It is usually through the negative Kompetenz-Kompetenz doctrine that a legal system gives deference to the tribunal with respect to jurisdictional disputes.
35. But the English legal system does not generally accept the negative Kompetenz-Kompetenz doctrine. As Lord Collins stated in *The Dallah* case, 'it does not follow [from the acceptance of the positive Kompetenz-Kompetenz doctrine] that the tribunal has the exclusive power to determine its own jurisdiction, nor does it follow that the court of the seat may not determine

³⁵ *Dallah Real Estate & Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2010] UKSC 46, [2011] 1 AC 763 [98].

³⁶ Law Commission, *Review of the Arbitration Act 1996* (Law Com CP 257, 2022) para 8.55.

³⁷ *Ibid*, para 8.56.

whether the tribunal has jurisdiction before the tribunal has ruled on it'.³⁸ In fact, the English courts have an amount of discretion to decide whether to let the tribunal decide the jurisdictional dispute first or deal with the jurisdictional dispute even if the tribunal may be or is actually dealing with it as well. In *Golden Ocean Group Ltd v Humpuss Intermoda Transportasi Tbk Ltd*,³⁹ Popplewell J stated:

'I would not regard it as contrary to the philosophy of arbitration pursuant to either the New York Convention or the Arbitration Act 1996, or to the importance of Kompetenz-Kompetenz jurisdiction in the role of arbitrators, that the court should go beyond establishing whether there is a good arguable case for an applicable arbitration agreement... there can be no presumption in favour of the Kompetenz-Kompetenz of a tribunal on which the parties may not have agreed to confer jurisdiction... A Kompetenz-Kompetenz decision of the tribunal is not final or binding on the parties, and it is not enough to make it so that one party establishes merely an arguable case that the other party agreed to confer such Kompetenz-Kompetenz jurisdiction on the tribunal... A party who has only arguably agreed to submit his disputes to arbitration, but not in fact done so, cannot be said to be cutting across the philosophy of the Act or the Convention by asking the court to decide that he has not done so.'⁴⁰

Nevertheless, the English courts have discretion to decide to only assess the existence, validity or scope of an arbitration agreement on a prima facie basis and, if they find that the tribunal has prima facie jurisdiction, let the tribunal deal with the jurisdictional dispute first.

36. The consequence of this is that the English legal system does not proscribe the duplication of costs that parallel arbitral and court proceedings on jurisdictional points create. There are situations where both the tribunal and the courts can be seised of a jurisdictional dispute under English law. This is also confirmed by the 1996 Act. Section 32(4) provides that, unless otherwise agreed by the parties, the tribunal may continue the arbitral proceedings and make an award while an application to the court under this section is pending. Similarly, section 67(2) provides that, the tribunal may continue the arbitral proceedings and make a further award while an application to the court under this section is pending in relation to an award as to jurisdiction.

V Conclusion

37. On the basis of the above reasons, I provide the following answers to Questions 22, 23 and 24 in the Law Commission's Consultation Paper.
38. Question 22: I do not agree. If, however, the Law Commission decides to proceed with its proposed changes to section 67, it is my opinion that it should clarify what is meant by 'appeal' in this context.

³⁸ *Dallah Real Estate & Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2010] UKSC 46, [2011] 1 AC 763 [84].

³⁹ [2013] EWHC 1240 (Comm), [2013] 2 All ER (Comm) 1025.

⁴⁰ *Ibid* [58].

39. Question 23: since section 32 requires either the agreement of the parties or the permission of the tribunal, if the proposed changes to section 67 are adopted, there would be no need to apply the same limitations to section 32.
40. Question 24: I agree that there is no need to change section 103.

Consultation Questions 25 and 26

41. Assuming that the difference between setting aside an award and declaring it to be of no effect is indeed as described by the Law Commission,⁴¹ I agree with its proposal that, in addition to the existing remedies under section 67(3) of the 1996 Act, the courts should have a remedy of declaring the award to be of no effect, in whole or in part.
42. I agree that as a matter of principle a tribunal that has ruled that it does not have jurisdiction should nevertheless be able to issue a binding award on costs incurred in the arbitral proceedings up to that point. It is my opinion, however, that it is not necessary to provide for this expressly in the 1996 Act. Section 61 is sufficiently wide to allow a tribunal to issue an award on costs. It gives the power to all tribunals (ie regardless of whether they are deciding only jurisdictional disputes or the merits and regardless of whether or not they decide that they have jurisdiction) to issue awards on costs.

Consultation Question 28

43. The separability doctrine is very important in international commercial arbitration and is widely recognised. The Law Commission explains very well the somewhat strange interaction between sections 2(1), 4(5) and 7 of the 1996 Act.
44. Many parties to arbitrations seated in England would probably find it surprising to learn that, when their arbitration agreement is governed by foreign law (which it usually will be if the parties have agreed that the main contract in which the arbitration clause is contained is governed by foreign law),⁴² the issue of separability is governed by that foreign law.
45. However, it is my opinion that this is unlikely to cause problems in practice. If the parties do not want the separability doctrine to apply, there is no reason for the law to preclude the parties from agreeing to exclude this doctrine. Similarly, in the unlikely event that the parties expressly agree that their arbitration agreement is governed by foreign law that does not recognise the separability doctrine, there is no reason for the law not to allow that choice and its consequences. The question thus boils down to whether the law should allow either the parties to impliedly agree that their arbitration agreement is governed by foreign law that

⁴¹ Law Commission, *Review of the Arbitration Act 1996* (Law Com CP 257, 2022) para 8.59.

⁴² *Enka Insaat ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38, [2020] 1 WLR 4117.

does not recognise the separability doctrine or the courts to find that, absent party autonomy, the arbitration agreement is governed by foreign law that does not recognise the separability doctrine. This is only problematic if the foreign law would lead to the invalidity or ineffectiveness of the arbitration clause, whereas the application of English law would uphold its validity and effectiveness. But this situation is unlikely to arise in practice because of the principle of validity that is built into the determination of the law governing the arbitration agreement.⁴³

46. On the basis of the above reasons, I provide the following answer to Question 28 in the Law Commission's Consultation Paper: I do not think that section 7 should be mandatory, although I see no harm in making it mandatory.

Consultation Question 29

47. It does indeed appear to be an oversight that section 9 of the 1996 Act does not state expressly that a party can appeal a decision of the High Court under section 9 to the Court of Appeal. I agree with your proposal to confirm that an appeal is available from a decision of the court under section 9.

Consultation Question 30

48. I agree with your assessment that subsections (2)(b)(i) to (iii) in the case of section 32 and (2)(b)(i) and (ii) in the case of section 45 of the 1996 Act are superfluous and potentially refer to inappropriate factors. If the court has discretion to grant permission, it is free to take these and other relevant factors into account, so there is no need for maintaining the two 'lists'. I therefore agree that an application under sections 32 and 45 should merely require either the agreement of the parties or the permission of the tribunal.

Dr Uglješa Grušić

14 December 2022

⁴³ Ibid.

Response ID ANON-PT57-RUR8-1

Submitted to Law Commission Consultation: Review of the Arbitration Act 1996
Submitted on 2022-12-08 19:55:31

About you

What is your name?

Name:

John Habergham

What is the name of your organisation?

Enter the name of your organisation:

Myton Law

Hull

Are you responding to this consultation in a personal capacity or on behalf of your organisation?

Personal response

If other, please state::

What is your email address?

Email:

[REDACTED]

What is your telephone number?

Telephone number:

[REDACTED]

If you want the information that you provide in response to this consultation to be treated as confidential, please explain to us why you regard the information as confidential. As explained in our privacy notice, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

Please explain to us why you regard the information as confidential:

Consultation questions

Consultation Question 1: 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?

Not Answered

Please share your views below.:

Consultation Question 2: We provisionally conclude that the Arbitration Act 1996 should not impose a duty of independence on arbitrators. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 3: 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. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 4: Should the Arbitration Act 1996 specify the state of knowledge required of an arbitrator's duty of disclosure, and why?

Not Answered

Please share your views below.:

Consultation Question 5: 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?

Not Answered

Please share your views below.:

Consultation Question 6:

Not Answered

Please share your views below.:

Consultation Question 7:

Not Answered

Please share your views below.:

Consultation Question 8: Should arbitrators incur liability for resignation at all, and why?

Liability for resignation

Please share your views below.:

Consultation Question 9: Should arbitrators incur liability for resignation only if the resignation is proved to be unreasonable?

Yes

Please share your views below.:

Consultation Question 10: 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. Do you agree?

Disagree

Please share your views below.:

If an arbitrator has acted unreasonably for eg accepting an appointment when he / she knew or ought to have known that the appointment should not have been accepted, then I see no good reason why costs consequences should not follow.

Consultation Question 11: 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. Do you agree?

Other

Please share your views below.:

there should be a default position that summary disposal is available - parties may opt out but that is the starting position. The procedure and threshold should be as contained in CPR.

if the summary procedure is only adopted if a party makes an application for summary procedure and the tribunal agrees, that will just add another hoop to jump through and burn through some more costs when in all likelihood the mischief that you highlight in 1.47 of your Summary paper will come to fruition - fear of challenge of this decision in the court.

Make it mandatory - experienced practitioners are well aware of the potential downside of any application for summary judgement. If it comes off, all well and good; if it fails, then the potential for an adverse costs order.

The arbitraion procedure is crying out for this facility.,

Consultation Question 12: 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. Do you agree?

Disagree

Please share your views below.:

See above

Consultation Question 13: We provisionally propose that the Arbitration Act 1996 should stipulate the threshold for success in any summary procedure. Do you agree?

Agree

Please share your views below.:

Consultation Question 14: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 15: 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. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 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?

Not Answered

Please share your views below.:

Consultation Question 17: 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. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 18: We provisionally conclude that the provisions of the Arbitration Act 1996 should not apply generally to emergency arbitrators. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 19: 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?

Not Answered

Please share your views below.:

Consultation Question 20: Do you think that section 44(5) of the Arbitration Act 1996 should be repealed, and why?

Not Answered

Please share your views below.:

Consultation Question 21:

Not Answered

Please share your views below.:

Consultation Question 22:

Agree

Please share your views below.:

Consultation Question 23: 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?

Not Answered

Please share your views below.:

Consultation Question 24: We provisionally conclude that our proposed change to section 67 of the Arbitration Act 1996 would not require any similar change to section 103. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 25: 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. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 26: 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?

Not Answered

Please share your views below.:

Consultation Question 27: 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?

Not Answered

Please share your views below.:

Consultation Question 28: Do you think that section 7 of the Arbitration Act 1996 (separability of arbitration agreement) should be mandatory, and why?

Not Answered

Please share your views below.:

Consultation Question 29: 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?

Not Answered

Please share your views below.:

Consultation Question 30: 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?

Not Answered

Please share your views below.:

Consultation Question 31: 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?

Not Answered

Please share your views below.:

Consultation Question 32: Do you think that section 39 of the Arbitration Act 1996 should be amended to refer to "orders" (rather than "awards"), and why?

Not Answered

Please share your views below.:

Consultation Question 33: Do you think that section 39(1) of the Arbitration Act 1996 should be amended to refer to "remedies" (rather than "relief"), and why?

Not Answered

Please share your views below.:

Consultation Question 34: 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?

Not Answered

Please share your views below.:

Consultation Question 35: 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?

Not Answered

Please share your views below.:

Consultation Question 36: We provisionally propose that sections 85 to 87 of the Arbitration Act 1996 (on domestic arbitration agreements) should be repealed. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 37: Do you think that any of the suggestions discussed in Chapter 11 needs revisiting in full, and if so, why?

Please share your views below.:

Consultation Question 38: 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?

Please share your views below.:

NOTE FOR THE LAW COMMISSION

REVIEW OF THE ARBITRATION ACT 1996

1. We are in broad support of the proposals made in the consultation paper but wish to encourage the Law Commission to consider one potential reform of the 1996 Act not included in those proposals.
2. Para 11.8 of the consultation paper refers to a suggestion that there should be a default rule that the law governing the arbitration agreement is the law of the seat. Framed in this way, the rule would be a general rule of the conflict of laws, applicable wherever the seat of the arbitration is located. The consultation paper makes the point that such a rule would be inconsistent with the decision of the Supreme Court in *Enka v Chubb* and concludes (at para 11.12) that the Law Commission is not yet persuaded that the Act needs to introduce a new regime which departs from that decision.
3. As members of the court (and the authors of the majority judgment) in *Enka v Chubb*, we make no comment on the merits of enacting a conflict of laws rule which would override the decision in that case. But we would invite the Law Commission to consider recommending the enactment of a narrower default rule similar to section 6 of the Arbitration (Scotland) Act 2010.
4. Such a rule would not be a general rule of the conflict of laws but a rule of domestic English law applicable only to an arbitration seated in England and Wales. A rule of this kind would not be inconsistent with the decision in *Enka v Chubb*. Indeed, at paras 70-71 and 170(iv)(a) of our judgment in that case we specifically recognised that the law of the seat may contain a provision that, where an arbitration is subject to that law, the arbitration agreement will also be governed by that country's law (giving the examples of Scotland and Sweden).
5. It is a reasonable default assumption that international parties who choose England and Wales as a forum in which to arbitrate their disputes do so in the expectation that such an arbitration will resolve all their disputes and not just some of them. That assumption underpins the principle of separability embodied in section 7 of the Act. But that principle is capable of being ousted inadvertently by a choice of law for the contract as a whole which applies to

the arbitration agreement (because no specific contrary intention is expressed), if the chosen law does not contain an equivalent principle. Furthermore, leaving this question to be resolved as a question of conflict of laws creates a layer of complexity, uncertainty and potential for litigation, as cases such as *Enka v Chubb* illustrate. All this is detrimental to the efficacy and attractiveness of England and Wales, and London in particular, as a venue for international arbitration.

6. These detriments could be mitigated by making section 7 of the Act mandatory, as canvassed in Question 28 of the consultation paper. Although we would support that as a second-best solution, it is open to the objection mentioned that it limits party autonomy. We suggest that a better solution would be to follow the example of Scotland and introduce a default rule similar to section 6 of the Arbitration (Scotland) Act which the parties are free to disapply.
7. We agree with two points made in the consultation paper about the detailed drafting of section 6. First, including the words “unless the parties otherwise agree” risks defeating the purpose of the provision by allowing a choice of law implied from the choice of law for the contract as a whole to oust the default rule rather than requiring an express opt-out. (On the other hand, we see no reason why the opt-out should have to be expressed in the arbitration clause itself.) Second, we agree that, rather than limiting the scope of the provision to situations where the parties have agreed on the seat, a better approach would be for the default rule to apply whenever England and Wales is the seat, however that came about. On that basis a suitable provision might read:

“Where an arbitration is seated in England and Wales and the law which is to govern the arbitration agreement has not been specified, then the arbitration agreement is to be governed by the law of England and Wales.”
8. It is a legitimate aim of the 1996 Act to promote England and Wales as a centre for international arbitration and we consider that including a provision of this kind would assist in achieving that aim.

Lord Hamblen
Lord Leggatt
14 December 2022

Response ID ANON-PT57-RUKJ-C

Submitted to Law Commission Consultation: Review of the Arbitration Act 1996
Submitted on 2022-12-09 19:52:52

About you

What is your name?

Name:
Geoffrey Michael Beresford Hartwell

What is the name of your organisation?

Enter the name of your organisation:
N/A

Are you responding to this consultation in a personal capacity or on behalf of your organisation?

Personal response

If other, please state::

[REDACTED]

What is your email address?

Email:
[REDACTED]

What is your telephone number?

Telephone number:
[REDACTED]

If you want the information that you provide in response to this consultation to be treated as confidential, please explain to us why you regard the information as confidential. As explained in our privacy notice, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

Please explain to us why you regard the information as confidential:

Consultation questions

Consultation Question 1: 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?

Agree

Please share your views below.:

Consultation Question 2: We provisionally conclude that the Arbitration Act 1996 should not impose a duty of independence on arbitrators. Do you agree?

Agree

Please share your views below.:

Disclosure is sufficient to protect parties

Consultation Question 3: 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. Do you agree?

Agree

Please share your views below.:

I would have thought it self-evident,

Consultation Question 4: Should the Arbitration Act 1996 specify the state of knowledge required of an arbitrator's duty of disclosure, and why?

No

Please share your views below.:

Such detail may be specific for a given case.

Consultation Question 5: 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?

What they ought to know

Please share your views below.:

Consultation Question 6:

More broadly justified

Please share your views below.:

Parties should be entitled to expect their bargains to be respected. Pacta sunt servanda, as we laymen say.

Consultation Question 7:

Disagree

Please share your views below.:

Consultation Question 8: Should arbitrators incur liability for resignation at all, and why?

No liability for resignation

Please share your views below.:

Unless unreasonable. The writer is especially conscious of the point, having had a major stroke in the course of an international arbitration.

Consultation Question 9: Should arbitrators incur liability for resignation only if the resignation is proved to be unreasonable?

Yes

Please share your views below.:

Consultation Question 10: 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. Do you agree?

Agree

Please share your views below.:

Unless malice can be shown.

Consultation Question 11: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 12: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 13: We provisionally propose that the Arbitration Act 1996 should stipulate the threshold for success in any summary procedure. Do you agree?

Disagree

Please share your views below.:

It is difficult to think of a matter of degree that cannot be argued.

Consultation Question 14: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 15: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 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?

No

Please share your views below.:

Third parties are not parties and arbitrators are not judges, Lawyers don't seem to understand the meaning of 'private agreement'!

Consultation Question 17: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 18: We provisionally conclude that the provisions of the Arbitration Act 1996 should not apply generally to emergency arbitrators. Do you agree?

Disagree

Please share your views below.:

Consultation Question 19: 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?

Agree

Please share your views below.:

Consultation Question 20: Do you think that section 44(5) of the Arbitration Act 1996 should be repealed, and why?

No

Please share your views below.:

If the arbitrators or others have the ability, the Court should not usurp it.

Consultation Question 21:

Permission under section 44

Please share your views below.:

Consultation Question 22:

Agree

Please share your views below.:

Consultation Question 23: 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?

Yes

Please share your views below.:

The arbitrator is the finder of fact chosen by the parties

Consultation Question 24: We provisionally conclude that our proposed change to section 67 of the Arbitration Act 1996 would not require any similar change to section 103. Do you agree?

Agree

Please share your views below.:

Consultation Question 25: 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. Do you agree?

Other

Please share your views below.:

It would be a discretionary matter under NYC 1958

Consultation Question 26: 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?

Agree

Please share your views below.:

Consultation Question 27: 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?

Agree

Please share your views below.:

Consultation Question 28: Do you think that section 7 of the Arbitration Act 1996 (separability of arbitration agreement) should be mandatory, and why?

No

Please share your views below.:

It would be an unnecessary fetter on party autonomy

Consultation Question 29: 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?

Agree

Please share your views below.:

Consultation Question 30: 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?

No

Please share your views below.:

The requirement of 32(2)(b) (i), (ii) & (iii) are commonsense and proportionate.

Consultation Question 31: 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?

No

Please share your views below.:

Let the law be general to accommodate future unforeseen techniques,

Consultation Question 32: Do you think that section 39 of the Arbitration Act 1996 should be amended to refer to “orders” (rather than “awards”), and why?

Other

Please share your views below.:

This responder would recommend that the section should be revised to provide for provisional decisions to be available unless agreed otherwise.

Consultation Question 33: Do you think that section 39(1) of the Arbitration Act 1996 should be amended to refer to “remedies” (rather than “relief”), and why?

No

Please share your views below.:

Why change/

Consultation Question 34: 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?

Agree

Please share your views below.:

Consultation Question 35: 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?

Agree

Please share your views below.:

Consultation Question 36: We provisionally propose that sections 85 to 87 of the Arbitration Act 1996 (on domestic arbitration agreements) should be repealed. Do you agree?

Agree

Please share your views below.:

Consultation Question 37: Do you think that any of the suggestions discussed in Chapter 11 needs revisiting in full, and if so, why?

Please share your views below.:

No

Consultation Question 38: 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?

Please share your views below.:

S,39 to be 'opt out'?

Response ID ANON-PT57-RU1R-T

Submitted to Law Commission Consultation: Review of the Arbitration Act 1996
Submitted on 2022-09-22 14:14:47

About you

What is your name?

Name:
Geoffrey M. Beresford Hartwell

What is the name of your organisation?

Enter the name of your organisation:

Independent

Are you responding to this consultation in a personal capacity or on behalf of your organisation?

Personal response

If other, please state::

[REDACTED]

What is your email address?

Email:
[REDACTED]

What is your telephone number?

Telephone number:
[REDACTED]

If you want the information that you provide in response to this consultation to be treated as confidential, please explain to us why you regard the information as confidential. As explained in our privacy notice, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

Please explain to us why you regard the information as confidential:

Consultation questions

Consultation Question 1: 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?

Agree

Please share your views below.:

There seems to be a general presumption in E&W that arbitration should be confidential. Disclosure of

Consultation Question 2: We provisionally conclude that the Arbitration Act 1996 should not impose a duty of independence on arbitrators. Do you agree?

Disagree

Please share your views below.:

I recall a matter in which I, as arbitrator, discovered that my [REDACTED] was employed by one Party. Both agreed that I should continue. There was no bias. There was disclosure.

Consultation Question 3: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 4: Should the Arbitration Act 1996 specify the state of knowledge required of an arbitrator's duty of disclosure, and why?

Yes

Please share your views below.:

See Q5

Consultation Question 5: 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?

Actual knowledge

Please share your views below.:

Actual knowledge is an objective criterion. What ought to be known is subjective.

Consultation Question 6:

More broadly justified

Please share your views below.:

The agreement between the parties should be a matter for them unless it is contrary to the public interest (see AA1996 s.1(b))

Consultation Question 7:

Disagree

Please share your views below.:

The agreement between the parties should be a matter for them unless it is contrary to the public interest (see AA1996 s.1(b))

Consultation Question 8: Should arbitrators incur liability for resignation at all, and why?

Liability for resignation

Please share your views below.:

Consultation Question 9: Should arbitrators incur liability for resignation only if the resignation is proved to be unreasonable?

Yes

Please share your views below.:

Consultation Question 10: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 11: 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. Do you agree?

Agree

Please share your views below.:

Provided that each party is given proper notice and an opportunity to make representation.

Consultation Question 12: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 13: We provisionally propose that the Arbitration Act 1996 should stipulate the threshold for success in any summary procedure. Do you agree?

Disagree

Please share your views below.:

Thresholds are notoriously difficult to define objectively. The exhortation that criminal juries should be, "... certain so that you are sure." is understandable but logically circular! One may be satisfied, "... on the balance of probabilities ..." but how much imbalance is necessary for a decision maker to find himself or herself satisfied that the decision should be made? The answer is likely to be that it's a matter of degree, The more serious the consequence of a decision, the more satisfied should be the decision maker. The OED speaks of an equitable decision. AA1996 uses the word, "fair".

Consultation Question 14: 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. Do you agree?

Agree

Please share your views below.:

Provided that each party is given proper notice and an opportunity to make representation. See Q11

Consultation Question 15: 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. Do you agree?

Disagree

Please share your views below.:

The word, "deposition" is, in some jurisdictions, a legal term of art for a procedure. If the word, "taken" is thought not to imply that a record should be made, the wording could be amended.

Save for s.44(3) this responder suggests that any application under the section should be accompanied by a certificate from the arbitrator(s).

Consultation Question 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?

Yes

Please share your views below.:

The Court has powers at large and can decide if justice requires the engagement of the third party.

As with Q15, save for s.44(3) this responder suggests that any application under the section should be accompanied by a certificate from the arbitrator(s).

Consultation Question 17: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 18: We provisionally conclude that the provisions of the Arbitration Act 1996 should not apply generally to emergency arbitrators. Do you agree?

Disagree

Please share your views below.:

An emergency procedure should remain fair. Rogue arbitrators would damage the reputation of the idea.

Consultation Question 19: 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?

Agree

Please share your views below.:

Court intervention defeats the object of the agreement,

Consultation Question 20: Do you think that section 44(5) of the Arbitration Act 1996 should be repealed, and why?

No

Please share your views below.:

S,44(5) AA1996 prevents Parties from using the section to evade the overall control of the arbitrators and delay the arbitration.

Consultation Question 21:

Peremptory order

Please share your views below.:

A peremptory order would be quicker. This responder is a lay practitioner and believes that lay persons can use such a power because it does not have coercive effect unless the Court enforces it,

Consultation Question 22:

Agree

Please share your views below.:

Rehearing is an unnecessary expense.

Consultation Question 23: 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?

Yes

Please share your views below.:

If there is an agreement, that is the basis of the arbitration, and the Court need not consider other issues.

Consultation Question 24: We provisionally conclude that our proposed change to section 67 of the Arbitration Act 1996 would not require any similar change to section 103. Do you agree?

Agree

Please share your views below.:

The style of NYC1958 should be retained in accordance with the obligations of the UK

Consultation Question 25: 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. Do you agree?

Disagree

Please share your views below.:

English legislation is limited to E&W. Elsewhere, the proposal is unnecessary. Within the jurisdiction, the proposal seems to have little effect that is not available from s.67(3)(c). The distinction is not apparent to this responder (an engineer, not an adept of law's mystery).

Consultation Question 26: 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?

Disagree

Please share your views below.:

There has been no arbitration. only a sham. The costs of the arbitrators and all other necessary costs logically are for the initiator of the work done. Any authority is vested in the Court as with any other debt.

Consultation Question 27: 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?

Agree

Please share your views below.:

Consultation Question 28: Do you think that section 7 of the Arbitration Act 1996 (separability of arbitration agreement) should be mandatory, and why?

Yes

Please share your views below.:

It seems a matter of logic.

Consultation Question 29: 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?

Agree

Please share your views below.:

Once the matter is in Court it should be open to the entire scope so that UKSC has ultimate control.

Consultation Question 30: 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?

Yes

Please share your views below.:

Absent agreement of the parties, the tribunal should be satisfied that it cannot make those determinations itself before the Court is invoked.

Consultation Question 31: 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?

No

Please share your views below.:

The present legislation has proved sufficient,

Consultation Question 32: Do you think that section 39 of the Arbitration Act 1996 should be amended to refer to "orders" (rather than "awards"), and why?

Other

Please share your views below.:

Before answering the question, this responder would like to propose the repeal of AA1996 s.39(4) and the amendment of s.39(1) to read, "Unless the parties agree otherwise the tribunal shall have power to award on a provisional basis any relief which it would have power to grant in a final award."

The success of "Adjudication" for construction in the UK and abroad (including similar contractual processes) suggests that a provisional decision backed by a final forum (arbitration in this context) is useful.

There is a question whether a Provisional Award should be enforceable under NYC1958. The answer may be in the wording of the dispositive section. It may dispose of issues finally. It may express a finding subject to amendment.

Consultation Question 33: Do you think that section 39(1) of the Arbitration Act 1996 should be amended to refer to "remedies" (rather than "relief"), and why?

Other

Please share your views below.:

A distinction without a difference?

Consultation Question 34: 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?

Agree

Please share your views below.:

Consultation Question 35: 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?

Agree

Please share your views below.:

Particularly security; in construction cases bankruptcy of a party

Consultation Question 36: We provisionally propose that sections 85 to 87 of the Arbitration Act 1996 (on domestic arbitration agreements) should be repealed. Do you agree?

Agree

Please share your views below.:

Logically, private agreements are no different in domestic or international contexts.

Consultation Question 37: Do you think that any of the suggestions discussed in Chapter 11 needs revisiting in full, and if so, why?

Please share your views below.:

Consultation Question 38: 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?

Please share your views below.:

AA1996 is well suited for laymen to use, More legal. as opposed to logical, provisions would not improve it.

Response ID ANON-PT57-RUBE-X

Submitted to Law Commission Consultation: Review of the Arbitration Act 1996
Submitted on 2022-12-15 21:47:16

About you

What is your name?

Name:

[REDACTED]

What is the name of your organisation?

Enter the name of your organisation:

Haynes and Boone CDG, LLP

Are you responding to this consultation in a personal capacity or on behalf of your organisation?

Response on behalf of organisation

If other, please state::

What is your email address?

Email:

[REDACTED]

What is your telephone number?

Telephone number:

[REDACTED]

If you want the information that you provide in response to this consultation to be treated as confidential, please explain to us why you regard the information as confidential. As explained in our privacy notice, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

Please explain to us why you regard the information as confidential:

Consultation questions

Consultation Question 1: 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?

Agree

Please share your views below.:

While we agree we do consider there are some difficulties with this and note the following:

- Confidential nature of arbitration is the reason that many of our clients choose arbitration over litigation and this is generally accepted by the parties.
- Those clients typically include confidentiality clauses in their contracts but these in practice do not address confidentiality in the arbitration agreement. This is not something that the Act can address, but an observation.
- Only a few arbitral rules, such as LCIA rules, contain an express confidentiality undertaking, while the rules of the ICC, ICDR, and LMAA tend to rely on implied right and only require the parties to request an order in respect of confidentiality and therefore the Commission paper possibly places this to highly.
- Relying on case law allows flexibility but creates uncertainty for the parties if there is no precedent. A party wanting to test the exceptions is sometimes forced to act and risk breach of the implied duty and to hope that if the other side objects and wishes to pursue it in arbitration or the courts, that their case falls within an exception. This is what happened to our client in *Teekay Tankers v STX* [2017] EWHC 253 where it wanted to disclose an arbitration award made against the Defendant in earlier arbitration proceedings with related parties in subsequent litigation and where the Defendant went onto sue for breach of confidentiality. The disclosure was ultimately permitted because it was in the interest of justice but did give rise to additional litigation and costs for the parties.

Consultation Question 2: We provisionally conclude that the Arbitration Act 1996 should not impose a duty of independence on arbitrators. Do you agree?

Agree

Please share your views below.:

Consultation Question 3: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 4: Should the Arbitration Act 1996 specify the state of knowledge required of an arbitrator's duty of disclosure, and why?

Other

Please share your views below.:

As this is now dealt with in *Halliburton v Chubb*, this does not seem necessary.

Consultation Question 5: 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?

What they ought to know

Please share your views below.:

It should be based on what they ought to know after making reasonable inquiries as otherwise the outcome for two arbitrators could be different i.e. the one who is diligent in their inquiries and the other who is not.

Consultation Question 6:

Not Answered

Please share your views below.:

Consultation Question 7:

Other

Please share your views below.:

We agree with the sentiments of this proposal but are concerned that clients may be left with an award which is unenforceable / open to challenge under the New York Convention. However, in our line of work, we do not encounter arbitration clauses that would be impacted by this change.

Consultation Question 8: Should arbitrators incur liability for resignation at all, and why?

Not Answered

Please share your views below.:

Consultation Question 9: Should arbitrators incur liability for resignation only if the resignation is proved to be unreasonable?

Not Answered

Please share your views below.:

Consultation Question 10: 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. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 11: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 12: 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. Do you agree?

Disagree

Please share your views below.:

In our view, the Arbitration Act should provide for a “default” summary procedure which would apply unless the parties agreed otherwise or the Tribunal determined that an alternative procedure should apply. In many cases, a default summary procedure would likely be wholly acceptable to the parties and the Tribunal and this would avoid the need for discussion between the parties in every case as to what would be the appropriate procedure, and so would save time and costs.

Consultation Question 13: We provisionally propose that the Arbitration Act 1996 should stipulate the threshold for success in any summary procedure. Do you agree?

Agree

Please share your views below.:

Consultation Question 14: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 15: 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. Do you agree?

Not Answered

Please share your views below.:

We have no view on this.

Consultation Question 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?

Yes

Please share your views below.:

Yes – for the sake of clarity.

Consultation Question 17: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 18: We provisionally conclude that the provisions of the Arbitration Act 1996 should not apply generally to emergency arbitrators. Do you agree?

Agree

Please share your views below.:

Consultation Question 19: 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?

Agree

Please share your views below.:

Consultation Question 20: Do you think that section 44(5) of the Arbitration Act 1996 should be repealed, and why?

Not Answered

Please share your views below.:

Consultation Question 21:

Peremptory order

Please share your views below.:

Prefer (1) on basis that the person who has made the order is best placed to determine whether a peremptory order is appropriate.

Consultation Question 22:

Agree

Please share your views below.:

Consultation Question 23: 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?

Yes

Please share your views below.:

The same limitation should be introduced where the tribunal has ruled on its jurisdiction to avoid a party having a "second bite of the cherry".

Consultation Question 24: We provisionally conclude that our proposed change to section 67 of the Arbitration Act 1996 would not require any similar change to section 103. Do you agree?

Agree

Please share your views below.:

Consultation Question 25: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 26: 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?

Agree

Please share your views below.:

This would hopefully reduce spurious applications to dispute jurisdiction.

Consultation Question 27: 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?

Agree

Please share your views below.:

We have a significant LMAA arbitration practice and consider that it is important that our clients have the opportunity to appeal an award on a point of law

Consultation Question 28: Do you think that section 7 of the Arbitration Act 1996 (separability of arbitration agreement) should be mandatory, and why?

Not Answered

Please share your views below.:

Consultation Question 29: 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?

Not Answered

Please share your views below.:

Consultation Question 30: 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?

Not Answered

Please share your views below.:

Consultation Question 31: 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?

Yes

Please share your views below.:

This will ensure these options are always considered and not overlooked by the parties (or the tribunal).

Consultation Question 32: Do you think that section 39 of the Arbitration Act 1996 should be amended to refer to "orders" (rather than "awards"), and why?

Not Answered

Please share your views below.:

Consultation Question 33: Do you think that section 39(1) of the Arbitration Act 1996 should be amended to refer to "remedies" (rather than "relief"), and why?

Not Answered

Please share your views below.:

Consultation Question 34: 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 appellants was notified of the result of that request. Do you agree?

Agree

Please share your views below.:

Consultation Question 35: 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?

Not Answered

Please share your views below.:

Consultation Question 36: We provisionally propose that sections 85 to 87 of the Arbitration Act 1996 (on domestic arbitration agreements) should be repealed. Do you agree?

Agree

Please share your views below.:

Consultation Question 37: Do you think that any of the suggestions discussed in Chapter 11 needs revisiting in full, and if so, why?

Please share your views below.:

Consultation Question 38: 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?

Please share your views below.:

COMMENTS RE LAW COMMISSION CONSULTATION PAPER ON REVIEW OF THE ARBITRATION ACT 1996

HILARY HEILBRON KC

Dated 6 December 2022

I am enclosing some comments on the Law Commission Proposal for changes to the 1996 Arbitration Act, some of which I raised at the Brick Court Conference a few weeks ago. I am only commenting on those questions where I have something to add or do not agree with.

Questions 2 and 3

Sections 1 and 33 of the 1996 Act do not clearly address the key issue. An arbitrator could act impartially, yet have a conflict i.e. not appear to be independent. The time the issue is first debated is when an arbitrator is appointed and has to disclose any conflicts. Thus a party might not choose to appoint an individual as their arbitrator or object to the other party's appointment or to the appointment of a Chair. This applies whether the arbitrators are directly nominated and/or appointed by the parties (in an ad hoc arbitration) or appointed by an arbitral institution directly or on the nomination of a party. At the end of the day it is the parties who have to feel comfortable with their appointments and to avoid challenges. What factual scenarios justify such conflicts and hence disclosure is a separate issue.

The phrase "independence and impartiality"(or the other way round) is widely used by various institutions and the IBA in its rules and there is therefore much to be said for the inclusion of the two words.

The Law Commission will have considered the IBA Rules on Conflicts of Interest which are currently undergoing revision.

I also favour including something specific about an ongoing duty of disclosure, but the current proposal misses the obligation to do so at the start. The word "continuing" only deals with half the situation. If disclosure is to be addressed specifically it should also refer to "prior to appointment" as well as a continuing duty thereafter to make it clear.

Question 7

While well intended and in principle a good idea, this is fraught with potential practical difficulties. First, a few small drafting points. Sub para (2) should not be "*the*" arbitrator's, but "*an*" arbitrator's. Somewhere it will be necessary to define "*Protected Characteristics*" other than by reference to an English statute which foreign participants may not have to hand. Also

it might be better to turn it round and say rather than “*should be unenforceable unless*” have “*may be unenforceable where*” and then “*not*”.

The proposal is a little unclear, but as I understand it what is being proposed is to make such agreements as opposed to appointments unenforceable subject to a proviso.

How is it proposed that such agreements would be challenged? In the courts I assume, because the challenge could arise before the formation of the Tribunal. If by the Tribunal would section 7 of the 1996 Act apply? If it is an ICC challenge – they would need to be familiar with English equality law. Is it to apply only where the seat is England and/or only where the arbitration clause is governed by English law? What if the arbitration clause is governed by another law? Is there a time limit for such challenges – otherwise it could become a tactical ploy and derail the arbitration?

It is really dealing with the issue after the horse has bolted? Such clauses may have been drafted many years ago. Would foreign parties really be encouraged by “*the expertise built up under the Equality Act 2010*” or avoid England because of this aspect of English law? Should it only refer to agreements going forward? What happens if both parties flout the legislation and in the example appoint women – can their agreement override this and allow them to pursue an arbitration on the basis of an unenforceable agreement? Say one party reserves its rights and does not appear, can they then challenge under the NYC? How does this affect the tribunal? The proviso may require detailed evidence in order to determine what is proportionate, increase costs and give rise to satellite litigation. What is a legitimate aim? Is this to be defined by English law principles of the nationality of the relevant party or parties? How does this fit with sections 1(b); 72 and 73?

One important factor is statistically how many agreements would be caught by this proposal? The real problem is discriminatory appointments: not agreements which I suspect are rare, but the former is a bridge too far to legislate on as the Law Commission has realised.

Questions 8-10

It is important to distinguish between fees and costs of any court application. I agree with No 10 which deals with the latter. As to the former, the court can control the removal of arbitrators. My preference would be to remove any liability arising from resignation unless it was done in bad faith. Most arbitrators are conscientious and do not resign on a whim, but for valid reasons such as ill-health.

Question 14

Very much agree with this proposal.

Question 20

I think section 44(5) is useful and have found it referred to on several occasions. It confirms the primary position that the Tribunal is the first port of call if constituted and emergency arbitrators are not common and the sub-section gives guidance to a tribunal as to when to give its consent under section 44(2): otherwise there is no guidance to the tribunal as to when to give its consent. If necessary the sub-section can be tweaked to deal with the emergency arbitrator position.

Questions 22-26 .Section 67

I made my views clear at the Brick Court Conference which speech I believe has already been sent to the Law Commission, but I attach here for completeness.

Question 27

The impact of section 69 is limited primarily to ad hoc arbitrations as many institutional rules preclude such an appeal in any event and to English law. I am not wholly against the provision, but I do have a concern about c(ii). First, viewed in the international context and in the shoes of the parties, whether the issue is one of general public importance is not of primary concern – they do not care whether or not there is an absence of a body of law on standard form contracts governed by English law – they are for the most part concerned about their case and there is an inconsistency of standard between (c) i and (c) ii. I do not see why (ii) is needed, despite earlier English authority, given (d).

Enka

I have nothing to add to what has been said by others at the Brick Court Conference and by Lord Hoffman at the Gaillard lecture and support their views.

TALK FOR BCC ON SECTION 67 – HILARY HEILBRON KC

Introduction

The topic of this first session concerns the nature of a section 67 hearing challenging the substantive jurisdiction of an arbitral tribunal, a mandatory provision under the 1996 Act, and to consider whether the provision, which has stood the test of time, should be changed as recommended by the Law Commission so as to mandate a particular type of review.

Section 67, as presently drafted, provides that:

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

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

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

A party may lose the right to object (see section 73) [participating without objection] and the right to apply is subject to the restrictions in section 70(2) and (3) [exhausting other routes and 28 day time limit etc]”

The Law Commission proposes to amend the provision thus:

“(1) where a party has participated in arbitral proceedings, and has objected to the jurisdiction of the arbitral tribunal; and

(2) the tribunal has ruled on its own jurisdiction in an award,

Then any subsequent challenge under section 67 should be by way of an appeal and not a rehearing.”

The Proposal

In other words, the present statutory provision is not prescriptive nor is anything enshrined into statute as to the nature of review for such a challenge, as is now proposed by the Law

Commission. The basic change proposed is from what has been judicially determined to be a *de novo* hearing to an appeal.

So, instead of giving no evidential or legal weight to the award and considering the question anew without constraint as to what evidence or arguments can be put before the court as is the current position, what is proposed is that effectively the court should apply an appellate approach paying deference to the award, asking did the tribunal get it wrong – was the decision against the weight of the evidence; did it apply the law wrongly, and occasionally, in limited circumstances if the evidence was not available before, admitting new evidence.

What is at issue is the legal power of the tribunal to make a decision not only on its own jurisdiction, but then later, if it finds jurisdiction, a determination of the merits, the former being the bedrock of the latter. Jurisdiction is not an issue of discretion.

It is universally acknowledged that arbitration and hence the power of the arbitrators to make decisions is based on the parties' consent. A party cannot be forced to arbitrate unless it agrees to that means of dispute resolution. Issues may arise, as in *Dallah*, as to how to determine such agreement according to different laws and different legal principles e.g. alter ego.

But the basic premise remains. Parties cannot be forced to arbitrate unless they have contracted to do so. Otherwise they can be deprived of their rights to go to court to determine the issue (hence stay proceedings) or risk enforcement proceedings against their assets in another jurisdiction.

Dallah

The leading case on the topic is *Dallah Real Estate and Tourism Co v Ministry of Religious Affairs of the Government of Pakistan*, a case in which I was involved from the start, from

being counsel in the arbitration itself until and including being leading counsel (and losing!) in the Supreme Court hearing.

Importantly *Dallah* was not a section 67 case, but an ICC case concerning the enforcement of a foreign award – the seat was Paris - under section 103(2)(b) of the 1996 Act and Article V(i) (a) of the NYC (arbitration agreement not valid – under French law) concerning a third party non signatory, the Government of Pakistan. The GOP had objected to the Tribunal's jurisdiction and had not participated in the arbitration.

In the present context, the Supreme Court considered two linked questions namely: the nature of the exercise which an enforcing court had to undertake and the relevance of the tribunal's own ruling.

It was made clear by the Supreme Court that the issue of jurisdiction was to be by way of an independent judicial re-hearing and not by any form of appeal or review. Section 67 was referred to by way of analogy, Lord Mance, in rejecting my argument for a flexible review akin to an appeal, stated:

“Domestically, there is no doubt that, whether or not a party's challenge to the jurisdiction has been raised, argued and decided before the arbitrator, a party who has not submitted to the arbitrator's jurisdiction is entitled to a full judicial determination on evidence of an issue of jurisdiction before the English court, on an application made in time for that purpose under section 67 of the Arbitration Act 1996 , just as he would be entitled under section 72 if he had taken no part before the arbitrator: see eg *Azov Shipping Co v Baltic Shipping Co* [1999] 1 All ER 476.” (26)

There are some differences between section 67 and Article V(1) of the NYC and s.103, the latter requiring a party resisting enforcement of an award to "*furnish proof*" of the lack of validity and the court retains a discretion to enforce in any event, but there is no distinction on the issue of re-hearing.

The underlying premise is that arbitrators, whether over zealous or simply wrong, cannot ascribe to themselves jurisdiction without a thorough independent legal check. The bootstraps argument. It is fundamental.

The Proposal

I turn now to the Law Commission's proposal and taking what appears to be a fashionable approach these days, unencumbered by any advocacy role, I am doing a U turn. I disagree with the Law Commission's proposal for these reasons.

1. It is out of kilter with the procedure in many other jurisdictions. *Dallah* has widely become the gold standard – but I will not address other jurisdictions as my colleagues will no doubt deal with those. If London is to retain its place among key arbitral centres there needs to be a very sound reason for change and its becoming an outlier.
2. It leads to an inconsistent approach between enforcement of English seated awards and foreign awards, as well as both (a) English awards not challenged here but then sought to be enforced in a foreign country and also (b) foreign awards enforced in England under Section 103 of the 1996 Act.
3. One of the premises on which the proposal is based is fairness – the two bites at the cherry argument – the hearing before the tribunal being a run-through or to quote “dress-rehearsal” for the main event – the court hearing.

A key passage in the Law Commission consultation paper is 8.42 which provides:

What we think a party should not be able to do, is ask a tribunal to issue an award, and for that party to insist that the award is binding, but only if the tribunal finds in its favour, and if not then to assert that the award can be ignored. It cannot be a case of “heads I win, tails it does not count”. It may be appropriate to allow for an appeal, but we are not

persuaded that it is fair to pursue a rehearing before the court which ignores what has gone on before the tribunal.

With the greatest respect this misses the point and confuses awards on the merits with awards on jurisdiction. It confuses tactics with the right to arbitrate in the first place. The nature of a Tribunal's jurisdiction does not depend on whether a party wins or loses on the merits: nor for that matter whether it wins or loses on jurisdiction, as section 67 applies to both a winning and losing party. So therefore the nature of review should not either.

In fact the proposal penalises those who want jurisdiction determined by a tribunal and resolved early.

4. Moreover, the proposal fails to indicate what is meant by participation so as to distinguish between those who can have a full judicial hearing under Section 72 because they have not participated, but only objected to jurisdiction, and those that cannot.
 - Is it participation for jurisdiction or jurisdiction and merits?
 - Is oral participation needed or do without prejudice written submissions put forward on jurisdiction by the objecting party suffice? (see *Dallah*)
 - If a party simply turns up to object, but takes no part in submissions and/or the merits – is that participation?
 - Parties and their counsel do all sorts of things – where is the line to be drawn?
5. Another justification is cost and delay through repetition. This is a very narrow way of assessing these issues. How can this be assessed? Will the proposal lead to more parties just sitting back and waiting for the Award or even enforcement and then challenging which could be even more costly?

6. Critically, and a point which has not been addressed, is that a genuine non party signatory will have had no choice as to the seat of the arbitration because it will not have consented to the arbitration clause in the first place. Thus if it finds itself in an English seated arbitration, it will have different opportunities for review than if elsewhere and may be forced to await enforcement rather than getting shut of the Award.

What is the Real Concern?

The real issue here is about procedure: not powers. The former are for rules, and courts to decide: the latter are for statutes.

Article 34 of the Model Law does not say how the court should approach the issue of setting aside, but sets out the grounds reflecting the NYC. Similarly if one looks through the 1996 Act, it sets out the court's powers e.g. sections 9, 42, 44 (enforcement of peremptory orders)

By setting the matter in statutory language it removes the flexibility inherent in the current procedure which the courts have determined to be a re-hearing, but nonetheless does enable courts to adjust the procedure to meet the case.

There is an important distinction between the evidence given previously and whether that needs to be repeated and the legal and evidential weight to be given to the award which in *Dallah* was considered to have no probative value.

A re-hearing is not therefore inconsistent with a flexible procedure and can include the following scenarios:

- The use of a summary disposition as in Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait) – also an enforcement case of an international award where the court indicated that there was no reason why a summary approach should not be adopted, and such an approach was fully consistent with the pro-enforcement policy of the Convention and the Act. In that case the appellant had been unable to show that an opportunity to adduce further evidence could make any realistic difference to the outcome. There had been no unfairness in deciding the matter by way of summary judgment.
- to direct preliminary issues.
- to use some of the original evidence even if the arguments are different. *In Dallah* there was no oral evidence from any witness of fact. Exert evidence on French law was heard because at original hearing a different basis had been argued and there had been no French expert evidence.
- To adjust to the nature of the issue. At one end the party who never signed the agreement or who alleges fraud, misrepresentation or corruption: at the other might be an issue as to whether an issue between consenting parties is arbitrable.

One option might be to add rules of court with something along these lines:

“In determining the procedure for any such [re]hearing (if statute) under Section 67, the court should take account of the extent to which the party opposing jurisdiction participated and had the opportunity to adduce evidence and the nature of the jurisdictional challenge and such other matters as the court deems appropriate.”

But if there is a need to enshrine anything into statute then it should be to affirm that the hearing is a *de novo* re-hearing and not an appeal.

London is one of the world’s leading centres for international arbitration. This proposal by enshrining a particular procedure I fear, far from enhancing London’s

reputation as an arbitral centre, will have a deleterious effect. While in practical terms there are likely to be a limited number of cases affected: in perspective terms it will send the wrong message internationally and is a retrograde step.

Response ID ANON-PT57-RUBZ-K

Submitted to Law Commission Consultation: Review of the Arbitration Act 1996
Submitted on 2022-12-15 14:26:40

About you

What is your name?

Name:

[REDACTED]

What is the name of your organisation?

Enter the name of your organisation:

Herbert Smith Freehills LLP

Are you responding to this consultation in a personal capacity or on behalf of your organisation?

Response on behalf of organisation

If other, please state::

Please select a region, state or province.

What is your email address?

Email:

[REDACTED]

What is your telephone number?

Telephone number:

[REDACTED]

If you want the information that you provide in response to this consultation to be treated as confidential, please explain to us why you regard the information as confidential. As explained in our privacy notice, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

Please explain to us why you regard the information as confidential:

We are content for it to be in the public domain that Herbert Smith Freehills LLP has contributed to this consultation. However, we would be grateful if you would contact us before publishing the content of this response.

Consultation questions

Consultation Question 1: 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?

Agree

Please share your views below.:

Yes we agree, for the reasons set out in the Consultation Paper. In particular, we believe that it is not possible to identify a sufficiently specific list of exceptions to the rule. These exceptions should be developed by the courts through case law. We also do not see the benefit of adding provisions on confidentiality into the statute, given that the broad principle is well-established by the courts and that parties can also agree their own scheme of confidentiality either through the adoption of institutional rules, in their own arbitration clause or through applications to the tribunal.

Consultation Question 2: We provisionally conclude that the Arbitration Act 1996 should not impose a duty of independence on arbitrators. Do you agree?

Agree

Please share your views below.:

Yes we agree that impartiality is the touchstone and that the Act need not impose a duty of independence on arbitrators. Although (as acknowledged in the consultation paper) many foreign jurisdictions treat "independence and impartiality" as inextricably linked, the test for impartiality is sufficiently broad to capture any lack of independence that could stray into partiality. However, we wonder whether this departure from international practice will require explanation, whether through definitions in the Act or otherwise?

Consultation Question 3: 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. Do you agree?

Agree

Please share your views below.:

Yes we agree. However, we note that no proposal has yet been made regarding the ramifications for failure to comply with this duty to disclose. As per *Halliburton v Chubb Bermuda Insurance* [2020] UKSC 48, is it to be assumed that a failure to disclose could itself give rise to doubts as to the impartiality of the arbitrator and lead to a challenge, but that non-disclosure in itself may not necessarily be sufficient to found a successful challenge? We wonder if this too is worth clarifying in the Act.

Consultation Question 4: Should the Arbitration Act 1996 specify the state of knowledge required of an arbitrator's duty of disclosure, and why?

Yes

Please share your views below.:

Yes, we think it worth clarifying the state of knowledge required of an arbitrator in order to provide as much clarity as possible to arbitrators and create a level playing field.

Consultation Question 5: 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?

What they ought to know

Please share your views below.:

We think the duty should be based upon what arbitrators ought to know after making reasonable inquiries. We believe that this will result in a fairer outcome for parties, whilst ensuring that this is manageable given the "reasonableness" standard. It will also ensure that arbitrators working in big law firms or large practices put in place the right systems to fulfil this duty.

Consultation Question 6:

More broadly justified

Please share your views below.:

We prefer the "broadly justified" test (which we assume is the "proportionate means of achieving a legitimate aim" that is elucidated below). This allows parties sufficient scope to choose the right arbitrator for the job (e.g. for religious or cultural reasons) but with the caveat that the aim is "legitimate", thereby avoiding discrimination. The "necessary" test appears to us to set the threshold too high and could lead to significant debate around whether or not a protected characteristic is truly "necessary" in an arbitrator (e.g. gender in a dispute founded on a religious legal system). However, we note that this same debate may also arise in relation to the "broader justification" test.

However, as below, we are not supportive of the proposal in question 7.

Consultation Question 7:

Disagree

Please share your views below.:

Although we understand the rationale for this proposal, on balance we are not supportive of it. We consider that it could be perceived as an unnecessary interference with party autonomy in choice of arbitrators and therefore lessen the attractiveness of England as a seat of arbitration.

It is common for parties to designate a particular nationality for their arbitrators, both in commercial and investment arbitration (an obvious example is in the insurance market where parties choose to have English KCs to arbitrate their disputes). Nationality is a protected characteristic under the Equality Act (as part of the definition of "race") and thus we understand that a designation of nationality would be unenforceable under this proposal. This feels like an unnecessary interference with party autonomy.

Moreover the Equality Act is an English statute which arguably should not apply to international arbitration. An unintended consequence of this proposal could be that foreign parties who wish to designate the nationality of their arbitrator decide to choose a different seat of arbitration to avoid any enforcement risk. In circumstances where an agreement as to a protected characteristic is deemed unenforceable in England & Wales, this could lead to enforcement difficulties in other jurisdictions.

We also anticipate that there will be debate as to the exact scope of the "proportionate means of achieving a legitimate aim" exception, leading to a risk of disputes. For example, would it be acceptable to specify that an arbitrator must have 20 years of experience in a particular field, because you want someone with experience, or is that problematic on the grounds of age discrimination? Similarly, this exception is likely to be engaged in the context of the appointment of religious figures – without guidance, it will be difficult for parties to be sure that their choice of protected characteristics constitutes a

"proportionate means of achieving a legitimate aim". This uncertainty could lead to disputes, or worse, a decision to choose a different seat of arbitration.

Finally, we as a firm are not coming across arbitration clauses that are obviously discriminatory. The characteristics of arbitrators that we see most frequently agreed in arbitration clauses relate to nationality and type of experience.

Consultation Question 8: Should arbitrators incur liability for resignation at all, and why?

Liability for resignation

Please share your views below.:

In theory, we agree that there should be a disincentive to prevent arbitrators from resignation that is unreasonable. We have considered whether this disincentive can be achieved by non-monetary means (e.g., we imagine that institutions may be unlikely to re-appoint arbitrators who have acted unreasonably in the past) but this means of policing arbitrator behaviour would not be effective for ad hoc arbitrations.

It would be useful to understand the scope of any proposed liability. For example, would the arbitrator be required to compensate the parties for any direct losses suffered as a result of the resignation (institutional and legal fees associated with appointing a replacement arbitrator) or would there be any broader liability? In defining the parameters of the liability, we are conscious that it will be important to ensure that any new provision does not discourage arbitrators from taking on appointments, e.g., for long-running cases.

Consultation Question 9: Should arbitrators incur liability for resignation only if the resignation is proved to be unreasonable?

Yes

Please share your views below.:

See above.

Consultation Question 10: 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. Do you agree?

Agree

Please share your views below.:

We agree in theory, but would question if exceptions are needed. For example, if, as in question 9 above, arbitrators can be liable for unreasonable resignation, then presumably it would be possible for them to incur liability to compensate the parties for the costs of court proceedings intended to appoint a new arbitrator. Could the extension of arbitrator immunity be subject to an "unreasonableness" exception?

Consultation Question 11: 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. Do you agree?

Agree

Please share your views below.:

We fully support the proposal to codify the existence of a summary procedure. However, we question whether this needs to be triggered by "an application of a party" or whether the tribunal could adopt the summary proposal of its own volition (which, arguably, the tribunal can currently do in any event).

Further, we note that the "subject to agreement of the parties" language is intended to ensure that the summary procedure is non-mandatory. In light of the way in which this particular language is used elsewhere in the Act, the proposal would appear to be an "opt-out" rather than an "opt-in" process. However, this is not clear, particularly given the requirement to make an application (which is potentially inconsistent with this).

In our view, this provision should be "opt-out". In other words, it should apply automatically to all English-seated arbitrations unless the parties expressly opt out of it. Relatively few parties choose bespoke drafting for their arbitration clauses and we do not anticipate the wide use of "opt-in" language at the contract-drafting stage (unless the opting-in is achieved through arbitral institutional rules). By using "opt-out" language in the Act, it would ensure that the provision is more actively utilised, achieving the streamlining benefits to the arbitral procedure that parties, counsel, institutions and the Law Commission identify in summary procedure.

Consultation Question 12: 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. Do you agree?

Agree

Please share your views below.:

Yes we agree that the precise procedure to be adopted will need to be considered between the parties and the arbitrator in the usual way, but see our answer to 11 above about whether this provision should be opt-out.

Consultation Question 13: We provisionally propose that the Arbitration Act 1996 should stipulate the threshold for success in any summary procedure. Do you agree?

Agree

Please share your views below.:

Consultation Question 14: 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. Do you agree?

Agree

Please share your views below.:

Yes we agree with this test. We note that arbitral institutions whose rules already provide for summary or early determination procedures will also need to consider whether they wish to amend their own rules in order to mirror the threshold specified in the Act. It will also be important to consider the relationship between the test in the Act and any Rules: For example, would a parties' choice to adopt the LCIA rules mean that Rule 22.1 (viii) of those rules would override the statutory test for summary procedure (assuming it is non-mandatory)? Could this lead to confusion? We raise this for the Law Commission's consideration.

Consultation Question 15: 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. Do you agree?

Agree

Please share your views below.:

Yes we agree – this will clarify the distinction between section 44(2)(a) and section 43, which is intended to relate to witness summonses rather than deposition evidence.

Consultation Question 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?

Yes

Please share your views below.:

We agree in principle that the Act should be amended to confirm that its orders can be made against third parties. However, we would make two comments in this regard:

1. Paragraph 7.35 of the consultation paper clarifies that whether an order against a third party is available in any given case will vary according to the rules applicable in domestic legal proceedings. We suggest that the drafting reflects this.

2. It is not clear to us from the consultation paper whether section 44 would apply to third parties based outside of the jurisdiction. Footnote 20 appears to suggest that a decision to refuse a freezing order against third parties who were outside of the jurisdiction was wrong, but it does not say if it was wrong simply because it said that section 44 orders cannot be made against third parties. This should be clarified.

Consultation Question 17: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 18: We provisionally conclude that the provisions of the Arbitration Act 1996 should not apply generally to emergency arbitrators. Do you agree?

Agree

Please share your views below.:

Yes we agree that it would not be appropriate for all provisions of the Arbitration Act to apply generally to emergency arbitrators.

Consultation Question 19: 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?

Agree

Please share your views below.:

Yes we agree that this is best managed by arbitral institutions.

Consultation Question 20: Do you think that section 44(5) of the Arbitration Act 1996 should be repealed, and why?

Yes

Please share your views below.:

Yes we agree that section 44(5) should be repealed, for the reasons stated in the consultation paper. This will clarify the law and put a stop to the "Gerald Metals" effect – particularly the practice of excluding emergency arbitrator provisions in arbitration clauses.

Consultation Question 21:

Permission under section 44

Please share your views below.:

We prefer option (2). This is because it is more streamlined and escalates the issue more quickly. This matches the urgency requirement which will likely have been met in order for the emergency arbitrator to have been appointed in the first place. However, we note that the language of various institutional rules may not match the list of matters contained in Section 44(2), which may then lead to arguments as to whether or not the application can be brought within Section 44 or not.

However, we do wonder whether there is a quicker option – as in both cases, we anticipate there could be some delay caused by the process. Could it be possible, for example, for a party to apply to court automatically if their counterparty does not comply with emergency arbitrator order within a set amount of time, such as one week, unless this time period is extended by the emergency arbitrator? Is the permission requirement strictly necessary provided an order has been granted by the emergency arbitrator?

We also note that the consultation paper refers to emergency arbitrator "orders" rather than "awards" and does not address how parties can seek to enforce such orders or awards outside of the UK. This issue frequently arises in practice - we are often asked whether an emergency arbitrator can ever issue an "award" that is enforceable for the purposes of the New York Convention (though we note that the proposed amendment may assist where there is a reciprocal enforcement regime in place for court orders). We are also asked whether the tribunal (once constituted) can issue an enforceable interim award. This is therefore a broader issue which is also relevant to Question 32 below regarding section 39 of the Act.

We believe that this issue has not been directly addressed by the English courts, and the current position on the enforceability of emergency arbitrator or other interim orders (such as interim payment orders in the construction context) is uncertain. However, there was a recent case in respect of an UNCITRAL arbitration, where the English court held that the Tribunal had exceeded its powers by issuing an award in respect of an interim remedy in circumstances where the parties had not agreed to confer such a power onto the Tribunal in the UNCITRAL rules (see *EGF v HVF, HWG, TOM, DCK, HRY* [2022] EWHC 2470 (Comm)).

In Singapore (which has specifically amended its legislation to refer to emergency arbitrators), there have been two decisions which are relevant to this issue:

1. The enforceability of interim awards was addressed by the Singapore courts in the case of *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation (Indonesia)* [2015] SGCA 30. In that case, the Court found that an interim award which disposed of a preliminary issue was enforceable, in contrast to a provisional award, which was issued only to protect a party from damage during the course of an arbitration (which was not capable of being enforced). The judgment includes some analysis of the intention behind s39 of the English Act.

2. This position was recently reinforced by the Singapore High Court in relation to an emergency arbitrator award in the case of *CVG v CVH* [2022] SGHC 249. In that case, the emergency arbitrator issued a mandatory injunction requiring a party to place orders with its counterparty, and that injunction was held to be an interim "award" that was enforceable under the Singapore International Arbitration Act.

Although we suspect that the majority of emergency arbitrator orders are likely to be "provisional" in nature because they would have the potential to be varied by the tribunal, the CVG case mentioned above demonstrates that some emergency arbitrations will involve interim relief which is more final in nature.

We are concerned that a (perhaps unintended) consequence of this proposal for section 44, as well as the proposal relating to section 39 of the Act, might be an implication that as a matter of English law, "awards" are solely in relation to final determinations and that any interim or provisional rulings will be "orders". Is this the intention of the Law Commission, or an issue which the Law Commission would prefer the courts to rule on?

Consultation Question 22:

Agree

Please share your views below.:

Consultation Question 23: 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?

Yes

Please share your views below.:

We agree that parties should not be entitled to a full re-hearing of a jurisdictional issue, and that an appeal would suffice. However, we wonder if the same outcome could be achieved by restricting section 32 to operate only before a tribunal has ruled on its own jurisdiction. This would clarify the difference between sections 32 and 67 and explains why there is also a permission requirement, as the parties are deliberately choosing to approach the court rather than the tribunal to make this decision.

Consultation Question 24: We provisionally conclude that our proposed change to section 67 of the Arbitration Act 1996 would not require any similar change to section 103. Do you agree?

Agree

Please share your views below.:

Consultation Question 25: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 26: 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?

Agree

Please share your views below.:

Yes we agree – this would be welcome clarification. We also note for information that the Singapore Ministry of Law is consulting on this issue following the case of CBX and another v CBZ and others [2021] SGCA(I) 3.

Consultation Question 27: 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?

Agree

Please share your views below.:

Consultation Question 28: Do you think that section 7 of the Arbitration Act 1996 (separability of arbitration agreement) should be mandatory, and why?

Yes

Please share your views below.:

Yes we think it should be mandatory given its importance and utility. This will give parties comfort that the arbitration agreement is separable, even if governed by a foreign law that does not recognise the principle of separability. We do not see any downside to this amendment.

Consultation Question 29: 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?

Agree

Please share your views below.:

Consultation Question 30: 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?

Yes

Please share your views below.:

Yes we agree with this proposal. It will streamline these provisions in circumstances where permission of the tribunal or agreement of the parties should both act as sufficient filters.

Consultation Question 31: 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?

Other

Please share your views below.:

We do not have strong views on this. Whilst it is not strictly necessary given how effectively the regime has been operating during the pandemic, it may have some symbolic value in demonstrating that the Act has been modernised.

Consultation Question 32: Do you think that section 39 of the Arbitration Act 1996 should be amended to refer to "orders" (rather than "awards"), and why?

Yes

Please share your views below.:

We agree that it would be sensible to amend section 39 to refer to orders rather than awards, as this section has historically caused some confusion. However, as we note in 21 above, this appears to be part of a broader issue which the Law Commission may wish to clarify - whether interim or provisional "awards" can be issued.

We also wonder whether amendment to section 39(4) is required. This provides:

"Unless the parties agree to confer such power on the tribunal, the tribunal has no such power."

We understand from the recent case of *EGF v HVF and others* [2022] EWHC 2470 (Comm) (16 September 2022) that this section was interpreted to refer to awards rather than orders. If this section is clarified to refer to "orders", then the requirement to agree may fall away.

Consultation Question 33: Do you think that section 39(1) of the Arbitration Act 1996 should be amended to refer to "remedies" (rather than "relief"), and why?

Yes

Please share your views below.:

We do not have strong views on this but note that it is usual practice to refer to the orders or awards sought from the tribunal as "relief".

Consultation Question 34: 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 appellants was notified of the result of that request. Do you agree?

Agree

Please share your views below.:

Yes we agree that it would be useful to codify this point.

Consultation Question 35: 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?

Agree

Please share your views below.:

Consultation Question 36: We provisionally propose that sections 85 to 87 of the Arbitration Act 1996 (on domestic arbitration agreements) should be repealed. Do you agree?

Agree

Please share your views below.:

Consultation Question 37: Do you think that any of the suggestions discussed in Chapter 11 needs revisiting in full, and if so, why?

Please share your views below.:

No.

Consultation Question 38: 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?

Please share your views below.:

This is a very comprehensive document and we are, on the whole, very supportive of the proposals.

Although we agree with the decision not to introduce a disclosure requirement for third-party funding, we do wish to raise for consideration the current uncertainty regarding the recovery of both third-party funding costs and lawyer success fees in English-seated arbitration. As noted in paragraph 11.17 of the consultation paper, there have been two English cases in which third-party funding costs has been awarded as part of arbitration costs. This is despite the fact that, pursuant to statute, success fees are not recoverable in English litigation. However, in both the cases cited in footnote 7 of the consultation paper, the English court was not asked to rule specifically on whether such fees are recoverable in arbitration as a matter of English law. Instead, they were asked to review whether the relevant tribunals had exceeded their powers or wrongly exercised their discretion. This issue is therefore only likely to

be addressed by the English courts in the rare (and perhaps unlikely) event that a party brings a s69 challenge or s45 application. As it currently stands, therefore, this is a regulatory black hole for law firms and third-party funders operating in this space, and contrasts with the position for English litigation. It would be useful to understand whether this is something that is best addressed by the Arbitration Act, or whether the legislature can clarify whether section 58 of the Courts and Legal Services Act 1990 is intended to apply to English-seated arbitrations.

Response ID ANON-PT57-RUBS-C

Submitted to Law Commission Consultation: Review of the Arbitration Act 1996
Submitted on 2022-12-15 14:23:25

About you

What is your name?

Name:

[REDACTED]

What is the name of your organisation?

Enter the name of your organisation:

Holman Fenwick Willan LLP (HFW)

Are you responding to this consultation in a personal capacity or on behalf of your organisation?

Response on behalf of organisation

If other, please state::

What is your email address?

Email:

[REDACTED]

What is your telephone number?

Telephone number:

[REDACTED]

If you want the information that you provide in response to this consultation to be treated as confidential, please explain to us why you regard the information as confidential. As explained in our privacy notice, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

Please explain to us why you regard the information as confidential:

Consultation questions

Consultation Question 1: 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?

Agree

Please share your views below.:

Response:

We refer to the HFW Submissions where we proposed that confidentiality be included in the Arbitration Act on an "opt-out" basis.

Having given this more consideration in light of the analysis in the Consultation Paper, we agree with the Law Commission's recommendation that confidentiality in arbitration is best addressed by the courts. As all users of arbitration are, in our experience, aware there is an implied obligation of privacy and confidentiality in arbitration seated in England. We agree with the Law Commission, the principal difficulties with seeking to codify arbitral confidentiality is setting out the precise scope of the obligation and, importantly, the exceptions. There is a diverse range of types of arbitration that take place in England. Examples include (but in no way an exhaustive list) commercial, trade, investment treaty, sports and statutory. The needs of each are different and the court has done an excellent job to date of, where necessary, carving out exceptions to the general obligations of confidentiality.

In addition, the parties are, of course, free to prescribe whatever additional confidentiality protections they want in the arbitration clause or indeed reach agreement on this post the dispute arising. In our experience if there are documents or matters that are particularly sensitive and one of the parties wishes to agree more definitive protections before providing the same then that is usually capable of agreement between the parties or (if that cannot be achieved) with the guidance of the tribunal.

In summary, the current system works well and there is no need to change it.

Consultation Question 2: We provisionally conclude that the Arbitration Act 1996 should not impose a duty of independence on arbitrators. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 3: 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. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 4: Should the Arbitration Act 1996 specify the state of knowledge required of an arbitrator's duty of disclosure, and why?

Not Answered

Please share your views below.:

Consultation Question 5: 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?

Not Answered

Please share your views below.:

Consultation Question 6:

More broadly justified

Please share your views below.:

Consultation Question 7:

Disagree

Please share your views below.:

We provisionally propose that: (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. Do you agree?

We agree with the approach of the House of Lords in *Hashwani v Jivraj* that the requirement of a protected characteristic in an arbitrator may be more broadly justified.

We also agree that the law in England and Wales should take a stance against discrimination. We also agree that protection against discrimination is in the public interest.

We understand that the proposed amendment to the Arbitration Act is intended to address this issue utilising the definition of "protected characteristics" in section 4 of the Equality Act 2010.

The question is whether the amendment is necessary. Most arbitration clauses do not include any qualifications for the arbitrator or if they do, the qualifications are limited (for example to the years of experience or specific types of experience). Many arbitration lawyers will advise against including any qualifications or characteristics in the arbitration clause for various reasons.

It is relatively rare that an arbitration clause would include the type of characteristic stipulated in the arbitration clause in the *Hashwani v Jivraj* case. That case was specific to the particular community involved. Indeed, in some communities it is common for parties to agree to appoint a decision maker within the community to resolve disputes.

Our view is that the amendment is not necessary. However, we understand if the Law Commission included the amendment for the reasons identified in the Consultation Paper.

Consultation Question 8: Should arbitrators incur liability for resignation at all, and why?

No liability for resignation

Please share your views below.:

Response:

From the perspective of arbitration users, the quality, efficiency, and finality of the arbitral process as well as the performance of the arbitrator(s) charged

with the impartial decision-making are paramount.

The current position, that arbitrators in this jurisdiction enjoy unqualified statutory immunity for anything done in the discharge of their functions unless shown to have been in bad faith, although they can still incur liability for resigning, is a key safeguard of the arbitral process.

We note that the rationale for immunity of arbitrators under English law is that it underpins the arbitral process and the ability of the independent and competent arbitrators appointed by the parties to discharge their decision-making function.

This was explained by the DAC in the consultation leading to the Arbitration Act 1996 in terms that a degree of immunity was necessary to enable the arbitrator properly to perform the impartial decision-making function without which the finality of the arbitral process could well be undermined. The limit on immunity is bad faith in the exercise of that function.

The DAC's reason for including the provision that the immunity rule does not affect any liability incurred by an arbitrator by reason of their resigning (Section 29(3)) was that otherwise a claim against an arbitrator for resigning in breach of contract and similarly a defence (based on resignation) to a claim by an arbitrator for his fees might be precluded, unless "bad faith" is proved. The freedom of the parties to agree with the arbitrator as to the consequences of the resignation as regards fees and any liability was maintained under Section 25(1).

Against this background, while there are different approaches to arbitrator immunity notably as between civil and common laws, and a wider debate as to the basis of arbitrator immunity, the concept of arbitrator immunity remains a cornerstone of English arbitration law. The approach to immunity is however mixed, as immunity attaches to the discharge of the arbitrator's decision making, i.e., quasi-judicial function, but not to the private contractual arrangements with the parties.

As to whether arbitrator immunity should be broadened, the Consultation highlights that the risk of incurring liability for resignation may be a disincentive to resignation even when it would be entirely appropriate for an arbitrator to resign or may undermine the arbitrator's ability to make robust and impartial decisions if faced with a dissatisfied party, and impact on the finality of the arbitral process, i.e., the same reasons as those in favour of maintaining the immunity of arbitrators.

However, the question whether to extend immunity to resignation re-frames the issue as one going to the integrity of the arbitral process, and impartial decision-making, rather than as a contractual matter. The original reasoning is clear and makes sense, but these are no doubt reasonable justifications for redrawing the boundaries of arbitral immunity to cover liability for resignation. It may, in place of a mixed approach, be attractive to bring arbitrators under one umbrella of immunity. However, conceptually that is not clear cut.

The Commission's view is that the 'only sure way of encouraging appropriate resignations might be to remove all liability for resignation'. It is not certain such a step would achieve this objective. An arbitrator may still be exposed to tactical pressure by a dissatisfied party to resign. With the risk of liability removed, it would make it easier for the dissatisfied party to push the arbitrator to resign. This would also run up against the recent caselaw holding that it is unreasonable to resign just because one party wishes it (at para 5.17). A blanket immunity for any arbitrator resignation may have practical drawbacks and possibly go too far as it encroaches on the parties' freedom to contract with the arbitrator on terms to be agreed between them. Surely also arbitrators should not be free to resign without impunity because of the losses that might be caused to the parties by the resignation. The practical impact of removal of the immunity of arbitrators for resignation is not fully explored in the discussion.

There is also limited information or evidence of direct arbitrator experiences of a "real and present danger" to their ability to perform their impartial decision-making function, although such experiences have likely been rehearsed often enough in the arbitrator community, but this information would assist in weighing up the perceived advantages as against any drawbacks.

The proposal to exclude liability for resignation, unless it is proved by the party raising the complaint to be unreasonable, appears to be a pragmatic solution. In time, this would give more certainty to all participants. However, the introduction of this new test may itself invite satellite litigation about whether a resignation was reasonable.

When selecting an independent and competent arbitrator, the possible resignation of that arbitrator later during the proceedings will likely not be at the forefront of parties' minds, while arbitrators will be aware of the potential personal liability in accepting such an appointment. London's dominant position as an arbitral venue suggests that the risk of liability for resignation under the law currently in force does not deter potential arbitrators from accepting appointments.

However, as noted, the parties and the arbitrator remain free to agree as to the consequences of the arbitrator's resignation. The terms of appointment under which arbitrators will accept appointments in London arbitrations do often include specific provisions excluding arbitrator's liability (and addressing the resigning arbitrator's entitlement to fees) that are routinely accepted by parties. This indicates that broader immunity is not generally viewed as a controversial issue by arbitration users in this jurisdiction. It would follow that the position outlined by the Consultation, if reform were to be recommended, is not out of line with current practices (at 5.22). It may, however, simply reflect that, having selected a person that is willing and able to act as an independent and competent arbitrator, the potential resignation of such an arbitrator is not high on parties' list of priorities at the outset of the arbitral process.

We agree that the issue whether to strengthen arbitrator immunity is finely balanced and we are inclined to the view that such a reform is neither necessary nor pressing to safeguard the arbitral process in this jurisdiction.

Consultation Question 9: Should arbitrators incur liability for resignation only if the resignation is proved to be unreasonable?

Yes

Please share your views below.:

Response:

From the perspective of arbitration users, the quality, efficiency, and finality of the arbitral process as well as the performance of the arbitrator(s) charged with the impartial decision-making are paramount.

The current position, that arbitrators in this jurisdiction enjoy unqualified statutory immunity for anything done in the discharge of their functions unless shown to have been in bad faith, although they can still incur liability for resigning, is a key safeguard of the arbitral process.

We note that the rationale for immunity of arbitrators under English law is that it underpins the arbitral process and the ability of the independent and competent arbitrators appointed by the parties to discharge their decision-making function.

This was explained by the DAC in the consultation leading to the Arbitration Act 1996 in terms that a degree of immunity was necessary to enable the arbitrator properly to perform the impartial decision-making function without which the finality of the arbitral process could well be undermined. The limit on immunity is bad faith in the exercise of that function.

The DAC's reason for including the provision that the immunity rule does not affect any liability incurred by an arbitrator by reason of their resigning (Section 29(3)) was that otherwise a claim against an arbitrator for resigning in breach of contract and similarly a defence (based on resignation) to a claim by an arbitrator for his fees might be precluded, unless "bad faith" is proved. The freedom of the parties to agree with the arbitrator as to the

consequences of the resignation as regards fees and any liability was maintained under Section 25(1).

Against this background, while there are different approaches to arbitrator immunity notably as between civil and common laws, and a wider debate as to the basis of arbitrator immunity, the concept of arbitrator immunity remains a cornerstone of English arbitration law. The approach to immunity is however mixed, as immunity attaches to the discharge of the arbitrator's decision making, i.e., quasi-judicial function, but not to the private contractual arrangements with the parties.

As to whether arbitrator immunity should be broadened, the Consultation highlights that the risk of incurring liability for resignation may be a disincentive to resignation even when it would be entirely appropriate for an arbitrator to resign or may undermine the arbitrator's ability to make robust and impartial decisions if faced with a dissatisfied party, and impact on the finality of the arbitral process, i.e., the same reasons as those in favour of maintaining the immunity of arbitrators.

However, the question whether to extend immunity to resignation re-frames the issue as one going to the integrity of the arbitral process, and impartial decision-making, rather than as a contractual matter. The original reasoning is clear and makes sense, but these are no doubt reasonable justifications for redrawing the boundaries of arbitral immunity to cover liability for resignation. It may, in place of a mixed approach, be attractive to bring arbitrators under one umbrella of immunity. However, conceptually that is not clear cut.

The Commission's view is that the 'only sure way of encouraging appropriate resignations might be to remove all liability for resignation'. It is not certain such a step would achieve this objective. An arbitrator may still be exposed to tactical pressure by a dissatisfied party to resign. With the risk of liability removed, it would make it easier for the dissatisfied party to push the arbitrator to resign. This would also run up against the recent caselaw holding that it is unreasonable to resign just because once party wishes it (at para 5.17). A blanket immunity for any arbitrator resignation may have practical drawbacks and possibly go too far as it encroaches on the parties' freedom to contract with the arbitrator on terms to be agreed between them. Surely also arbitrators should not be free to resign without impunity because of the losses that might be caused to the parties by the resignation. The practical impact of removal of the immunity of arbitrators for resignation is not fully explored in the discussion.

There is also limited information or evidence of direct arbitrator experiences of a "real and present danger" to their ability to perform their impartial decision-making function, although such experiences have likely been rehearsed often enough in the arbitrator community, but this information would assist in weighing up the perceived advantages as against any drawbacks.

The proposal to exclude liability for resignation, unless it is proved by the party raising the complaint to be unreasonable, appears to be a pragmatic solution. In time, this would give more certainty to all participants. However, the introduction of this new test may itself invite satellite litigation about whether a resignation was reasonable.

When selecting an independent and competent arbitrator, the possible resignation of that arbitrator later during the proceedings will likely not be at the forefront of parties' minds, while arbitrators will be aware of the potential personal liability in accepting such an appointment. London's dominant position as an arbitral venue suggests that the risk of liability for resignation under the law currently in force does not deter potential arbitrators from accepting appointments.

However, as noted, the parties and the arbitrator remain free to agree as to the consequences of the arbitrator's resignation. The terms of appointment under which arbitrators will accept appointments in London arbitrations do often include specific provisions excluding arbitrator's liability (and addressing the resigning arbitrator's entitlement to fees) that are routinely accepted by parties. This indicates that broader immunity is not generally viewed as a controversial issue by arbitration users in this jurisdiction. It would follow that the position outlined by the Consultation, if reform were to be recommended, is not out of line with current practices (at 5.22). It may, however, simply reflect that, having selected a person that is willing and able to act as an independent and competent arbitrator, the potential resignation of such an arbitrator is not high on parties' list of priorities at the outset of the arbitral process.

We agree that the issue whether to strengthen arbitrator immunity is finely balanced and we are inclined to the view that such a reform is neither necessary nor pressing to safeguard the arbitral process in this jurisdiction.

Consultation Question 10: 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. Do you agree?

Disagree

Please share your views below.:

Consultation Question 8. Should arbitrators incur liability for resignation at all, and why?

Consultation Question 9. Should arbitrators incur liability for resignation only if the resignation is proved to be unreasonable?

Consultation Question 10. 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. Do you agree?

Response:

From the perspective of arbitration users, the quality, efficiency, and finality of the arbitral process as well as the performance of the arbitrator(s) charged with the impartial decision-making are paramount.

The current position, that arbitrators in this jurisdiction enjoy unqualified statutory immunity for anything done in the discharge of their functions unless shown to have been in bad faith, although they can still incur liability for resigning, is a key safeguard of the arbitral process.

We note that the rationale for immunity of arbitrators under English law is that it underpins the arbitral process and the ability of the independent and competent arbitrators appointed by the parties to discharge their decision-making function.

This was explained by the DAC in the consultation leading to the Arbitration Act 1996 in terms that a degree of immunity was necessary to enable the arbitrator properly to perform the impartial decision-making function without which the finality of the arbitral process could well be undermined. The limit on immunity is bad faith in the exercise of that function.

The DAC's reason for including the provision that the immunity rule does not affect any liability incurred by an arbitrator by reason of their resigning (Section 29(3)) was that otherwise a claim against an arbitrator for resigning in breach of contract and similarly a defence (based on resignation) to a claim by an arbitrator for his fees might be precluded, unless "bad faith" is proved. The freedom of the parties to agree with the arbitrator as to the consequences of the resignation as regards fees and any liability was maintained under Section 25(1).

Against this background, while there are different approaches to arbitrator immunity notably as between civil and common laws, and a wider debate as to the basis of arbitrator immunity, the concept of arbitrator immunity remains a cornerstone of English arbitration law. The approach to immunity is however mixed, as immunity attaches to the discharge of the arbitrator's decision making, i.e., quasi-judicial function, but not to the private contractual

arrangements with the parties.

As to whether arbitrator immunity should be broadened, the Consultation highlights that the risk of incurring liability for resignation may be a disincentive to resignation even when it would be entirely appropriate for an arbitrator to resign or may undermine the arbitrator's ability to make robust and impartial decisions if faced with a dissatisfied party, and impact on the finality of the arbitral process, i.e., the same reasons as those in favour of maintaining the immunity of arbitrators.

However, the question whether to extend immunity to resignation re-frames the issue as one going to the integrity of the arbitral process, and impartial decision-making, rather than as a contractual matter. The original reasoning is clear and makes sense, but these are no doubt reasonable justifications for redrawing the boundaries of arbitral immunity to cover liability for resignation. It may, in place of a mixed approach, be attractive to bring arbitrators under one umbrella of immunity. However, conceptually that is not clear cut.

The Commission's view is that the 'only sure way of encouraging appropriate resignations might be to remove all liability for resignation'. It is not certain such a step would achieve this objective. An arbitrator may still be exposed to tactical pressure by a dissatisfied party to resign. With the risk of liability removed, it would make it easier for the dissatisfied party to push the arbitrator to resign. This would also run up against the recent caselaw holding that it is unreasonable to resign just because once party wishes it (at para 5.17). A blanket immunity for any arbitrator resignation may have practical drawbacks and possibly go too far as it encroaches on the parties' freedom to contract with the arbitrator on terms to be agreed between them. Surely also arbitrators should not be free to resign without impunity because of the losses that might be caused to the parties by the resignation. The practical impact of removal of the immunity of arbitrators for resignation is not fully explored in the discussion.

There is also limited information or evidence of direct arbitrator experiences of a "real and present danger" to their ability to perform their impartial decision-making function, although such experiences have likely been rehearsed often enough in the arbitrator community, but this information would assist in weighing up the perceived advantages as against any drawbacks.

The proposal to exclude liability for resignation, unless it is proved by the party raising the complaint to be unreasonable, appears to be a pragmatic solution. In time, this would give more certainty to all participants. However, the introduction of this new test may itself invite satellite litigation about whether a resignation was reasonable.

When selecting an independent and competent arbitrator, the possible resignation of that arbitrator later during the proceedings will likely not be at the forefront of parties' minds, while arbitrators will be aware of the potential personal liability in accepting such an appointment. London's dominant position as an arbitral venue suggests that the risk of liability for resignation under the law currently in force does not deter potential arbitrators from accepting appointments.

However, as noted, the parties and the arbitrator remain free to agree as to the consequences of the arbitrator's resignation. The terms of appointment under which arbitrators will accept appointments in London arbitrations do often include specific provisions excluding arbitrator's liability (and addressing the resigning arbitrator's entitlement to fees) that are routinely accepted by parties. This indicates that broader immunity is not generally viewed as a controversial issue by arbitration users in this jurisdiction. It would follow that the position outlined by the Consultation, if reform were to be recommended, is not out of line with current practices (at 5.22). It may, however, simply reflect that, having selected a person that is willing and able to act as an independent and competent arbitrator, the potential resignation of such an arbitrator is not high on parties' list of priorities at the outset of the arbitral process.

We agree that the issue whether to strengthen arbitrator immunity is finely balanced and we are inclined to the view that such a reform is neither necessary nor pressing to safeguard the arbitral process in this jurisdiction.

Consultation Question 11: 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. Do you agree?

Agree

Please share your views below.:

Response:

We again agree with the Law Commission's recommendations including as to the relevant test/threshold to be applied, namely, the "no reasonable prospect of success" test. As things stand, one of the significant advantages that litigating in the courts has over arbitration is the ability to dispose of wholly unmeritorious cases quickly and without the need to go through a full trial. Whether through summary judgment, strike out, or default judgment a party can be saved the time and expense of having to prosecute a claim in circumstances in which the defence has no merit or to defend a claim that has no merit by applying for and obtaining some form of summary disposal. Whilst we accept that pursuant to sections 33 and 34 of the AA 1996 a tribunal arguably does have the power to put in place some form of summary disposal the reality is, in our experience, that tribunals do not do so. We suspect that the reason for this is the fear of falling foul of the requirement for due process and the risk that any subsequent award would be susceptible to challenge, appeal and/or would give rise to enforcement issues. If the AA 1996 was amended to specifically include this power then that should remove the due process concern.

It is also true that summary disposal is increasingly being included within the updated versions of the institutional arbitration rules (see for example the latest versions of the LCIA, SIAC, ICSID and ICC rules). One assumes that the reason it is being included is because the users of arbitration want there to be such a procedure and the relevant institutions are trying to remain competitive.

In terms of whether the procedure should be mandatory, in keeping with the principles of party autonomy, we agree that it should not be. It should be possible to contract out if the parties so wish – whether at the time the arbitration clause is agreed or at any later date. We also agree that the procedure should only be available on the application of one of the parties. It is not something that the tribunal should adopt on their own volition. Whilst it is unlikely that any tribunal would wish to do so it should be solely on the application of one of the parties.

In terms of the relevant test/threshold to be applied we agree with the Law Commission that it should be the well-established test that is applied by the courts. Whilst we accept that other forms of wording are used in some of the institutional rules, such as "manifestly without merit", the difficulty with these alternative forms of wording is the lack of a body of case law setting out precisely what that means. The significant advantage of using the test applied in the English courts is that there is such a body of case law that arbitrators can be referred to and that establishes, with reasonable certainty, what the test means. English practitioners at least should be very familiar with it.

Consultation Question 12: 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. Do you agree?

Agree

Please share your views below.:

Response:

We again agree with the Law Commission's recommendations including as to the relevant test/threshold to be applied, namely, the "no reasonable prospect of success" test. As things stand, one of the significant advantages that litigating in the courts has over arbitration is the ability to dispose of wholly unmeritorious cases quickly and without the need to go through a full trial. Whether through summary judgment, strike out, or default judgment a party can be saved the time and expense of having to prosecute a claim in circumstances in which the defence has no merit or to defend a claim that has no merit by applying for and obtaining some form of summary disposal. Whilst we accept that pursuant to sections 33 and 34 of the AA 1996 a tribunal arguably does have the power to put in place some form of summary disposal the reality is, in our experience, that tribunals do not do so. We suspect that the reason for this is the fear of falling foul of the requirement for due process and the risk that any subsequent award would be susceptible to challenge, appeal and/or would give rise to enforcement issues. If the AA 1996 was amended to specifically include this power then that should remove the due process concern.

It is also true that summary disposal is increasingly being included within the updated versions of the institutional arbitration rules (see for example the latest versions of the LCIA, SIAC, ICSID and ICC rules). One assumes that the reason it is being included is because the users of arbitration want there to be such a procedure and the relevant institutions are trying to remain competitive.

In terms of whether the procedure should be mandatory, in keeping with the principles of party autonomy, we agree that it should not be. It should be possible to contract out if the parties so wish – whether at the time the arbitration clause is agreed or at any later date. We also agree that the procedure should only be available on the application of one of the parties. It is not something that the tribunal should adopt on their own volition. Whilst it is unlikely that any tribunal would wish to do so it should be solely on the application of one of the parties.

In terms of the relevant test/threshold to be applied we agree with the Law Commission that it should be the well-established test that is applied by the courts. Whilst we accept that other forms of wording are used in some of the institutional rules, such as "manifestly without merit", the difficulty with these alternative forms of wording is the lack of a body of case law setting out precisely what that means. The significant advantage of using the test applied in the English courts is that there is such a body of case law that arbitrators can be referred to and that establishes, with reasonable certainty, what the test means. English practitioners at least should be very familiar with it.

Consultation Question 13: We provisionally propose that the Arbitration Act 1996 should stipulate the threshold for success in any summary procedure. Do you agree?

Agree

Please share your views below.:

Response:

We again agree with the Law Commission's recommendations including as to the relevant test/threshold to be applied, namely, the "no reasonable prospect of success" test. As things stand, one of the significant advantages that litigating in the courts has over arbitration is the ability to dispose of wholly unmeritorious cases quickly and without the need to go through a full trial. Whether through summary judgment, strike out, or default judgment a party can be saved the time and expense of having to prosecute a claim in circumstances in which the defence has no merit or to defend a claim that has no merit by applying for and obtaining some form of summary disposal. Whilst we accept that pursuant to sections 33 and 34 of the AA 1996 a tribunal arguably does have the power to put in place some form of summary disposal the reality is, in our experience, that tribunals do not do so. We suspect that the reason for this is the fear of falling foul of the requirement for due process and the risk that any subsequent award would be susceptible to challenge, appeal and/or would give rise to enforcement issues. If the AA 1996 was amended to specifically include this power then that should remove the due process concern.

It is also true that summary disposal is increasingly being included within the updated versions of the institutional arbitration rules (see for example the latest versions of the LCIA, SIAC, ICSID and ICC rules). One assumes that the reason it is being included is because the users of arbitration want there to be such a procedure and the relevant institutions are trying to remain competitive.

In terms of whether the procedure should be mandatory, in keeping with the principles of party autonomy, we agree that it should not be. It should be possible to contract out if the parties so wish – whether at the time the arbitration clause is agreed or at any later date. We also agree that the procedure should only be available on the application of one of the parties. It is not something that the tribunal should adopt on their own volition. Whilst it is unlikely that any tribunal would wish to do so it should be solely on the application of one of the parties.

In terms of the relevant test/threshold to be applied we agree with the Law Commission that it should be the well-established test that is applied by the courts. Whilst we accept that other forms of wording are used in some of the institutional rules, such as "manifestly without merit", the difficulty with these alternative forms of wording is the lack of a body of case law setting out precisely what that means. The significant advantage of using the test applied in the English courts is that there is such a body of case law that arbitrators can be referred to and that establishes, with reasonable certainty, what the test means. English practitioners at least should be very familiar with it.

Consultation Question 14: 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. Do you agree?

Agree

Please share your views below.:

Response:

We again agree with the Law Commission's recommendations including as to the relevant test/threshold to be applied, namely, the "no reasonable prospect of success" test. As things stand, one of the significant advantages that litigating in the courts has over arbitration is the ability to dispose of wholly unmeritorious cases quickly and without the need to go through a full trial. Whether through summary judgment, strike out, or default judgment a party can be saved the time and expense of having to prosecute a claim in circumstances in which the defence has no merit or to defend a claim that has no merit by applying for and obtaining some form of summary disposal. Whilst we accept that pursuant to sections 33 and 34 of the AA 1996 a tribunal arguably does have the power to put in place some form of summary disposal the reality is, in our experience, that tribunals do not do so. We suspect that the reason for this is the fear of falling foul of the requirement for due process and the risk that any subsequent award would be susceptible to challenge, appeal and/or would give rise to enforcement issues. If the AA 1996 was amended to specifically include this power then that should remove the due process concern.

It is also true that summary disposal is increasingly being included within the updated versions of the institutional arbitration rules (see for example the latest versions of the LCIA, SIAC, ICSID and ICC rules). One assumes that the reason it is being included is because the users of arbitration want there to be such a procedure and the relevant institutions are trying to remain competitive.

In terms of whether the procedure should be mandatory, in keeping with the principles of party autonomy, we agree that it should not be. It should be possible to contract out if the parties so wish – whether at the time the arbitration clause is agreed or at any later date. We also agree that the procedure should only be available on the application of one of the parties. It is not something that the tribunal should adopt on their own volition. Whilst it is unlikely that any tribunal would wish to do so it should be solely on the application of one of the parties.

In terms of the relevant test/threshold to be applied we agree with the Law Commission that it should be the well-established test that is applied by the courts. Whilst we accept that other forms of wording are used in some of the institutional rules, such as "manifestly without merit", the difficulty with these alternative forms of wording is the lack of a body of case law setting out precisely what that means. The significant advantage of using the test applied in the English courts is that there is such a body of case law that arbitrators can be referred to and that establishes, with reasonable certainty, what the test means. English practitioners at least should be very familiar with it.

Consultation Question 15: 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. Do you agree?

Agree

Please share your views below.:

Response:

As explained in the HFW Submissions, there is an emerging issue as to the extent to which the court's powers under section 44 may be exercised against third parties.

In one case, the court held that as this issue was not addressed in the DAC Report, it was intended that section 44 did not extend to third parties.

However, in a subsequent case, the Court of Appeal held that the court's power in section 44(2)(a) to order the taking of evidence extended to a non-party but did not comment on the other orders in section 44(2).

Hence, there seems to be some uncertainty as to whether the court's powers in section 44(2) may be exercised with respect to third parties. This issue could be clarified by an amendment to section 44

Consultation Question 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?

Yes

Please share your views below.:

Response:

As explained in the HFW Submissions, there is an emerging issue as to the extent to which the court's powers under section 44 may be exercised against third parties.

In one case, the court held that as this issue was not addressed in the DAC Report, it was intended that section 44 did not extend to third parties.

However, in a subsequent case, the Court of Appeal held that the court's power in section 44(2)(a) to order the taking of evidence extended to a non-party but did not comment on the other orders in section 44(2).

Hence, there seems to be some uncertainty as to whether the court's powers in section 44(2) may be exercised with respect to third parties. This issue could be clarified by an amendment to section 44

Consultation Question 17: 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. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 18: We provisionally conclude that the provisions of the Arbitration Act 1996 should not apply generally to emergency arbitrators. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 19: 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?

Not Answered

Please share your views below.:

Consultation Question 20: Do you think that section 44(5) of the Arbitration Act 1996 should be repealed, and why?

Yes

Please share your views below.:

Response:

As explained in the HFW Submissions, sSection 44(5) provides that the court should only act in circumstances where the tribunal "has no power or is unable for the time being to act effectively".

Since the AA1996 was enacted, many arbitral institutions have adopted new provisions that provide for the appointment of an emergency arbitrator prior to the constitution of the tribunal so that the emergency arbitrator may issue interim measures.

With the introduction of emergency arbitrators, there has been a question as to whether references to the tribunal in arbitration legislation extends to emergency arbitrators given that they are appointed separately, and prior to, the constitution of the tribunal.

The courts have acknowledged this development and rejected an application for the court to grant interim measures in circumstances where there was the ability for the applicant to obtain relief through an emergency arbitrator.

An express reference to emergency arbitrators in section 44 would clarify this issue.

Consultation Question 21:

Not Answered

Please share your views below.:

Consultation Question 22:

Disagree

Please share your views below.:

We refer to section 3 of the HFW Submissions where we have set out our analysis of some of the issues relating to challenging the jurisdiction of a tribunal under section 67.

We have considered the specific questions raised by the Law Commission in Chapter 8 and respond to those below.

We do not agree with this proposition.

As explained in the HFW Submissions, in addressing the question of the tribunal's jurisdiction and permitting challenges of the tribunal's jurisdiction, there is a balance to be struck between the fundamental principles underlying the concept of arbitration and the need for the support and supervision of the court, as explained in the HFW Submissions.

We agree with the DAC's approach.

Whilst the tribunal has the power to rule on its own jurisdiction, the Court has the final say on jurisdiction, as acknowledged in the Consultation Paper and the cases referred to therein.

In order to carry out this role, the Court must be able to fully review the factual evidence and the legal submissions. However, as noted in some of the cases, this may be by way of a summary judgment process rather than a full trial. The extent of the review may depend on the specific circumstances of the case.

We note the concerns that this may result in the jurisdiction hearing before the tribunal being a "trial run" and that a party may end up having a "second bite at the cherry". However, the cases referred to indicate that the Courts are attune to this issue.

In this context, we agree that Parties should not be entitled to submit new evidence or new legal submissions, as has been noted in some cases. The development of these restrictions in the cases may be an appropriate way forward.

In any event, the Arbitration Act should adopt a consistent approach to this issue regardless of whether it is considered in the context of section 67 or section 103.

Consultation Question 23: 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?

No

Please share your views below.:

We do not think the same limitation should apply to section 32 for two reasons.

First, if this limitation was applied then it would need to be restricted to circumstances where the Court is reviewing a jurisdiction decision of the Tribunal. As explained in the Consultation Paper, there are safeguards against this, namely that a challenge under section 32 cannot be considered unless:

(a) the challenge is made with the agreement in writing of all the other parties to the proceedings;

(b) it is made with the permission of the tribunal and the court is satisfied that the determination of the question is likely to produce substantial savings in costs, the application is made without delay and there is good reason why the matter should be decided by the court.

Second, if this limitation was applied then it may prevent parties from applying to the Court to determine the issue of jurisdiction rather than the tribunal. Whilst the framework of the Act is designed such that it is the tribunal who first determines the issue of jurisdiction rather than the Court (as explained in the HFW Submission) there are occasional circumstances where there may be good reason for the issue of jurisdiction to be addressed first by the Court. It is precisely such circumstance that section 32 is addressing.

The safeguards in section 32(2) (set out above), are sufficient to protect against the abusive use of section 32.

Consultation Question 24: We provisionally conclude that our proposed change to section 67 of the Arbitration Act 1996 would not require any similar change to section 103. Do you agree?

Not Answered

Please share your views below.:

As we have noted that we do not agree with the proposed change to section 67, we also propose that no change is required to section 103.

However, whichever approach is taken, our view is that the approach should be consistent under section 67 and section 103.

As explained in the Consultation Paper, section 103 gives effect to Article V of the New York Convention, i.e. the grounds for challenging the recognition and enforcement of an award. It operates with respect to foreign-seated awards rather than English seated awards.

Also, as noted in the Consultation Paper, the English courts have consistently emphasised that when the ground for challenging enforcement of an award is that the tribunal lacks jurisdiction, the court may carry out a rehearing of the issue. In *Dallah Real Estate & Tourism Holding Co v Pakistan*, Lord Collins stated, after analysing approaches from various jurisdictions and considering whether the party resisting enforcement is required to challenge the award before the courts of the seat (and determining that this is not required):

"It follows that the English court is entitled (and indeed bound) to revisit the question of the tribunal's decision on jurisdiction if the party resisting enforcement seeks to prove that there was no arbitration agreement binding upon its under the law of the country where the award was made."

However, the rehearing may be by way of summary judgment rather than a full trial.

Other common law countries, such as Singapore and Australia, have taken a similar approach.

Accordingly, our view is that there is no need for a similar change to section 103. A rehearing of the question of jurisdiction by the courts may be required at the enforcement stage.

Consultation Question 25: 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. Do you agree?

Agree

Please share your views below.:

We agree with the proposal to include this additional remedy for the reasons explained in the Consultation Paper.

Consultation Question 26: 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?

Agree

Please share your views below.:

We agree with this proposal.

Our understanding is that the framework of the Arbitration Act 1996 (as explained above and in the HFW Submission) is intended to ensure that it is the tribunal who first determines jurisdiction.

If a respondent has defeated a claim on the grounds of lack of jurisdiction, it would be unfair if the respondent was not able to recover its costs in defending a claim where the tribunal had jurisdiction.

We appreciate that this common sense approach is being challenged and that it is for this reason that the position should be expressly stated.

Consultation Question 27: 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?

Agree

Please share your views below.:

We agree with this proposal and refer to the analysis in section 5 of the HFW Submission.

We have summarised some of the key points below.

The main benefit of the current approach is that it provides the opportunity for the courts to consider questions of law at each of these three stages in the arbitration process, including an appeal on a point of law. However, the courts can only consider such questions if the parties have agreed to that referral or the tribunal has granted permission and the court is satisfied as to the need for the referral.

This approach strikes an appropriate balance between the principle of party autonomy (s 1(b)) and the principle of minimal court intervention (s 1(c)). One of the reasons that parties regularly waive these rights in their arbitration agreement is because they want to limit the grounds for appeal or challenge in favour of receiving a final determination of the issues in dispute. In many cases, finality is more important to the parties than having the right to appeal. In this context, we consider below some of the issues and arguments for and against the courts being more involved in determining questions of law. As the DAC acknowledged there is a need to limit the intervention of the courts in the arbitral process. The 1996 does this by limiting the circumstances in which an appeal on a point of law can be brought.

Further, for the reasons explained in the HFW Submissions, the argument that arbitration inhibits the development of the common law does not justify overriding the non-intervention principle.

Consultation Question 28: Do you think that section 7 of the Arbitration Act 1996 (separability of arbitration agreement) should be mandatory, and why?

Yes

Please share your views below.:

There are sound reasons for making section 7 mandatory. The AA1996 has a pro-arbitration policy. The separability of the arbitration agreement is a fundamental pillar of international arbitration. The English approach to uphold the separability of the arbitration agreement does not put the application of the principle beyond doubt, since this is a non-mandatory provision. As a result, as the principle can be disapplied if the parties agree otherwise, and in particular pursuant to section 4(5) a choice of foreign law to govern the arbitration agreement will disapply section 7. Now, following *Enka v Chubb*, in the absence of an express choice of law governing the arbitration agreement, a choice of a foreign law as the governing law of the contract in a London arbitration will be the law of the arbitration agreement, and therefore amount to an agreement to disapply section 7, and only where the parties have not chosen a foreign substantive law will the applicable law generally be the law of the arbitral seat. Since the principle of separability does not enjoy universal consensus, it may not be reintroduced by the foreign substantive law, resulting in greater scope for challenge and disruption to the arbitral process in a London arbitration. It is noted that the current position overturned previous case law that had taken a strong pro-arbitration approach holding that, in an arbitration seated in England and Wales, the separability of the arbitration agreement would be decided by the law of the seat absent a specific choice of law in relation to the specific matter, i.e., separability, or an express provision excluding the principle of separability. Aside from the tension that English law as the *lex fori* governed separability for arbitrations seated in England and Wales, but elsewhere the Act in section 2(5) provided that the English approach on separability under section 7 applied if English law was the law of the arbitration agreement in a foreign seated arbitration, the position supported the presumption of separability and certainty that in a London arbitration the parties' choice of arbitration to resolve their disputes would be upheld unless (which would be rare) they had made specific provision to the contrary. The potential risk is that London arbitration may not be (or may not be perceived by its users to be) as "robust" a choice of arbitral seat in future when compared to other key arbitral hubs which give effect to separability. The legislative framework is intended to uphold party autonomy and keep the parties to their agreement to arbitrate, to ensure effectiveness of arbitration where London/England or Wales is the seat of arbitration. Making section 7 of the Arbitration Act 1996 mandatory would serve this purpose.

Consultation Question 29: 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?

Not Answered

Please share your views below.:

Consultation Question 30: 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?

Not Answered

Please share your views below.:

Consultation Question 31: 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?

Yes

Please share your views below.:

We support a change to the Arbitration Act 1996 to include express references to procedural matters including remote hearings and the use of eBundles etc., which we would like to see as the default option.

We are founder members of the Campaign for Greener Arbitrations (CGA) and are also Steering Committee members, and support the work and advances already made by the arbitration community. As shown by the Herbert Smith Freehills recent study, the use of remote hearings and technology will reduce the arbitration community's climate footprint (by an estimated 19 times compared to an in the room hearing), and lead to greater time efficiency. These changes could also reduce cost.

Current powers:

Article 19.2 of the Arbitration Act 1996 provides that "The arbitral tribunal shall organise the conduct of any hearing in advance, in consultation with the parties."

Arguably, the tribunal also has this power under sections 33, 34, and/or 38.

The tribunal does already the power to determine the procedure and format to be adopted. However, in our experience, not all tribunals approach these matters in a consistent way, and so by including an express reference in the Act, the messaging would be clearer, and the inconsistency, and uncertainty reduced, and parties would feel more able to seek procedural orders, such as that created by the CGA.

In 2020, numerous guidelines were published by arbitral institutions to assist participants navigate and be prepared for remote hearings. For example: (a) the ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic addresses issues that might arise during a virtual hearing and makes suggestions as to how the parties can maximise the efficiency of the proceedings; (b) the HKIAC Guidelines for Virtual Hearings highlight ways that the parties can utilise institutional rules and resources to enhance the efficiency of the proceedings; and (c) the Seoul Protocol on Video Conference in International Arbitration provides advice in relation to the logistical and practical challenges of remote hearings.

These guidelines help minimise challenges or disruptions that the parties may face during virtual hearings. For example, the Seoul Protocol provides minimum technological specification requirements, such as minimum bandwidth speed, which can minimise any technological disruptions. Equally, the guidelines assist in ensuring greater cyber security of these hearings and assistance in obtaining virtual witness statements. All of these guidelines bring greater confidence to virtual hearings, which may encourage more parties to opt for arbitration in the future.

Whilst many arbitral rules permitted the tribunal to hold virtual hearings, many arbitral rules have been amended to expressly, give such power to the tribunal. For example, the revised ICC Rules, LCIA Rules and ACICA Rules now include an express provision for virtual hearings. It would therefore be entirely consistent for the wording of the Arbitration Act 1996 to reflect this change of approach.

Consultation Question 32: Do you think that section 39 of the Arbitration Act 1996 should be amended to refer to “orders” (rather than “awards”), and why?

Not Answered

Please share your views below.:

Consultation Question 33: Do you think that section 39(1) of the Arbitration Act 1996 should be amended to refer to “remedies” (rather than “relief”), and why?

Not Answered

Please share your views below.:

Consultation Question 34: 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?

Not Answered

Please share your views below.:

Consultation Question 35: 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?

Not Answered

Please share your views below.:

Consultation Question 36: We provisionally propose that sections 85 to 87 of the Arbitration Act 1996 (on domestic arbitration agreements) should be repealed. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 37: Do you think that any of the suggestions discussed in Chapter 11 needs revisiting in full, and if so, why?

Please share your views below.:

With regards to the suggestions in Chapter 11, our view is that the first issue relating to the law governing the arbitration agreement should be given further consideration.

As explained in the Consultation Paper, the *Enka v Chubb* decision has resulted in English law being out of step with international practice in arbitration, i.e. that the law governing the arbitration agreement is usually the law with which it is most connected which is usually the seat rather than the governing law of the contract.

Notably, the LCIA Arbitration Rules provide that the law governing the arbitration agreement is the law of the seat of the arbitration (Article 16.4).

The Law Commission may wish to give this issue more consideration to ensure that there is certainty on this issue and that it is consistent with international practice.

Consultation Question 38: 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?

Please share your views below.:

Response ID ANON-PT57-RUB1-A

Submitted to Law Commission Consultation: Review of the Arbitration Act 1996
Submitted on 2022-12-15 23:49:00

About you

What is your name?

Name:
Dr Sara Hourani

What is the name of your organisation?

Enter the name of your organisation:
Middlesex University London

Are you responding to this consultation in a personal capacity or on behalf of your organisation?

Personal response

If other, please state::

What is your email address?

Email:
[REDACTED]

What is your telephone number?

Telephone number:
[REDACTED]

If you want the information that you provide in response to this consultation to be treated as confidential, please explain to us why you regard the information as confidential. As explained in our privacy notice, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

Please explain to us why you regard the information as confidential:

Consultation questions

Consultation Question 1: 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?

Agree

Please share your views below.:

Consultation Question 2: We provisionally conclude that the Arbitration Act 1996 should not impose a duty of independence on arbitrators. Do you agree?

Disagree

Please share your views below.:

Consultation Question 3: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 4: Should the Arbitration Act 1996 specify the state of knowledge required of an arbitrator's duty of disclosure, and why?

Yes

Please share your views below.:

To add clarity to what information needs to be disclosed.

Consultation Question 5: 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?

What they ought to know

Please share your views below.:

Consultation Question 6:

More broadly justified

Please share your views below.:

Consultation Question 7:

Agree

Please share your views below.:

Consultation Question 8: Should arbitrators incur liability for resignation at all, and why?

No liability for resignation

Please share your views below.:

Consultation Question 9: Should arbitrators incur liability for resignation only if the resignation is proved to be unreasonable?

No

Please share your views below.:

Consultation Question 10: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 11: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 12: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 13: We provisionally propose that the Arbitration Act 1996 should stipulate the threshold for success in any summary procedure. Do you agree?

Agree

Please share your views below.:

Consultation Question 14: 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. Do you agree?

Other

Please share your views below.:

It depends on what measures are in place to maintain a fair and equitable procedure for all claims/issues.

Consultation Question 15: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 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?

Yes

Please share your views below.:

For clarification and to confirm the position of current case law on this issue.

Consultation Question 17: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 18: We provisionally conclude that the provisions of the Arbitration Act 1996 should not apply generally to emergency arbitrators. Do you agree?

Other

Please share your views below.:

Whilst it is essential for emergency arbitration to be carried out quickly and efficiently without any extra hurdles- it would be important for the procedure to be carried out in a fair and equitable way. Measures need to be in place to ensure this is the case.

Consultation Question 19: 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?

Other

Please share your views below.:

See my answer above.

Consultation Question 20: Do you think that section 44(5) of the Arbitration Act 1996 should be repealed, and why?

No

Please share your views below.:

It is important to identify the extent of the powers of the court.

Consultation Question 21:

Peremptory order

Please share your views below.:

To ensure there is a system of checks and balances.

Consultation Question 22:

Agree

Please share your views below.:

Consultation Question 23: 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?

Yes

Please share your views below.:

Both call for a review of what has been decided.

Consultation Question 24: We provisionally conclude that our proposed change to section 67 of the Arbitration Act 1996 would not require any similar change to section 103. Do you agree?

Agree

Please share your views below.:

Consultation Question 25: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 26: 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?

Other

Please share your views below.:

This is a contentious point- if such a provision is imposed- it might be beneficial to add an explanation regarding why it would be fair to impose it.

Consultation Question 27: 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?

Agree

Please share your views below.:

Consultation Question 28: Do you think that section 7 of the Arbitration Act 1996 (separability of arbitration agreement) should be mandatory, and why?

Yes

Please share your views below.:

To ensure that the arbitration can take place.

Consultation Question 29: 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?

Agree

Please share your views below.:

Consultation Question 30: 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?

Yes

Please share your views below.:

To protect the parties' intentions and autonomy.

Consultation Question 31: 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?

Other

Please share your views below.:

I. Remote Hearings:

My conclusion is that it would not be essential to make an express reference to remote hearings in the EAA. Further guidance and the eventual clarification of associated rights could be necessary whether or not express reference to remote hearings is made.

A) If express reference to remote hearings is adopted in the EAA:

In this case the main advantage could be more procedural flexibility and legal certainty concerning the recognition of the validity of remote hearings. This

would also help widen access to arbitration for smaller businesses.

It has been found that there is no absolute right to a physical hearing in England and Wales. Express reference to remote hearings in the statute would therefore not be a breach of the parties' right to a physical hearing in the first instance, especially if it is only referred to as an option or possibility that can be used. This would also be in line with the Campaign for Greener Arbitrations' Green Protocol for Arbitral Proceedings, and Model Procedural Order (mentioned in the report).

If express mention to remote hearings is made in the EAA, the best way to introduce it is by way of making it an option but not an obligation. It would be important not to affect the parties' right to a fair and equitable procedure if they are opposed to having remote hearings. Guidance on how to conduct hearings online in line with due process would be important. For example, the ICODR Standards for ODR can be used as a model guidance that can be adopted for the purposes of the EAA.

Further guidance on cybersecurity and data protection, trust issues regarding the process, issues relating to evidence and witness testimonies and other issues generated from the advancement of technology such as deepfakes would also be necessary.

Moreover, there would be a need for clarification on how the EAA would apply in the case of remote hearings in circumstances where there is no mention of the applicable *lex arbitri*.

B) If no express mention of remote hearings is made in the EAA:

The main issue in this case would be that recourse to remote hearings in arbitration governed by English law would remain ambiguous and a grey area of law. This could lead to conflicting positions and decisions by the parties, arbitral tribunals and court judgments, thereby adding to the uncertainty of the legal status of such a form of hearings.

It is currently not clear what the extent of the power of the arbitrators would be to impose the conduct of remote hearings as an obligation on the parties, even if this would form part of the procedural aspects that they can give directions under. It would be of utmost importance to strike a balance between the powers of the arbitrators to impose remote hearings and the fairness of the procedure and the right of the parties to be heard. The use of such powers should not affect the parties' right under Article 6 of the ECHR, Article V(1)(b) NYC and Articles 34(2)(a)(ii) and 18 UNCITRAL Model Law.

Although there would be a gap in the EAA if no express mention of remote hearings is made, this gap can be filled in circumstances where the parties opt for the application of institutional rules that refer to remote hearings and offer guidance on this form of hearings.

II. Electronic Documentation:

My conclusion is that it would be important to make an express reference to electronic documentation in the EAA.

Analysis:

The current position of English Law on what constitutes a valid signature, arbitration agreement or award in digital form is not entirely clear. The EAA has been somewhat open ended on this issue, which has encouraged a wide interpretation by the courts. But the position of the law is not completely clear on this point, which can generate a challenge over the validity of the electronic document in question (whether it is an electronically signed arbitration agreement, arbitral award or other document).

Even though the UNCITRAL Model Law on International Commercial Arbitration offers a wide interpretation of what form an arbitration agreement can undertake, there is not much guidance in the current international legal instruments on arbitration on the legal validity of electronic documentation.

Guidance and explanation has been led by arbitral institutions since the pandemic, but the legal status of these instruments remains uncertain.

For example, it would be important to make express reference to the ability to use electronic documents in the statute to clarify the legal validity of electronic signatures found in arbitration agreements and arbitral awards. Also, the lack of clarity on legal validity of electronic arbitration agreements for example in the EAA could lead to more complex issues such as the identification of the signatories to an arbitration agreement in code form.

It is currently not clear what electronic documentation is- and it might not be in line with the development of technology e.g. smart contract- based arbitration as proposed by UKJT DRRR.

Express mention to the above would add clarity and eliminate risks of the rejection of the validity of the arbitral proceedings.

Consultation Question 32: Do you think that section 39 of the Arbitration Act 1996 should be amended to refer to "orders" (rather than "awards"), and why?

Yes

Please share your views below.:

To avoid the confusion with the actual final award.

Consultation Question 33: Do you think that section 39(1) of the Arbitration Act 1996 should be amended to refer to "remedies" (rather than "relief"), and why?

Yes

Please share your views below.:

It is clearer from a legal standpoint what this would entail.

Consultation Question 34: 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 appellants was notified of the result of that request. Do you agree?

Agree

Please share your views below.:

Consultation Question 35: 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?

Agree

Please share your views below.:

Consultation Question 36: We provisionally propose that sections 85 to 87 of the Arbitration Act 1996 (on domestic arbitration agreements) should be repealed. Do you agree?

Agree

Please share your views below.:

Consultation Question 37: Do you think that any of the suggestions discussed in Chapter 11 needs revisiting in full, and if so, why?

Please share your views below.:

N/A

Consultation Question 38: 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?

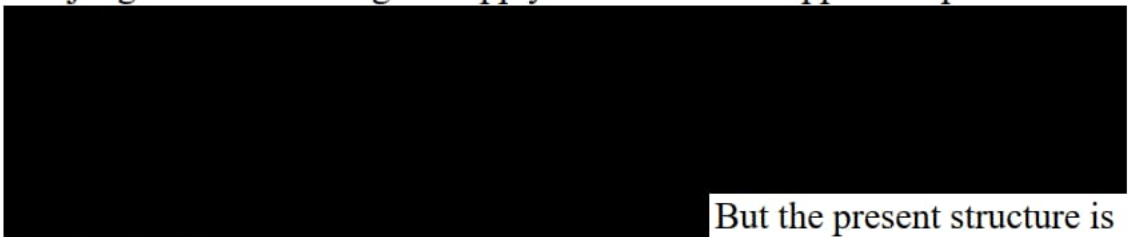
Please share your views below.:

Yes. The consultation paper did not cover the topic of the automation of the procedure and the legal validity and consequences of such a feature.

The UKJT Digital Dispute Resolution Rules for example state that an arbitral award governed by the rules would be automatically enforced and executed (via a smart contract platform it is presumed). A clarification of the position of the EEA on the matter could be helpful to ensure the fairness and equity of the procedure.

Leave to Appeal to the Court of Appeal from a Judge’s Decision under Section 69 of the Arbitration Act 1996.

1. The thesis of this short paper is that where a judge refuses leave to appeal from his decision on an appeal under section 69 of the Arbitration Act 1996, the Court of Appeal should itself be empowered to hear an application for permission to appeal and, in an appropriate case, to allow an appeal to go forward.
2. In general, with one qualification, I accept the Law Commission’s findings and conclusion to appeals to the Commercial Court from arbitration awards in §§9.1-9.53 of its report.
3. That qualification is relevant only because it has some knock-on relevance to the volume of appeals to the Court of Appeal. In §§9.37-8, it is said that the concern that too few appeals are heard is really a “complaint that too many parties prefer to arbitrate, rather than bring court proceedings”. With respect, this is based on a logical fallacy. There is no reason to suppose that the disputes which are currently arbitrated would generate more appeals if they were litigated in court. Most disputes which are arbitrated are primarily factual or technical or both. This is where the burden of costs is principally generated: legal questions characteristically involve much the smaller part of the costs. One of the principal attractions of arbitration is that arbitrators are experienced in the area of commerce or technology within which the particular dispute lies. The Commission’s proposed solution to the lack of legal appeals is in effect to redirect cases from a more suitable forum to a less. The need for appeals on points of law arises generally from the fact that there may be questions of law, often ancillary and/or subordinate to the main questions in dispute. This is so whether the case is brought in court or arbitration.
4. Where a first instance judge hears and determines an appeal from an arbitration award, his judgment can only be appealed with permission from that judge. There is no right to apply to the Court of Appeal for permission.



But the present structure is illogical and unsatisfactory.

5. If I may be permitted some anecdotal evidence, I was involved in a case where a Commercial Court judge heard an appeal from an arbitration tribunal. Leave to appeal to the Commercial Court had been given on the correct basis that a point of general importance was involved. The judge heard and allowed the substantive appeal and then refused leave to appeal to the Court of Appeal, notwithstanding the ground on which the original leave had been given. In the relevant industry there was a chorus of disapproval, echoed in the leading textbook; but it bound all arbitrators thereafter. No doubt the Court of Appeal is not infallible either, but the chances of this particular type of mistake would have been minimised if the judge had given leave or if the Court of Appeal had been permitted to do so.
6. There is obviously nothing wrong with a rule that requires leave to be given for appeals to the Court of Appeal. This is generally the rule in civil and criminal cases. But I know of no other appellate framework where the power to determine whether or not an appeal should be allowed to proceed to a higher tier in the structure is given exclusively to the judge hearing the first appeal.
7. The reason for conferring that power on him or her is that it saves time and costs if someone who is familiar with the issues can immediately say that it is a clear case for a further appeal.
8. The figure given in §9.46 does not take one very far because (a) it covers a much wider range of cases than appeals on points of law in the arbitration, and (b) it is silent altogether on the number of applications to the Commercial Court for leave to appeal and applications refused.
9. It is worth noting that the fact that the case has got as far as the Commercial Court means that it has already gone through a filtration process. I believe – again I do not have the statistics – that only in a minority of cases is the ground of appeal that the arbitrator has made an obvious error. Even such cases may be appropriate for consideration by the Court of Appeal.
10. There are a number of reasons, both negative and positive, for saying that the Court of Appeal should have a right to give permission to appeal from a decision of the Commercial Court on a substantive appeal, notwithstanding that leave was refused below. In this sort of discussion, it is easy to fail to place on the scales that a decision of the Court of Appeal is presumed to have a better chance of being correct than that of a lower tribunal. If that were not so, there would never be any justification of any system of appeals.

11. I set out shortly the factors which in my mind overwhelmingly tilt the scales in favour of granting the Court of Appeal the right to determine what cases it hears.
- (a) Where there is a right of appeal on a point of law, it is unusual to have only one level of appeal.
 - (b) Three policies which tend to the restriction or exclusion of rights of appeal from arbitral decisions have already been breached by permitting appeals to the Commercial Court: another layer of appeal will cause no further damage to:-
 - (1) the finality of the award;
 - (2) the confidentiality of the award;
 - (3) the exclusion of legal tribunals from the arbitral process.
 - (c) The fact that leave to appeal has been granted has already demonstrated (in cases other than those where obvious error is invoked) that there is a serious issue or one of particular public importance to be considered.
 - (d) The purpose of a giving a right to appeal is to enable the law to be developed in an authoritative way. Given that the Court of Appeal is the primary source of authoritative case law in the UK, there is something perverse in excluding it from deciding cases most commonly of international significance.
 - (e) I repeat that I know of no other appellate framework involving the Senior Courts where the power to determine whether or not an appeal should be allowed to proceed to a higher tier in the structure is given exclusively to the judge hearing the first appeal. The fact that the judge who is asked to give permission is the judge who has heard and determined the appeal has three serious disadvantages:-
 - (1) Though judges are no doubt all paragons, some of them are not quite perfect. It is not unknown for a judge to be afflicted with, at one extreme, an excess of self-confidence, and at the other, a surfeit of self-doubt. In either case, there may be an unconscious unwillingness to allow a judgment to be reconsidered by another tribunal.
 - (2) Although the judge who gives or refuses leave has the advantage of having just considered all the arguments, but there is the disadvantage, completely distinct from the failings mentioned in the last sub-paragraph, that a judge who has considered the competing arguments carefully and dismissed one set in favour of another will have difficulty, at the application stage, in giving

appropriate weight to the arguments he has already decided are ill-founded.

(3) The parties to appeals from arbitral awards to the Commercial Court are frequently foreigners. They are also often non-lawyers. To them it may well seem inappropriate or give rise to a suggestion of apparent bias that a judge should be able to decide on whether or not his own ruling should be the subject of appeal. This may be irrational; but it would be unrealistic not to see that this is potentially unfortunate.

12. For these reasons I counsel the Commission to reconsider the question whether or not the rule should be changed so that it is the Court of Appeal which has the final say in whether or not it hears an appeal. If this results in very few successful applications, no harm will have been done, but a few injustices may be remedied and more to the point the law developed more authoritatively. If on the other hand (as I do not expect) there is a rash of successful applications to the Court of Appeal, that would justify reform all the more.

Michael Howard KC
Quadrant Chambers
LONDON EC4Y 1AU.

14th December 2022.

Response ID ANON-PT57-RUBG-Z

Submitted to Law Commission Consultation: Review of the Arbitration Act 1996
Submitted on 2022-12-15 22:54:20

About you

What is your name?

Name:

[REDACTED]

What is the name of your organisation?

Enter the name of your organisation:

ICC International Court of Arbitration

Where we have not commented on a question, it is because context shows we are either in full agreement or otherwise because the proposal is English law specific.

Are you responding to this consultation in a personal capacity or on behalf of your organisation?

Response on behalf of organisation

If other, please state::

What is your email address?

Email:

[REDACTED]

What is your telephone number?

Telephone number:

[REDACTED]

If you want the information that you provide in response to this consultation to be treated as confidential, please explain to us why you regard the information as confidential. As explained in our privacy notice, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

Please explain to us why you regard the information as confidential:

Consultation questions

Consultation Question 1: 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?

Other

Please share your views below.:

Parties' autonomy to define the aspects of an arbitration which should be confidential should remain. 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.

Consultation Question 2: We provisionally conclude that the Arbitration Act 1996 should not impose a duty of independence on arbitrators. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 3: 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. Do you agree?

Agree

Please share your views below.:

Codifying the common law would clarify the duty of disclosure within the express text of the Arbitration Act in such a way as to increase clarity and predictability in international arbitration

Consultation Question 4: Should the Arbitration Act 1996 specify the state of knowledge required of an arbitrator's duty of disclosure, and why?

Not Answered

Please share your views below.:

ICC is favourable because a clear standard provides arbitrators and parties with certainty as to what is expected.

Article 11 of the ICC Rules provides that an arbitrator shall disclose any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties, as well as any circumstances that could give rise to reasonable doubts as to the arbitrator's impartiality.

Consultation Question 5: 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?

Not Answered

Please share your views below.:

ICC does not take a view on which, if any, standard should be identified and set out in the Act.

In the context of ICC Arbitration, our guidance to prospective arbitrators is as follows:

Article 11(3) of the ICC Rules provides that arbitrators "shall immediately disclose [...] any facts or circumstances [...] concerning the arbitrator's impartiality or independence which may arise during the arbitration".

This is explained at para. 29 of the Note to Parties and Arbitral Tribunal, which provides that "the duty to disclose is of an ongoing nature and therefore applies throughout the duration of the arbitration".

The Note at para 31 provides that "when completing his or her Statement and identifying whether he or she should make a disclosure, both at the outset of the arbitration and subsequently, an arbitrator or prospective arbitrator should make reasonable enquiries in his or her records, those of his or her law firm and, as the case may be, in other readily available materials".

Pursuant to current ICC practice, failure to disclose is not itself a ground for disqualification. However, it will be considered by the Court in assessing whether an objection to confirmation or a challenge is well founded (Para 26, Note to Parties).

Consultation Question 6:

Not Answered

Please share your views below.:

ICC does not see a need to amend the current common law position (i.e. that taken by the Supreme Court).

ICC's position is that, while diversity is important to ICC and it stands against all forms of discrimination, legislation may not be the best way to address this perceived issue.

One of the advantages of arbitration is that parties can influence the characteristics or specialisms they want their arbitrators to possess. It is often the case in ICC arbitration that parties will agree on certain characteristics depending on the specific circumstances of their dispute.

If the Law Commission is minded to include provisions on diversity, it is requested to have mind to the following:

- The Act should be aimed at identifying the least possible intervention with party choice and to safeguard inclusion, rather than risking opening the door for more instances that would progressively expand.

- Any amendment must not capture nationality (which falls into the definition of race in the Equalities Act), which is still considered by the international arbitration community as a necessary characteristic to ensure the appearance of neutrality of tribunals. The ICC Rules, like those of many other institutions, contain default provisions on the nationality of arbitrators (which parties may elect out of) to ensure the appearance of neutrality of tribunals. This is especially important in international arbitrations.

- ICC has seen a rise in parties attempting "positive discrimination", for example deciding, where there are two male co-arbitrators that the president be a female. The Law Commission should consider how such positive discrimination, which is aimed at encouraging diversity, would fall foul of the suggested amendments.

- In relation to the proposal "any agreement between the parties in relation to the arbitrator's protected characteristic(s) should be unenforceable", the Law Commission should consider whether this would be interpreted as only the portion of the characteristic being unenforceable, or the entire

arbitration agreement would be unenforceable.

Consultation Question 7:

Not Answered

Please share your views below.:

See response to Question 6

Consultation Question 8: Should arbitrators incur liability for resignation at all, and why?

Not Answered

Please share your views below.:

Consultation Question 9: Should arbitrators incur liability for resignation only if the resignation is proved to be unreasonable?

Not Answered

Please share your views below.:

Consultation Question 10: 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. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 11: 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. Do you agree?

Agree

Please share your views below.:

This would align with our experience in international arbitrations. A summary procedure is being used as a procedural tool in ICC arbitration and it would be useful to clarify that this is available and equip arbitrators with the confidence to use it in appropriate circumstances.

Consultation Question 12: 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. Do you agree?

Agree

Please share your views below.:

This would align with our experience in international arbitrations. The arbitral tribunal is best placed to determine the procedure to be adopted in the circumstances, but subject to consultation with the parties.

Consultation Question 13: We provisionally propose that the Arbitration Act 1996 should stipulate the threshold for success in any summary procedure. Do you agree?

Not Answered

Please share your views below.:

ICC does not take a view on what standard, if any, should be applied in the Act. However, to assist the Law Commission, we set out ICC's approach.

The Note 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.

Consultation Question 14: 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. Do you agree?

Not Answered

Please share your views below.:

See Question 13

Consultation Question 15: 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. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 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?

Not Answered

Please share your views below.:

Consultation Question 17: 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. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 18: We provisionally conclude that the provisions of the Arbitration Act 1996 should not apply generally to emergency arbitrators. Do you agree?

Agree

Please share your views below.:

Agree to no general application.

There are a number of provisions in the Act which would not apply for Emergency Arbitration and therefore there should not be general application. If such procedure is to be provided in the Act, it would benefit from standalone provisions or clear guidance as to which provisions would be applicable (such as s. 13 limitation, s. 33 general duty, s. 29 and 74 immunity)

Consultation Question 19: 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?

Agree

Please share your views below.:

ICC is well placed to administer such proceedings, where agreed by the parties, for example by being available to administer these 365 days a year without being subject to court schedules.

Consultation Question 20: Do you think that section 44(5) of the Arbitration Act 1996 should be repealed, and why?

Not Answered

Please share your views below.:

A party should be at liberty to seek interim relief from both the domestic court and the arbitral tribunal (as guided by the institutional rules), a position which is highlighted in institutional rules.

Consultation Question 21:

Not Answered

Please share your views below.:

Consultation Question 22:

Not Answered

Please share your views below.:

Consultation Question 23: 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?

Not Answered

Please share your views below.:

Consultation Question 24: We provisionally conclude that our proposed change to section 67 of the Arbitration Act 1996 would not require any similar change to section 103. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 25: 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. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 26: 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?

Not Answered

Please share your views below.:

Consultation Question 27: 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?

Not Answered

Please share your views below.:

Consultation Question 28: Do you think that section 7 of the Arbitration Act 1996 (separability of arbitration agreement) should be mandatory, and why?

No

Please share your views below.:

The ICC Rules tend to favour party autonomy by use of the words “unless agreed otherwise”. The current non-mandatory status given to separability under Section 7 is therefore in tandem with the Rules. This is especially the case in international arbitration where parties from different jurisdictions need to compromise.

Consultation Question 29: 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?

Not Answered

Please share your views below.:

Consultation Question 30: 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?

Not Answered

Please share your views below.:

Consultation Question 31: 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?

Not Answered

Please share your views below.:

Consultation Question 32: Do you think that section 39 of the Arbitration Act 1996 should be amended to refer to “orders” (rather than “awards”), and why?

Not Answered

Please share your views below.:

Consultation Question 33: Do you think that section 39(1) of the Arbitration Act 1996 should be amended to refer to “remedies” (rather than “relief”), and why?

Not Answered

Please share your views below.:

Consultation Question 34: 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 appellatant was notified of the result of that request. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 35: 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?

Not Answered

Please share your views below.:

Consultation Question 36: We provisionally propose that sections 85 to 87 of the Arbitration Act 1996 (on domestic arbitration agreements) should be repealed. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 37: Do you think that any of the suggestions discussed in Chapter 11 needs revisiting in full, and if so, why?

Please share your views below.:

a) There should be a default rule that the law governing the arbitration agreement is the law of the seat, for example because the approach in *Enka v Chubb* was wrong.

ICC does not take a position on which rule, if any, should be adopted in the Act.

As an institution, we see parties in ICC cases seeking "safe seats" with a consideration being consistency of positions and an assurance that there is no risk of terms being overridden by external laws.

Consultation Question 38: 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?

Please share your views below.:

**Arbitration Act 1996 – Law Commission Consultation Questions
Response from ICC United Kingdom Arbitration & ADR Committee**

Consultation Question 1.

12.1 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?

Paragraph 2.47

We appreciate the difficulty in defining any boundaries to the application of confidentiality to certain types of arbitration. However, the current law, based on case law is a matter that can be codified. The reason for this is that international arbitration is just that, international. Parties and counsel from across the world choose international arbitration, choose English law, or choose to seat their arbitrations in England & Wales specifically for the certainty they gain from those choices and the reputation English law has (either as the *lex fori* or *lex arbitri*). Expecting international parties to have to delve into case law to understand central concepts of arbitration, such as confidentiality, does not make arbitration as accessible as it could be.

Practice in ICC arbitration is often for parties to expressly include confidentiality in the arbitration agreement, terms of reference or procedural order. Views of our members are split with many of the view that arbitration in England and Wales would best be served by a non-mandatory provision that confidentiality in arbitration applies unless the parties agree otherwise (for example investor-state arbitration under UNCITRAL Rules, where the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration may apply). A non-mandatory provision can then incorporate the *Emmott* exceptions. We accept that creates a situation where in the absence of agreement confidentiality would apply, but it is still then open to the parties to agree either full or partial exceptions to that confidentiality. If it were necessary for provision to be made to disapply the non-mandatory rule in specific types of arbitration, we believe that could be accommodated.

Consultation Question 2.

12.2 We provisionally conclude that the Arbitration Act 1996 should not impose a duty of independence on arbitrators. Do you agree?

Paragraph 3.44

Yes. Generally, the view is that no change is required here and that impartiality is the key requirement.

Consultation Question 3.

12.3 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. Do you agree?

Paragraph 3.51

Yes

Consultation Question 4.

12.4 Should the Arbitration Act 1996 specify the state of knowledge required of an arbitrator's duty of disclosure, and why?

Paragraph 3.55 136

No. Whilst we understand that there is some benefit in providing clarity on the threshold of knowledge required, we are concerned that the adoption of a specific state of knowledge might result in the requirement being misused with more arbitrator challenges being made on the basis of what might be trivial failures to following or operate to a particular standard. We think it better that this requirement be allowed to have some flexibility and, if necessary, develop over time. We would also note, for institutional arbitration, there are often specific rules or procedures that would apply in these circumstances.

Consultation Question 5.

12.5 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?

Paragraph 3.56

For the reasons given above, we do not think a specific standard should be specified. However, if a standard were to be applied, our members generally preferred a standard that required an arbitrator to make reasonable inquiries. The potential problem that then arises is the frequency with which reasonable enquiries should be made if it is to be a continuing duty.

Consultation Question 6.

12.6 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 by the House of Lords)?

Paragraph 4.10

*No answer proposed by ICC United Kingdom as this is being addressed by ICC HQ

Consultation Question 7.

12.7 We provisionally propose that: (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. Do you agree?

[Protected characteristics: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, sexual orientation. Race can mean nationality]

Paragraph 4.36

*No answer proposed by ICC United Kingdom as this is being addressed by ICC HQ

Consultation Question 8.

12.8 Should arbitrators incur liability for resignation at all, and why?

Paragraph 5.23 137

The ICC rules make specific provision for liability of arbitrators, but we comment further on the questions below.

Consultation Question 9.

12.9 Should arbitrators incur liability for resignation only if the resignation is proved to be unreasonable?

Paragraph 5.24

We can see a benefit in identifying that where an arbitrator resigns without good reason, then the arbitrator should incur liability. Otherwise, there is no effective commitment by the arbitrator to complete their appointment, and the cost and delay resulting from having to replace an arbitrator can be significant. We also agree that section 25 as currently drafted does not provide any degree of certainty for arbitrators when considering resignation.

Consultation Question 10.

12.10 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. Do you agree?

Paragraph 5.45

Yes and we believe this was what the Act intended (see section 29(3)). We are, however, aware of a small number of occasions where an arbitrator could be said to have participated extensively in court proceedings (rather than taking a more neutral approach). Whilst the court having the ability to impose costs on an arbitrator ought to be a deterrent to such conduct, we do not think this is what the Arbitration Act ever intended. We also think that changes to the Act should not be driven by a tiny minority of cases or behaviours. That said, some members have expressed the view that there should be power for the court to impose costs against arbitrators who have unreasonably refused to resign and thereby force a party to incur the costs of an application. That could result in a liability for the arbitrator arising in the same way in which an arbitrator who resigns without good reason might also incur a liability.

Consultation Question 11.

12.11 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. Do you agree?

Paragraph 6.25

Yes.

Consultation Question 12.

12.12 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. Do you agree?

Paragraph 6.29
Yes.

Consultation Question 13.

12.13 We provisionally propose that the Arbitration Act 1996 should stipulate the threshold for success in any summary procedure. Do you agree?

Paragraph 6.31 138

Under ICC Rules, a tribunal already has a broad discretion, including to dispose of claims, counterclaims or defences that are manifestly unmeritorious. As noted in the Consultation, the ICC has also published guidance to arbitrators on dealing with such situations. This is covered in its 1 January 2021 Notes to Parties and Arbitral Tribunals on the conduct of the arbitration. It does not, however, specify the threshold to apply. That provides a tribunal with flexibility but, on balance, we favour the adoption of a specific threshold for arbitrations seated in England & Wales.

Consultation Question 14.

12.14 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. Do you agree?

Paragraph 6.35

If a threshold were to be adopted, we are concerned that adopting the same threshold as applies to summary judgment in court proceedings in England & Wales will also result in the adoption of procedures very similar to that used in summary judgment applications before the court. Given there is already a developed form of language used in the rules of some arbitral institutions, we would generally favour adopting the same term “manifestly without merit”. There may not, in practice, be a material difference between the two but the choice of ‘arbitration’ rather than ‘court’ language, we think, is important to maintain the perception of England as a place supportive of international arbitration and not a place where arbitration risks becoming another form of litigation.

Consultation Question 15.

12.15 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. Do you agree?

Paragraph 7.22

Yes. We suspect this is what was already intended, since the ‘taking of evidence’ in our view is not the same as ‘requiring a witness to attend’ for the taking of evidence.

Consultation Question 16.

12.16 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?

Paragraph 7.36

Yes. We believe this was always the intention with section 44. As noted in the Consultation, section 44 imports the powers of the court, including the power to act in respect of third parties.

Consultation Question 17.

12.17 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. Do you agree?

Paragraph 7.39

No. The court does apply different rules on appeals in different situations and here we think the limited approach is appropriate. Whilst exercise of court's powers against third parties might seem to justify additional support for those third parties than the parties to the arbitration themselves, those proceedings are likely to be infrequent and, in most cases, made in a manner where the third party is not prejudiced by the exercise of the power. There may also be situations where the third party is really a connected entity to a party to the arbitration where the court's power is needed to avoid the potential for a party to use corporate structures to abuse the arbitration process.

Consultation Question 18.

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

Paragraph 7.48 139

No. We think that certain provisions of the 1996 Act should apply to emergency arbitrators (EAs). For example, even though an EA is acting in that capacity, we still think that section 33 (general duty of the tribunal) should apply, as should section 34 (procedural and evidential matters). We also think that disapplying the provisions of the Act might give rise to uncertainty of an EA's powers in respect of arbitrations seated in England & Wales (for example in relation to the preservation of property, that is an express power conferred on arbitrators pursuant to section 38). We also consider that whilst an EA's order or award is provisional in nature, we consider it important that it is capable of being recognised as a decision of an arbitrator nonetheless (including in jurisdictions outside of England & Wales). Disapplying the Act to an EA opens the door, we think, to the argument that an EA's order or award has no standing at all. We accept, however, that it may be appropriate to disapply certain specific provisions of the Act to emergency arbitrators that might otherwise apply.

Consultation Question 19.

12.19 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?

Paragraph 7.51

Yes.

Consultation Question 20.

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

Paragraph 7.87

Yes. We agree with the reasoning of the Law Commission that its repeal is not required to correct any perceived problems arising from case law (e.g. *Gerald Metals*) but because it adds nothing to section 44. We were concerned that its repeal might result in parallel applications being made to an emergency arbitrator and the court, but we agree that a court in that situation is able to assess

whether the application is urgent, and is entitled to take into account the availability of interim arbitral procedures. If the court concludes it is not urgent (because appropriate procedures are available to parties in arbitration), then this would be an application to which section 44(4) would apply, with the restrictions that would then follow.

Consultation Question 21.

12.21 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.

Paragraph 7.97 140

Our preference is for (1). Our concern with option (2) is that it inevitably adds delay to what might be a very urgent matter.

Consultation Question 22.

12.22 We provisionally propose that: (1) where a party has participated in arbitral proceedings, and has objected to the jurisdiction of the arbitral tribunal; and (2) 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. Do you agree?

Paragraph 8.46

Among members of ICC UNITED KINGDOM's Arbitration and ADR committee, there was a majority of those polled in favour of an appeal rather than a rehearing. However, there are strong views from a sizeable minority against this proposal. Those concerns largely arise in the context of the possibility of a tribunal without jurisdiction, making its own determination which is then never properly determined by the court. A further concern, with which other members see some force, is the potential collateral harm of such a change, which could give rise to a party choosing not to participate in arbitration in order to preserve the right to challenge jurisdiction before the courts. Arguably that would harm arbitration and may, perversely, result in an increase in applications under section 67. It is accepted that this would apply only in a small minority of cases, but it is likely those cases will attract a disproportionate amount of attention.

Consultation Question 23.

12.23 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?

Paragraph 8.51

No. Given section 32 will only apply where either the parties agree or the tribunal gives permission, we see a full hearing to be exactly what was intended here, where the arbitration is deliberately subordinating itself to the ability of a court to determine the jurisdiction of the tribunal.

Consultation Question 24.

12.24 We provisionally conclude that our proposed change to section 67 of the Arbitration Act 1996 would not require any similar change to section 103. Do you agree?

Paragraph 8.57

Yes.

Consultation Question 25.

12.25 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. Do you agree?

Paragraph 8.64 141

Yes.

Consultation Question 26.

12.26 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?

Paragraph 8.71

Yes. Whilst we can see that this might seem inconsistent with a finding that it has no substantive jurisdiction, we think it is legally sound on the basis that the costs award will be made against the party that has asserted it has jurisdiction. It can hardly then rely on the opposite finding of the tribunal to avoid liability in costs for the approach it has taken.

Consultation Question 27.

12.27 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?

Paragraph 9.53

Yes. Since the ICC Rules exclude rights of appeal under section 69, this recommendation has no direct relevance to ICC arbitrations.

Consultation Question 28.

12.28 Do you think that section 7 of the Arbitration Act 1996 (separability of arbitration agreement) should be mandatory, and why?

Paragraph 10.11

Yes. We refer to our response to Consultation Question 37.

Consultation Question 29.

12.29 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?

Paragraph 10.17

Yes

Consultation Question 30.

12.30 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?

Paragraph 10.34 142

Yes. In circumstances where either the parties or the tribunal believes it is appropriate for the court to deal with a particular issue, we do not see why it is necessary to apply any further threshold, and indeed, it would appear to be rather problematic for a tribunal to consider an issue to be of sufficient importance to be determined by a court only for the court to refuse. (An alternative was proposed which would reverse the current approach, by giving the court a discretion where only the parties have agreed to refer a matter to the court.)

Consultation Question 31.

12.31 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?

Paragraph 10.42

No. We consider it would be problematic for the Act to start making provision as to the way in which procedural matters be determined or applied, nor do we think there is any omission that needs to be corrected.

Consultation Question 32.

12.32 Do you think that section 39 of the Arbitration Act 1996 should be amended to refer to “orders” (rather than “awards”), and why?

Paragraph 10.47

Yes. We agree with the Law Commission that the body of the section should take priority in determining what was intended by section 39. On that basis it would appear that this section was intended to apply to orders, and not awards. However, we would mention that some members have identified examples where this section has usefully been used to obtain interim awards for payments which have been beneficial when it comes to issues of enforcement.

Consultation Question 33.

12.33 Do you think that section 39(1) of the Arbitration Act 1996 should be amended to refer to “remedies” (rather than “relief”), and why?

Paragraph 10.49

Yes, for internal consistency.

Consultation Question 34.

12.34 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?

Paragraph 10.59

Yes.

Consultation Question 35.

12.35 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?

Paragraph 10.64 143

Yes.

Consultation Question 36.

12.36 We provisionally propose that sections 85 to 87 of the Arbitration Act 1996 (on domestic arbitration agreements) should be repealed. Do you agree?

Paragraph 10.69

Yes.

Consultation Question 37.

12.37 Do you think that any of the suggestions discussed in Chapter 11 needs revisiting in full, and if so, why?

Paragraph 11.5

Some members of the ICC UNITED KINGDOM Arbitration and ADR committee believe, strongly, that the Arbitration Act 1996 should address the question of the applicable law of the arbitration agreement. Some propose that the Act should include an express provision that the law of the seat of the arbitration governs the law of the arbitration agreement unless the parties have expressly chosen otherwise. This proposal is made arising from concerns following *Enka v Chubb* that if preference is given to a party's choice of law into the contract in which the arbitration agreement forms part, where that is a foreign law, the effect of section 4(5) of the Act is to disapply (all or some) non-mandatory provisions of the Act and it may encourage challenges to the parties' choice of arbitration based on questions of, for example, arbitrability under the other law. An express provision might also avoid the time and costs incurred by tribunals (and in some cases, courts) in resolving the question as to the law applicable to the arbitration, which may still arise after *Enka v Chubb*.

There would appear to be two central issues here. The first is largely a question of contract, being how one determines the law applicable to the arbitration agreement. The second issue that arises is whether the Arbitration Act 1996 adequately covers the position where the arbitration agreement is governed by a law other than that of England & Wales.

On the first issue, it is acknowledged that there are plausible arguments in both directions. The argument that the Act should step in and determine the issue certainly has the attraction of avoiding other issues that may then arise. However, that does risk the perception that the Act might be overreaching by imposing an applicable law to the arbitration that is not what the parties ever intended. In theory, doing so also creates a practical problem at inception – should the party or its lawyer obtain English law advice on enforceability of agreements to arbitrate. It is simply not practical to do so. That said, this topic falls into what some have described “policy”.

The applicable law of the arbitration agreement as an independent question arises from its severability. This is, understandably, a topic that those choosing arbitration in their commercial contracts are unlikely to spend a great deal of time considering. In those circumstances, that is perhaps an area where policy may rightly step in. In *Enka v Chubb*, the Supreme Court concluded that the governing law of the contract would also be (by implication) the governing law of the arbitration agreement (unless otherwise agreed). Some members consider this to be the correct decision and one that reflects the likely commercial reality that where parties choose the law applicable to their contracts, they expect it to apply to all the contract (including the arbitration agreement). To include a provision in the Act to the contrary does, in the view of some members, go too far because it has the effect of imposing a decision on the parties that they did not make. That is balanced, however, by the argument that if the parties had chosen London as the seat of arbitration, could it not be said with the same amount of force, that by choosing arbitration in London, the parties are choosing English law to be imported to all matters relating to the arbitration, other than the substantive law of the contract. Moreover, given this falls in an area where policy already applied, namely the principle of severability of the arbitration agreement, it can also be justified on that basis.

As to the second issue, if an amendment were made to the Act that had the effect of making arbitration agreements subject to English law where the seat of arbitration is England & Wales, unless the parties expressly agreed otherwise that would appear to be a solution (and of course this would be consistent with the position taken in Scotland). If, however, the Law Commission is not minded to make such a change, the question then arises, whether section 4(5) ought to be amended, and if so, to what extent?

We note the Law Commission's Consultation Question 28 (to which we have answered that section 7 should be a mandatory provision). Whilst even that has the potential to overreach the parties' agreement, we do conclude that it is preferable to the alternative being an incentive in some cases to challenge the validity even of the arbitration agreement. This is, effectively, another policy issue. As to section 4(5), we are aware that some amendments to it have been proposed that would limit the effect of it to only specific non-mandatory provisions. Ultimately, we recognise the challenge with doing so, particularly in the context of the broader principles of party autonomy. We would gladly consider potential amendments to section 4(5).

As with views expressed elsewhere, where it is possible for the Act to include a near comprehensive statement of all laws applicable to arbitration, we believe that is preferable, as that will make the Act and arbitration in England & Wales more accessible to more parties, including importantly international parties.

Consultation Question 38.

12.38 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?

Paragraph 11.7

No.

Response of the Institute of Family Law Arbitrators to
Law Commission Consultation Paper on Arbitration
published on 22 September 2022

Reference to family arbitration is found in two places within the Consultation Paper. The first is:

Paragraph 1.20 of the Consultation Paper (“the CP”) refers to the right of the parties to an arbitration under the Arbitration Act 1996 S3 and S4(3) to apply to the Court to remove or appoint an arbitrator or to challenge an award and the assignment of such applications to various branches of the High Court by the CPR r.62.3 and CPR PD para 2.3.

In a footnote it is observed that the Commercial Court *Court Guide* (11th ed 2022) para O 12.1. and the *Chancery Guide* (updated 2022) ch 31 paras 3.3, 3.4, and 3.11; *TCC Guide* (updated July 2019) paras 10.1.2 to 10.1.3 deal with such matters, but that there is no express provision for transfer to the Family Court or the Family Division of the High Court. This might merit revisiting, given the rise of family law arbitrations.

RESPONSE: Currently the only circumstances under which family law arbitrations take place are under the rules published by the Institute of Family Law Arbitrators (“IFLA”) and by arbitrators trained by IFLA and accredited to the Chartered Institute of Arbitrators. Two schemes exist each with its own rules. One relates to children. The other relates to financial disputes.

The children’s scheme and rules deal with welfare disputes and issues arising out of any challenge to the procedure or outcome of such an arbitration would inevitably be superseded by an application to the Family Court under the Children Act 1989 (“CA 1989”).

The financial scheme and rules deal primarily with claims under the Matrimonial Cause Act 1973 (“MCA 1973”) and Schedule 1 of the CA 1989. However, the financial scheme is also intended to deal with disputes under the Inheritance (Provision for Family and Dependents) Act 1975 (“the 1975 Act”) and under the

Trusts of Land and Appointment of Trustees Act 1996 ("TOLATA"). It is in relation to the interface between the Arbitration Act 1996 ("AA 1996") and the IFLA financial scheme that clarification and minor changes in the legislation and procedure are sought by IFLA. [REDACTED]

Our proposals need to be considered in the context of the allocation of family cases between the Family Court and the Family Division of the High Court. In relation to most children cases (the exceptions being wardship cases and some international cases) and to all financial cases, except claims under the 1975 Act or TOLATA (which cannot be heard in the Family Court): (i) the claim must be issued in the Family Court and not in the Family Division (in financial cases in that part of the Family Court known as the Financial Remedies Court), (ii) such cases are almost never transferred to the Family Division, and (iii) if trial by a High Court judge is appropriate the judge will sit in the Family Court. Thus in the present context the focus must be on the Family Court.

IFLA agrees with the Commission that to a limited extent the position of family arbitration should be revisited and clarification would be welcomed. However, since the bulk of family arbitrations under the financial scheme relate to disputes under the MCA 1973 or Schedule 1 of the CA 1989 and it is now unlikely that courts other than the Family Court or the Family Division of the High Court will be invited to intervene or to enforce the outcome of arbitrations in those areas. That is because the Court of Appeal in *Haley v Haley* [2020] EWCA Civ 1369 and the High Court in *A v A (Arbitration: Guidance)* [2021] EWHC 1889 (Fam) have held and have issued guidance as to the applicable procedure for enforcing and challenging financial remedy arbitral awards under the MCA 1973 and Schedule 1 of the CA 1989, which effectively require that all such proceedings are issued in the Financial Remedies Courts under the provisions of the MCA 1973 or the CA 1989.

However, those decisions do not expressly deal with arbitrations under the 1975 Act or TOLATA and it is there in particular that clarification and change is needed. The Law Commission's attention is drawn to the Practice Guidance issued by the

President of the Family Division (Munby P) on 23 November 2015 (IFLA Financial Scheme). The Guidance was issued long before the Court of Appeal's decision in *Haley v Haley* [2020] EWCA Civ 1369 clarified the legislative basis upon which arbitrations related to MCA 1973 and Schedule 1 should be dealt. However, the Guidance has not been withdrawn and, although it is uncertain, it probably still applies to 1975 Act and TOLATA cases. The result is that these matters have to be dealt with in a regulatory and enforcement scheme which is to a large extent anomalous.

Whilst enforcement proceedings under S.66 of the Arbitration Act 1996 ("AA 1996") may be brought in any County Court centre, challenges to awards under SS.67 to 69 of AA 1996 must be issued in the Commercial Court, with the exception of landlord and tenant or partnership disputes which must be issued in the Chancery Division (CPR Practice Direction 62 para. 2.3(2)).

Transfer to an alternative list, court or Division of the High Court is permitted pursuant to Art.6 of the High Court and County Courts (Allocation of Arbitration Proceedings) Order 1996 ("Allocation Order"). Art.5 of the Allocation Order made provision for AA 1996 proceedings to be brought in the Central London County Court Mercantile list; that list no longer exists and the White Book at 2E-381 suggests this provision should be regarded as defunct.

Against this background IFLA make two linked proposals.

(1) IFLA would suggest that the Primary legislation, rules and guidance should be amended to permit applications under the 1975 Act and TOLATA to be issued in the Family Court. Nearly all 1975 Act cases and most TOLATA cases are equally if indeed not better, suited to be dealt with by the Family Court. Rarely it might be appropriate to transfer a case to the Chancery Division of the High Court and that could be dealt with easily.

Not only is the present scheme topsy turvy, effectively giving excessive weight to the minority of 1975 Act and TOLATA matters which are not best placed within the Family Courts, it contains within it a serious and unprincipled anomaly which has

been identified for some time, but not remedied. Whilst disputes of this description that arbitrated under the IFLA Scheme arise in a family context, they are not designated as family business within the jurisdiction of the Family Court. That needs to be changed.

[REDACTED]

The relevant provisions are section 25(1) of the Inheritance (Provision for Family and Dependents) Act 1975 and section 23(3) of the Trusts of Land and Appointment of Trustees Act 1996.

Section 25(1) of the 1975 Act (as amended) provides as follows (suggested amendment being shown in [xxx]):

“In this Act – ... “the court” means unless the context otherwise requires the High Court, [*or the family court.*] or where the county court has jurisdiction by virtue of section 25 of the County Courts Act 1984, the county court; ...”

Section 23(3) of the 1996 Act (as amended) provides as follows (suggested amendment being shown in [xxx]):

“In this Act “the court” means – (a) the High Court, or (b) [*the family court, or (c)*] the county court”

(2) The 1996 Order and the relevant provisions in the CPR should be amended to permit applications under AA 1996 to be issued in or transferred to the Family Court.

The second group of references relevant to family arbitration is found at paragraphs 2.13, 2.28 and 2.34. They refer to privacy and to disclosure of child welfare issues in Family Arbitrations. The Conclusion of the Consultation says:

“2.47 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? “

Response:

The IFLA Rules fully provide for that disclosure to appropriate authorities in the event of material welfare concerns. IFLA therefore suggests that the Commission's provisional conclusion is appropriate in so far as it relates to family arbitration. As to para.2.13 and to an equitable right to privacy in arbitration and its particular potential reference to family arbitration, IFLA considers that, given the contractual basis of privacy in IFLA Arbitrations reliance on any additional, potential equitable right would be so vanishingly rare as to validate the Commission's provisional conclusions.

15 December 2022

His Honour Donald Cryan

Chair of the Advisory Committee to IFLA

Tel: [REDACTED]
e-mail: [REDACTED]

14 December 2022

Professor Sarah Green
Law Commissioner for Commercial and Common Law

Dear Professor Green

RE: CP 257, Response to the consultation of the Arbitration Act 1996

The knowledge and skills of an arbitrator should be ensured when judiciously deciding a dispute because there is no reason in the present times to believe that a compromise can be made to this effect. The historical context of arbitration doesn't stipulate any particular qualifications other than the normative characteristics of ethics. The same concept is followed now also despite the increasing competitiveness and complexity of the field. The edge of the arbitration mechanism over national courts is not only due to the expediency, party autonomy, and distrust of foreign subjects towards the adversary's national courts but also the quality and consistency of the awards rendered. Recently in India, an attempt was made to exhaustively categorise the qualifications apart from the qualities of the arbitrators in the Arbitration and Conciliation Act, 1996, but due to serious concerns regarding the curtailment of the right of the parties to choose the arbitrators of their wish, it had to be replaced with a non-exhaustive provision. Although there are many practical difficulties when exhaustively specifying the qualifications considering arbitration's customary practice and international nature, a need for knowledge and skill-based yardsticks in the present era cannot be totally disregarded. Hence, it is imperative to have some sort of measures taken in the national legislation so that the sanctity and quality of arbitral awards can be maintained.

The suggestion that I would like to make in this regard is that the statute should not be silent with regard to ensuring the knowledge and skills of an arbitrator. To be more specific, there is no harm to the statute in ensuring that the arbitrators are competent to understand the complex jurisprudence of arbitration. If the qualifications, if any, put forth cannot be complied with by the arbitrator of the parties' choice, at least a mechanism to ensure the basic knowledge of the arbitrator is imperative for the consistency and jurisprudential development of the field.

Yours sincerely

Emmanuel Thomas Mathai Kandamchira
LLM Student, Queen Mary University of London

Response ID ANON-PT57-RU15-W

Submitted to Law Commission Consultation: Review of the Arbitration Act 1996
Submitted on 2022-11-09 06:36:35

About you

What is your name?

Name:
Anthony Kennedy

What is the name of your organisation?

Enter the name of your organisation:

Are you responding to this consultation in a personal capacity or on behalf of your organisation?

Personal response

If other, please state::

What is your email address?

Email:
[REDACTED]

What is your telephone number?

Telephone number:
[REDACTED]

If you want the information that you provide in response to this consultation to be treated as confidential, please explain to us why you regard the information as confidential. As explained in our privacy notice, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

Please explain to us why you regard the information as confidential:

Consultation questions

Consultation Question 1: 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?

Agree

Please share your views below.:

Consultation Question 2: We provisionally conclude that the Arbitration Act 1996 should not impose a duty of independence on arbitrators. Do you agree?

Agree

Please share your views below.:

Consultation Question 3: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 4: Should the Arbitration Act 1996 specify the state of knowledge required of an arbitrator's duty of disclosure, and why?

No

Please share your views below.:

Consultation Question 5: 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?

What they ought to know

Please share your views below.:

If there is concern as to "actual knowledge" not being sufficient to capture industry standard practice (i.e. what an arbitrator ought to do in the current environment), the "what they ought to know" standard meets that objection.

Consultation Question 6:

Not Answered

Please share your views below.:

Consultation Question 7:

Not Answered

Please share your views below.:

Consultation Question 8: Should arbitrators incur liability for resignation at all, and why?

Not Answered

Please share your views below.:

Consultation Question 9: Should arbitrators incur liability for resignation only if the resignation is proved to be unreasonable?

Not Answered

Please share your views below.:

Consultation Question 10: 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. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 11: 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. Do you agree?

Agree

Please share your views below.:

This is in keeping with the emphasis on party autonomy which underpins the AA 1996.

Consultation Question 12: 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. Do you agree?

Agree

Please share your views below.:

It follows on from the comment I have made in the previous box.

Consultation Question 13: We provisionally propose that the Arbitration Act 1996 should stipulate the threshold for success in any summary procedure. Do you agree?

Agree

Please share your views below.:

If you are going to set out the summary procedure then that summary procedure needs to be objectively policed. Including a standard will ensure consistency of approach (if not necessarily consistency of outcome).

Consultation Question 14: 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. Do you agree?

Agree

Please share your views below.:

There is no good reason not to follow the content of CPR 24 on this point.

Consultation Question 15: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 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?

Not Answered

Please share your views below.:

Consultation Question 17: 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. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 18: We provisionally conclude that the provisions of the Arbitration Act 1996 should not apply generally to emergency arbitrators. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 19: 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?

Not Answered

Please share your views below.:

Consultation Question 20: Do you think that section 44(5) of the Arbitration Act 1996 should be repealed, and why?

Not Answered

Please share your views below.:

Consultation Question 21:

Not Answered

Please share your views below.:

Consultation Question 22:

Disagree

Please share your views below.:

I think that there is a danger of being misled by terminology here. An appeal itself may take the form of a rehearing or a review (see, for example, Part 52 of the CPR). In those circumstances, I am not sure that it helps to juxtapose, on the one hand, the language of "appeal" with, on the other hand, the language of "rehearing". Instead, the question really ought to be whether the court, when faced with the application which Section 67 envisages, reviews the decision of the tribunal or engages in a rehearing.

Against that background, there is no need to dispense with the court's ability to rehear the question. The reasons set out at paragraphs 8.33 - 8.36 of the Consultation Paper demonstrate that there is no reason to reform existing practice.

Consultation Question 23: 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?

Yes

Please share your views below.:

This would be consistent.

Consultation Question 24: We provisionally conclude that our proposed change to section 67 of the Arbitration Act 1996 would not require any similar change to section 103. Do you agree?

Agree

Please share your views below.:

Consultation Question 25: 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. Do you agree?

Agree

Please share your views below.:

While I would not go so far as to say that this is necessary (given that Section 67(3) does not say that the court may "only" do one of the things listed), the proposed amendment does make the relationship between Section 67(1) and Section 67(3) clearer and therefore is helpful.

Consultation Question 26: 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?

Agree

Please share your views below.:

Consultation Question 27: 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?

Agree

Please share your views below.:

I entirely agree with the conclusion for the reasons set out in the Consultation Paper.

Consultation Question 28: Do you think that section 7 of the Arbitration Act 1996 (separability of arbitration agreement) should be mandatory, and why?

Yes

Please share your views below.:

The Supreme Court's explanation of the principle in *Enka* is helpful. It is of fundamental importance. Section 7 ought to be mandatory, given that fundamental importance.

Consultation Question 29: 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?

Agree

Please share your views below.:

Consultation Question 30: 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?

Not Answered

Please share your views below.:

Consultation Question 31: 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?

No

Please share your views below.:

There is no need for it to do so.

Consultation Question 32: Do you think that section 39 of the Arbitration Act 1996 should be amended to refer to “orders” (rather than “awards”), and why?

Not Answered

Please share your views below.:

Consultation Question 33: Do you think that section 39(1) of the Arbitration Act 1996 should be amended to refer to “remedies” (rather than “relief”), and why?

Not Answered

Please share your views below.:

Consultation Question 34: 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 appellants was notified of the result of that request. Do you agree?

Agree

Please share your views below.:

Consultation Question 35: 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?

Agree

Please share your views below.:

Consultation Question 36: We provisionally propose that sections 85 to 87 of the Arbitration Act 1996 (on domestic arbitration agreements) should be repealed. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 37: Do you think that any of the suggestions discussed in Chapter 11 needs revisiting in full, and if so, why?

Please share your views below.:

In my view, the only question which might need to be revisited is the question of the law which governs an arbitration agreement. It is true that this is not of major importance, given that it lies within the parties' grasp to put the matter to bed. However, there is something deeply unsatisfactory, in my view, with the majority conclusion in *Enka* at the second stage (where there is no choice by the parties as to the law which governs the main contract); it is respectfully suggested that the minority arrived at the better position. Testing whether the minority's conclusion ought to be put on a statutory footing is something that is worthwhile doing, in my view.

Consultation Question 38: 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?

Please share your views below.:

Response ID ANON-PT57-RUBJ-3

Submitted to Law Commission Consultation: Review of the Arbitration Act 1996
Submitted on 2022-12-15 14:25:18

About you

What is your name?

Name:

Paul Key K.C.

What is the name of your organisation?

Enter the name of your organisation:

Self-employed barrister practising from Essex Court Chambers

Are you responding to this consultation in a personal capacity or on behalf of your organisation?

Personal response

If other, please state::

London

What is your email address?

Email:

[REDACTED]

What is your telephone number?

Telephone number:

[REDACTED]

If you want the information that you provide in response to this consultation to be treated as confidential, please explain to us why you regard the information as confidential. As explained in our privacy notice, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

Please explain to us why you regard the information as confidential:

Consultation questions

Consultation Question 1: 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?

Agree

Please share your views below.:

I have nothing to add to the analysis in Consultation Paper 257.

Consultation Question 2: We provisionally conclude that the Arbitration Act 1996 should not impose a duty of independence on arbitrators. Do you agree?

Agree

Please share your views below.:

I have nothing to add to the analysis in Consultation Paper 257.

Consultation Question 3: 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. Do you agree?

Agree

Please share your views below.:

I have nothing to add to the analysis in Consultation Paper 257.

Consultation Question 4: Should the Arbitration Act 1996 specify the state of knowledge required of an arbitrator's duty of disclosure, and why?

No

Please share your views below.:

This should be left to the courts to develop the law, not least because the international views about this may develop and change as the years go by.

Consultation Question 5: 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?

What they ought to know

Please share your views below.:

However, as stated above, I do not consider that the statute should specify the state of knowledge required. Instead, this should be left to the courts to develop the law.

Consultation Question 6:

Other

Please share your views below.:

I have discussed my views on this subject with Professor Sarah Green at (and following) an Arbitration Club lunch meeting in London on Wednesday 23 November 2022. In short, I consider that it is a bad idea to make any change to the Arbitration Act dealing with discrimination or protected characteristics (etc).

1. There is no problem to be solved by way of statutory amendment.

Whilst it might be considered laudatory to be "against discrimination" and to be perceived, in particular, to promote diversity and move away from a world of elderly, white, male arbitrators (though see also point 3 below), statutory amendments are not the way to do this

The starting assumption appears to be that there is problem to solve because there are arbitration agreements which refer to "commercial men" (which, implicitly, it is assumed would enable a party to insist that a male is appointed to a tribunal as opposed to a woman). I do not agree at all that there is any such problem.

(a) Of the thousands of arbitration agreements that I have seen in practice over the last 30+ years, I have never seen an arbitration agreement which requires "commercial men", still less have I seen anything which requires males (or white males). Whilst there may have been such phraseology used in the past, I do not see it in current practice.

(b) In any event, I regard it as inconceivable that anyone would now read "men" as meaning "males", as opposed to meaning "persons". To my knowledge (having looked at the point), there are no cases where such a reading has been taken. Nor, as far as I am aware, does anyone suggest this at all. It is similarly inconceivable to me that any judge would read "men" as meaning "males", as opposed to meaning "persons".

In short, taking the example referred to in paragraph 4.5 of the Consultation Paper, there is no problem to solve, at least by way of statutory amendment. If the perceived problem is to promote diversity, the way to do that is via the various initiatives which are now common across the arbitral world (e.g. "The Pledge"), not via the proposed statutory amendments.

2. The proposed reform would create problems where none currently exist

The proposed reform can reasonably be anticipated to lead inevitably to considerable satellite litigation around the issue of whether or not a "discriminatory" quality in an arbitrator is justified/justifiable, akin to the sort of speculative and costly satellite litigation which was launched by the respective parties in that *Jivraj v Hashwani*. In that case one party challenged an appointment of a sole arbitrator on the basis that (i) the parties to the arbitration agreement were members of the Ismaili community, (ii) they had freely agreed that the arbitrators should all be members of the Ismaili community, but (iii) the sole arbitrator was not a member of the Ismaili community. The other party sought an order that the agreement to appoint arbitrators from the Ismaili community was illegitimate discrimination contrary to anti-discrimination laws. That debate played out before the arbitrator, before the Commercial Court, before the Court of Appeal and before the Supreme Court, at a total cost of well over £1m. And the Supreme Court indicated that such debates about anti-discrimination legislation will turn on "all the circumstances of the case" (para 59, SC Judgment), i.e. they are case and fact specific.

Such satellite litigation can reasonably be anticipated to concern arbitrator qualities which some might consider should simply be promoted without any debate at all.

For example assume that an arbitration clause states that the tribunal should be comprised of a woman sitting as a sole arbitrator (or 3 women in a tribunal of 3). Or assume that an arbitration clause states that the tribunal should be comprised of a person holding an African state nationality sitting as a sole arbitrator (or 3 such people in a tribunal of 3). An appointment in accordance with the strict terms of such an arbitration agreement can be reasonably anticipated to prompt court applications which seek to challenge the appointment (e.g. as to a default appointment made pursuant to the sole arbitrator clause or a party appointment made pursuant to the 3 person clause). Similar debates may be envisaged to arise as to whether the relevant race /gender/nationality terms can legitimately be severed without rendering the entire arbitration agreement void or ineffective.

Such satellite litigation is intrinsically inimicable to the basis objectives of time-efficient and cost-efficient dispute resolution. And it may equally be perceived to be inimicable to "diversity promoting" objectives, whereby some might hope that a parties are free to stipulate by agreement a woman arbitrator (for example) and to have such an agreement strictly enforced. However, that result is only secured if the proposed reforms to the arbitration act are not enacted (and instead the legal position remains as it currently stands).

3. Arbitration is in any event a dispute resolution setting where the parties are entitled to stipulate characteristics of the arbitrators

Hitherto it has been a generally accepted (positive) feature of arbitration that parties are entitled to stipulate characteristics of the arbitrators. (As a simple example, one might point to the generally accepted right of Jewish parties to agree to Beth Din arbitration which requires appropriate Jewish arbitrators.) The proposed reforms seek significantly to cut down that (positive) feature of arbitration. The point is discussed at length in multiple sources – and I refer here only (by way of example) to Born, *International Commercial Arbitration* (3rd ed.) chapter 12. Paragraph 12.01 of Born states (for example) “a defining characteristic of the selection of the arbitral tribunal is the principle of party autonomy. As discussed below, international arbitration conventions, national arbitral legislation and institutional arbitration rules all accord parties broad autonomy both to agree directly upon the identities of the arbitrators in ‘their’ arbitration and to agree on indirect procedural mechanisms for selecting such arbitrators. ... The parties’ predominant role in the selection of the arbitrators and in the development of procedural mechanisms and substantive standards governing the constitution of arbitral tribunals, are among the distinguishing characteristics of contemporary international arbitration”. Later, in paragraph 12.04(D) Born observes with approval that “the parties’ autonomy to agree upon contractual requirements for the arbitrators’ qualifications is recognized and given effect under both national arbitration regimes and the New York and Inter-American Conventions”.

This was also the position of the ICC (as intervening party) in the Supreme Court in *Jivraj v Hashwani*. I acted as junior counsel for the ICC in that hearing (with Toby Landau K.C. and others) and our clear submission was that party autonomy needed to be observed, whether in relation to an agreement that the tribunal be comprised of respected members of the Ismaili community (as in *Jivraj v Hashwani*), or in relation to a nationality requirement (as in many arbitral institution rules) or otherwise (race, religion, gender etc). (The SC Judgment refers with approval to the written submissions of the ICC at para 61 Judgment). Given that the Law Commission website does not appear to permit attachments, I shall separately send an email which attaches the ICC Case in *Jivraj v Hashwani*; and the relevant paragraphs are at para 108ff.

4. Out-of-step with other jurisdictions and the Model Law

The Consultation Paper suggests at para 4.20 that the proposal would be a “world-leading initiative”. Certainly it would be introducing a provision / rule which is not found in other jurisdictions. However, I consider that the reason such a provision / rule is not found in other jurisdictions is not because those other jurisdictions are discriminatory or casually permit discrimination on the grounds of race/gender/nationality (etc). Instead I consider that the reason such a provision / rule is not found in other jurisdictions is found in points (2) and/or (3) above. It is, I suggest, naïve to believe that England has alighted upon some solution which somehow escaped the attention of other states (and somehow escaped the attention of those who debated and finalised the UNCITRAL Model Law).

Consultation Question 7:

Other

Please share your views below.:

Please see response to Consultation Question 6. In short, I consider the proposal for "anti-discriminatory" amendments is flawed.

Consultation Question 8: Should arbitrators incur liability for resignation at all, and why?

Other

Please share your views below.:

I have no strong view either way.

Consultation Question 9: Should arbitrators incur liability for resignation only if the resignation is proved to be unreasonable?

Other

Please share your views below.:

I have no strong view either way.

Consultation Question 10: 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. Do you agree?

Other

Please share your views below.:

I have no strong view either way.

Consultation Question 11: 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. Do you agree?

Other

Please share your views below.:

I have no strong view either way. All tribunals which I appear in front of (or of which I form a part) already consider that they have such a power.

Consultation Question 12: 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. Do you agree?

Other

Please share your views below.:

I have no strong view either way. All tribunals which I appear in front of (or of which I form a part) already consider that they have such a power.

Consultation Question 13: We provisionally propose that the Arbitration Act 1996 should stipulate the threshold for success in any summary procedure. Do you agree?

Disagree

Please share your views below.:

This should be a matter for the arbitrators. The proposal seeks to regulate arbitral procedure in a manner which is antithetical to the minimalist / non-interventionist role which I believe the state should play in arbitration.

Consultation Question 14: 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. Do you agree?

Disagree

Please share your views below.:

Please see the response to Consultation Question 13.

Consultation Question 15: 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. Do you agree?

Other

Please share your views below.:

I have no strong view either way.

Consultation Question 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?

Other

Please share your views below.:

I have no strong view either way.

Consultation Question 17: 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. Do you agree?

Other

Please share your views below.:

I have no strong view either way.

Consultation Question 18: We provisionally conclude that the provisions of the Arbitration Act 1996 should not apply generally to emergency arbitrators. Do you agree?

Other

Please share your views below.:

I have no strong view either way.

Consultation Question 19: 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?

Other

Please share your views below.:

I have no strong view either way.

Consultation Question 20: Do you think that section 44(5) of the Arbitration Act 1996 should be repealed, and why?

Other

Please share your views below.:

I have no strong view either way.

Consultation Question 21:

Other

Please share your views below.:

I have no strong view either way.

Consultation Question 22:

Disagree

Please share your views below.:

I strongly disagree with this. I agree with the many written and oral responses which have been made in opposition to this proposal, including those made orally [REDACTED] and those made in writing by Jacob Grierson in the Journal of International Arbitration.

It is otiose to repeat those in any length, so I shall simply note briefly some important points.

1. The proposed approach is entirely inconsistent with the approach taken by the vast majority states around the world, including those which have adopted the Model Law. The international position is summarised in Born and many other texts.
2. The proposed approach is entirely inconsistent with the approach taken as to questions of jurisdiction which arise when considering whether to enforce New York Convention awards. The Court takes (and must take) a de novo approach - and consider jurisdiction afresh for itself. And there is no legitimate or compelling reason why the approach should be any different for jurisdiction arguments for arbitrations seated in England and Wales.
3. The proposed approach is inconsistent with statements of the highest authority from the Supreme Court and the Court of Appeal. For example, in *Dallah*, Lord Mance stated that "a party who has not submitted to the arbitrator's jurisdiction is entitled to a full judicial determination on evidence of an issue of jurisdiction before the English court, on an application made in time for that purpose under section 67 of the Arbitration Act 1996" and that "[t]he tribunal's own view of its jurisdiction has no legal or evidential value". It appears clear that these statements were not merely intended to reflect the position as it had evolved under caselaw, but were intended to reflect the correct juridical approach as a matter of principle.
4. The proposed approach seems to be the reopening of a debate which was settled first by *Rix J in Azov Shipping Co v Baltic Shipping Co (No. 1)*. The wording of section 67 permitted a textual reading to support either a rehearing or a review - and *Rix J* (rightly in my view) concluded for powerful reasons that a rehearing was required, including because the court should not be placed in a worse position than the arbitrators for the purpose of determining that challenge. A multitude of other judges in the years that have followed have agreed.
5. The proposed approach appears to assume that a decision of a putative tribunal that it has jurisdiction is somehow prima facie authoritative and need only be "reviewed" by a court. However, that misstates the status of the putative tribunal. A putative tribunal which is challenged as to jurisdiction by one party in court proceedings is simply an individual or group of individuals whose right to claim jurisdiction over a dispute is still to be determined. And the decision of that individual / group of individuals as to jurisdiction cannot have any special status, since that effectiveness and lawfulness of that decision is the very question which is in issue and to be determined. There must be a full and independent decision afresh of the issue by a court.
6. From my experience of many 100s of arbitrations, I do not see cynical jurisdiction applications being brought. Instead those who challenge jurisdiction in a court setting, genuinely consider that the tribunal did not have jurisdiction.
7. As I believe [REDACTED] has observed, the Courts are well-equipped to case manage full rehearings in a time-efficient and cost-efficient manner. And, in my experience, the Judges do case manage full hearings very effectively. The answer to the alleged concern about unnecessary costs (etc) is in proper case management (and not in introducing reviews).
8. The suggestion that there are increased costs and delay cause by a full rehearing ignores or marginalises (i) the fact that there is only a very small number of section 67 applications which in fact are launched and make it to a full rehearing in front of a judge and (ii) the court's effective case management powers.

Consultation Question 23: 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?

Other

Please share your views below.:

Please see the response to Consultation Question 22. I do not agree at all that there should be an appeal rather than a rehearing.

Consultation Question 24: We provisionally conclude that our proposed change to section 67 of the Arbitration Act 1996 would not require any similar change to section 103. Do you agree?

Other

Please share your views below.:

Please see the response to Consultation Question 22. I do not agree at all that there should be any change to section 67 along the proposed lines.

Consultation Question 25: 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. Do you agree?

Other

Please share your views below.:

I have no strong views.

Consultation Question 26: 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?

Agree

Please share your views below.:

I don't see there is any problem to be solve here. Every tribunal I have seen which ruled it has no substantive jurisdiction has made an award of costs. A separate and more complicated question arises more frequently in practice. Assume that a tribunal rules it has jurisdiction, but the court concludes that the tribunal had no jurisdiction. Who (if anyone) has the power to award costs to the party which was resisting jurisdiction. That party was not awarded its costs by the tribunal (as it lost the jurisdiction debate in front of the tribunal), but the costs of arguing that point in front of the tribunal are not in fact costs of and occasioned by the court application (so it is not at all obvious that the court has power to award such costs incurred in the underlying tribunal proceedings).

Consultation Question 27: 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?

Agree

Please share your views below.:

I have nothing to add to the Consultation Paper.

Consultation Question 28: Do you think that section 7 of the Arbitration Act 1996 (separability of arbitration agreement) should be mandatory, and why?

Other

Please share your views below.:

I have no strong views.

Consultation Question 29: 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?

Other

Please share your views below.:

I have no strong views.

Consultation Question 30: 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?

Other

Please share your views below.:

I have no strong views.

Consultation Question 31: 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?

Other

Please share your views below.:

I have no strong views.

Consultation Question 32: Do you think that section 39 of the Arbitration Act 1996 should be amended to refer to “orders” (rather than “awards”), and why?

Other

Please share your views below.:

I have no strong views.

Consultation Question 33: Do you think that section 39(1) of the Arbitration Act 1996 should be amended to refer to “remedies” (rather than “relief”), and why?

Other

Please share your views below.:

I have no strong views.

Consultation Question 34: 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?

Other

Please share your views below.:

I have no strong views.

Consultation Question 35: 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?

Other

Please share your views below.:

I have no strong views.

Consultation Question 36: We provisionally propose that sections 85 to 87 of the Arbitration Act 1996 (on domestic arbitration agreements) should be repealed. Do you agree?

Other

Please share your views below.:

I have no strong views.

Consultation Question 37: Do you think that any of the suggestions discussed in Chapter 11 needs revisiting in full, and if so, why?

Please share your views below.:

I have no strong views.

Consultation Question 38: 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?

Please share your views below.:

Yes - please see my response to Consultation Question 26.

Response ID ANON-PT57-RURD-D

Submitted to Law Commission Consultation: Review of the Arbitration Act 1996
Submitted on 2022-11-29 14:25:22

About you

What is your name?

Name:
Michael Kotrly

What is the name of your organisation?

Enter the name of your organisation:
One Essex Court

Are you responding to this consultation in a personal capacity or on behalf of your organisation?

Personal response

If other, please state::

What is your email address?

Email:
[REDACTED]

What is your telephone number?

Telephone number:
[REDACTED]

If you want the information that you provide in response to this consultation to be treated as confidential, please explain to us why you regard the information as confidential. As explained in our privacy notice, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

Please explain to us why you regard the information as confidential:

Consultation questions

Consultation Question 1: 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?

Disagree

Please share your views below.:

The Terms of Reference are to ensure that the Act "continues to promote the UK as a leading destination for commercial arbitrations". As a result the Act needs to be both externally and internally facing - and to the extent that we say that the answer to the question of confidentiality is "in the common law" may create a misleading impression as to the rules on confidentiality in this jurisdiction to those who do not practice in England (or who may not otherwise be au fait with the legal position here) in comparison with other arbitration statutes.

To the extent there are misgivings on addressing confidentiality at all because it may require a rewriting of the law of confidentiality writ large, it is not clear why this would have to be the case. Moreover, to the extent there is a concern of "over-legislating" the exceptions could be drafted in a relatively broad/open-ended manner.

Consultation Question 2: We provisionally conclude that the Arbitration Act 1996 should not impose a duty of independence on arbitrators. Do you agree?

Agree

Please share your views below.:

For the reasons given in the Consultation Paper.

Consultation Question 3: 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. Do you agree?

Other

Please share your views below.:

Agree but I would query whether we might make it clear that the test is not applied in the same way as the test for apparent bias in the Courts. In *Halliburton v Chubb* the Court noted that in applying the test to bear in mind the differences between judicial and arbitral determination of disputes (see paras 55-68) and this should somehow be reflected in the drafting.

Consultation Question 4: Should the Arbitration Act 1996 specify the state of knowledge required of an arbitrator's duty of disclosure, and why?

Other

Please share your views below.:

Yes - and it should be based on reasonable enquiries.

It would also be helpful to state something about barristers/arbitrators in the same Chambers. In this regard the IBA Guidelines on Conflicts of Interest (Orange List, 3.3.2) are not helpful and it would be helpful to legislate on this point.

Consultation Question 5: 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?

What they ought to know

Please share your views below.:

An arbitrator ought to be expected to make reasonable inquiries in relation to conflicts generally, and in such circumstances an objective standard makes sense. Otherwise it may encourage a "head in the sand" approach.

Consultation Question 6:

Only if necessary

Please share your views below.:

Consultation Question 7:

Disagree

Please share your views below.:

It is not clear whether point 1 is necessary to be included.

Consultation Question 8: Should arbitrators incur liability for resignation at all, and why?

Liability for resignation

Please share your views below.:

Only if the resignation is proved to be unreasonable.

Consultation Question 9: Should arbitrators incur liability for resignation only if the resignation is proved to be unreasonable?

Yes

Please share your views below.:

Consultation Question 10: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 11: 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. Do you agree?

Disagree

Please share your views below.:

The notion of a summary procedure (as might be understood in litigation) does not necessarily translate to that of arbitration where the procedure itself is supposed to be flexible. As a result, the notion of what constitutes a "summary procedure" is difficult to define. What does it mean in practice? Consider for example summary judgment in the litigation context: this will often encompass the presentation of witness (and other) evidence in addition to a hearing. And yet that might not only be envisaged in an arbitral proceeding, but some arbitral proceedings can be decided on a much more limited basis (i.e. a jurisdictional objection decided on the papers).

It is also unclear why, if we are going to allow this, has to be on the application of a party. That may actually limit the protection available to parties if arbitral rules do not require an application.

What we might say is that an agreement for summary procedures does not necessarily offend s. 33 of the Act.

Consultation Question 12: 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. Do you agree?

Other

Please share your views below.:

Agree subject to my comments in Consultation Question 11.

Consultation Question 13: We provisionally propose that the Arbitration Act 1996 should stipulate the threshold for success in any summary procedure. Do you agree?

Disagree

Please share your views below.:

The notion of a summary procedure is not a creation of English law but one of arbitral institutions. English law should not wade into what is very much an evolving concept (and which may not have the same meaning across arbitral rules).

Consultation Question 14: 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. Do you agree?

Disagree

Please share your views below.:

It is not at all apparent that it is appropriate to apply the test for summary judgment in an English litigation context in an arbitration context. For one, the context of summary judgment typically applies in the context of an expectation of a full court trial. That should not be the expectation in arbitration. Indeed, it is not always the case that there should be necessarily an expectation of a "full hearing".

The use of the summary judgment test may also inadvertently make a so-called "summary procedure" more difficult.

Consultation Question 15: 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. Do you agree?

Other

Please share your views below.:

No opinion.

Consultation Question 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?

Yes

Please share your views below.:

This coincides with the purpose of making the Arbitration Act 1996 easier to understand (and therefore assists in making England more attractive as a destination for arbitration).

Consultation Question 17: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 18: We provisionally conclude that the provisions of the Arbitration Act 1996 should not apply generally to emergency arbitrators. Do you agree?

Other

Please share your views below.:

Have not considered this seriously enough to take a view.

Consultation Question 19: 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?

Agree

Please share your views below.:

Consultation Question 20: Do you think that section 44(5) of the Arbitration Act 1996 should be repealed, and why?

No

Please share your views below.:

Perhaps the language could be clarified to indicate that the availability of emergency arbitration alone is not determinative – or to explain what we mean by “the time being” and/or “to act effectively”?

Consultation Question 21:

Permission under section 44

Please share your views below.:

Consultation Question 22:

Agree

Please share your views below.:

If this is going to be done the same logic should apply to a challenge of a foreign arbitral award.

Consultation Question 23: 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?

Other

Please share your views below.:

The solution to this quandary may be to limit section 32 to scenarios where a tribunal has not yet ruled on jurisdiction?

Consultation Question 24: We provisionally conclude that our proposed change to section 67 of the Arbitration Act 1996 would not require any similar change to section 103. Do you agree?

Other

Please share your views below.:

See response to Question 22 above.

Consultation Question 25: 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. Do you agree?

Disagree

Please share your views below.:

It is not clear whether this is necessary and seems to be overly clever. It is also unclear how this might interact with enforcement of London-seated awards in other Model Law countries.

Consultation Question 26: 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?

Agree

Please share your views below.:

Provided that it would otherwise had the ability to make an award of costs.

Consultation Question 27: 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?

Other

Please share your views below.:

Generally agree, but it might be helpful to spell out expressly that contracting out of section 69 includes an agreement to incorporate rules which provides that an award is final and binding and/or not subject to appeal.

Consultation Question 28: Do you think that section 7 of the Arbitration Act 1996 (separability of arbitration agreement) should be mandatory, and why?

Yes

Please share your views below.:

Consultation Question 29: 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?

Agree

Please share your views below.:

Consultation Question 30: 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?

Other

Please share your views below.:

I do not have a view on this issue.

Consultation Question 31: 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?

No

Please share your views below.:

It is not necessary to do so and may become "stale" very quickly.

Consultation Question 32: Do you think that section 39 of the Arbitration Act 1996 should be amended to refer to "orders" (rather than "awards"), and why?

Yes

Please share your views below.:

For the reasons stated in the Consultation Paper.

Consultation Question 33: Do you think that section 39(1) of the Arbitration Act 1996 should be amended to refer to "remedies" (rather than "relief"), and why?

Other

Please share your views below.:

I do not have a view on this issue.

Consultation Question 34: 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 appellants was notified of the result of that request. Do you agree?

Other

Please share your views below.:

Yes, but only if the request is material and that too needs need to be clarified/specified in the legislation.

Consultation Question 35: 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?

Other

Please share your views below.:

No objection but query why the general rules on leave to appeal appeal could apply?

Consultation Question 36: We provisionally propose that sections 85 to 87 of the Arbitration Act 1996 (on domestic arbitration agreements) should be repealed. Do you agree?

Agree

Please share your views below.:

Agreed provided that we are talking about commercial arbitration.

Consultation Question 37: Do you think that any of the suggestions discussed in Chapter 11 needs revisiting in full, and if so, why?

Please share your views below.:

The suggestion in 12(1) seems sensible.

Query whether section 43 should also apply to foreign seated arbitrations.

Consultation Question 38: 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?

Please share your views below.:

As set out above, it would be helpful if we made it clear in the statute that there should be no risk of conflict simply because a barrister is in the same chambers as one of the arbitrators (in contrast with the IBA Guidelines).

Response to Law Commission's Consultation (CP 257)

Review of the Arbitration Act 1996

1. This responds specifically to Consultation Question 27 which you propose no change.
2. But this paper takes the view that s.69 Arbitration Act 1996 should expressly clarify the inclusion of mixed questions of law and fact.
3. Appeal under s.69 must be based on a 'question of law'. But does 'question of law' include mixed question of law and fact? Looking at s.69 alone, it is not possible to ascertain this. Furthermore, the interpretive provision s.82 unhelpfully defines 'question of law' as a 'question of law' in England and Wales and Northern Ireland. However, case law (to be explained below) actually reveals that s.69 also covers mixed questions. It is suggested that s.69 (or s.82) should clarify and codify this inclusion.
4. Apart from improving ease of statutory reference, there are four other reasons calling for codification.
 - A. First, it is quite common to encounter mixed question, indicating its practical significance.
 - B. Second, the current case law is already settled, which can be easily codified.
 - C. Third, this area of law can at times be unnecessarily complicated and confusing. Codification will resolve this.
 - D. Finally, different jurisdictions have adopted varying approaches on whether mixed questions are included. This could make the English position less instinctive for international practitioners, which elevates the risk of confusion. There are also already early signs of potential inconsistency in English law.

A. Strong practical relevance: common to encounter mixed questions

5. In practice, issues are not always pure questions of law or fact (even though sometimes a pure question of law can be distilled from a mixed question).¹ Instead, former High Court judge Sir Bernard Eder KC has commented that '[t]he position is complicated by the fact that, in truth, many questions of law involve what might be described as a "mixed" question of law and fact'.²

6. For present purpose, there is no need to dwell on the convoluted boundaries and definitions of the respective questions,³ especially when it is 'never easy to define what is meant by a question of law in the context of an arbitration appeal' (per Judge Thornton).⁴ The point made here is simply that mixed questions are often relevant for s.69 and even experienced practitioners like Sir Eder KC and Judge Thornton agree with the difficulty to classify them.

7. The most obvious example is contractual interpretation, where the factual matrix can become relevant depending on the circumstances and turns it into a mixed

¹ See eg *Fence Gate Ltd v NEL Construction Ltd* [2001] EWHC 456 [44] ('where the finding...was a mixed finding of fact and law... an absence of supporting evidence can give rise to a question of law').

² The Hon Mr Justice Eder (as he then was), 'Challenges to Arbitral Awards at the Seat' (Mauritius International Arbitration Conference, 15 December 2014) <<https://www.judiciary.uk/wp-content/uploads/2015/10/Eder-Speech-Dec-2014.pdf>> [39]; *Geogas SA v Trammo Gas Ltd (The Baleares)* [1993] 1 Lloyd's Rep 215, 231 ('It is often difficult to decide what is a question of law, or a question of mixed law and fact, rather than a pure question of fact.').

³ The key authority in this arbitration context is *Finelvet AG v Vinava Shipping Co Ltd (The Chrysalis)* [1983] 1 WLR 1469, 1475 ('an error of law can be demonstrated by studying the way in which the arbitrator has stated the law in his reasons. It is, however, also possible to infer an error of law in those cases where a correct application of the law to the facts found would lead inevitably to one answer, whereas the arbitrator has arrived at another'.) The same quote was applied in many cases which confirmed its relevance to s.69 Arbitration Act 1996, such as *Fehn Schiffahrts GmbH & Co KG v Romani SPA* [2018] EWHC 1606 [14]; *Kershaw Mechanical Services Ltd v Kendrick Construction Ltd* [2006] EWHC 727 [59]-[60]; *CH Offshore Ltd v Internaves Consorcio Naviero SA & Ors* [2020] EWHC 1710 [29]; *MUR Shipping BV v RTI Ltd* [2022] EWHC 467 [53]. See also the Supreme Court of Canada's explanation in *Teal Cedar Products Ltd v British Columbia*, 2017 SCC 32 [43] ('legal questions are questions "about what the correct legal test is" ... factual questions are questions "about what actually took place between the parties" ... and mixed questions are questions about "whether the facts satisfy the legal tests" or, in other words, they involve "applying a legal standard to a set of facts"').

⁴ *ibid* [38] (further quoting *The Baleares* (n 2) 231 that 'what is a question of law in a judicial review case may not necessarily be a question of law in the field of consensual arbitrations.').

question.⁵ Even when a standard form contract is involved,⁶ its interpretation can still be a mixed question as the factual matrix remains relevant depending on the circumstances.⁷

8. Additionally, arbitrators have encountered other mixed questions that have been subject to debate on whether leave to s.69 appeal can be granted: e.g. frustration as in *The Nema*,⁸ repudiation in *The Aegean Dolphin*,⁹ remoteness in *Sylvia Shipping*,¹⁰ and costs in *Fence Gate Ltd*.¹¹ So it is essential for practitioners to check if s.69 covers mixed questions when advising on potential appeal, but only to find that s.69 provides no direct answer.¹²

B. The case law is already settled

⁵ *ibid* [41] (noting the trend of taking into account the factual matrix after *ICS v West Bromwich Building Society* [1991] 1 WLR 896, 912-913); *Martin v Harris* [2019] EWHC 1962 (Ch) [53] ('The interpretation of the terms of a contract is primarily a question of law... There may be issues of fact that have to be determined in order to establish the factual matrix or the relevant background knowledge that would reasonably have been available to the parties. In that sense it could be said to be a question of mixed fact and law'); Martin Kwan, 'Appealing to Courts on Question of Law: Is an Arbitrator's Contractual Interpretation a Question of Law, Or a Mixed One of Both Fact and Law?' (2021) 24(2) *International Arbitration Law Review* 104, 107 ('The English courts recognise that the modern approaches of contractual interpretation *sometimes* require the factual materials to be taken into account').

⁶ As a side note, standard form contracts are commonly used in the commercial world and are particularly relevant for s 69 because the precedential value of its interpretation usually fulfils the other threshold of general public importance under s 69(c)(ii) for obtaining leave to appeal. See *Quiana Navigation SA v Pacific Gulf Shipping (Singapore) Pte Ltd ("The Caravos Liberty")* [2019] EWHC 3171 (Comm) [2].

⁷ *Seadrill Management Services Ltd & Anor v OAO Gazprom* [2009] EWHC 1530 [172] ('the history and development of a standard form contract can legitimately be considered as part of the factual matrix or commercial background against which the contract is construed'). See also *Tryggingarfelagio Foroyar P/F v CPT Empresas Maritimas SA* [2011] EWHC 589 [27] (where the factual matrix is considered relevant when a formal sub-contract is pending and the standard form terms are not yet ascertained); *Legends Live Ltd v Harrison* [2016] EWHC 1938 [36], [40], [87]-[88]; *Credico Marketing Ltd & Anor v Lambert & Ors* [2021] EWHC 1504 [3], [247]. Cf *77m Ltd v Ordnance Survey Ltd* [2019] EWHC 3007 [138] ('I would only add that where an agreement reflects a public standard form contract, factual evidence regarding the circumstances surrounding an individual instance of that contract will be of limited, if any, importance: Lewison 5th Ed at [3.18] and Chitty 33rd Ed. at [13-051].').

⁸ *Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema)* [1982] AC 724.

⁹ *Dolphin Hellas Shipping S.A. v Itemslot Ltd. (The Aegean Dolphin)* [1992] 2 Lloyd's Rep. 178.

¹⁰ *Sylvia Shipping Co Ltd v Progress Bulk Carriers Ltd* [2010] EWHC 542 (Comm) [53].

¹¹ *Fence Gate Ltd* (n 1) [38], [69]

¹² See Andrew Tweeddale, Keren Tweeddale and Natasha Nguyen, 'Section 69 of the English Arbitration Act 1996—When Fact and Law Collide' (2014) 80(2) *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management* 136.

9. In the key case of *The Nema*, it involved ‘a question of mixed fact and law’ (whether a charterparty has been frustrated by delay).¹³ The courts will interfere with an arbitrator’s decision on mixed questions, when ‘either that they had erred in law or that they had reached a conclusion on the facts which they had found which no reasonable person, applying the relevant law, could have reached’.¹⁴ Coghlin et al commented that the latter aspect of the test justifiable, because if no reasonable person would have reached that conclusion, it would mean ‘the arbitrators have in fact got the law wrong, despite having appeared to express themselves in accordance with the correct legal test’.¹⁵
10. Cases rendered post-Arbitration Act 1996 have accepted that it is possible to appeal against mixed questions of law and fact, and applied the same guidance in *The Nema*.¹⁶ It is safe to suggest the law is settled.

¹³ *The Nema* (n 8) (affirmed in *Director of Public Prosecutions v Ziegler & Ors* [2021] UKSC 23 [38]). See also Eder 2014 (n 2) [39] (‘The charterer sought leave to appeal on the basis that the question as to whether the charterparty was frustrated was a question of law arising out of the award. The shipowner opposed the grant of leave on the basis that such question was, in effect, a question of fact (or at least a “mixed” question of law and fact)...Lord Diplock, in a seminal judgment, stated that what was then the new Arbitration Act 1979 gave effect to the “turn of the tide” in favour of finality as against “meticulous legal accuracy”; and that *The Nema* was the sort of case in which leave to appeal on a question of construction ought not to be granted.’).

¹⁴ *The Nema* (n 8) 752-53 (Lord Roskill) (emphasis added); *Ziegler* (n 13) [38]; *Sylvia Shipping Co Ltd* (n 10) [54].

¹⁵ Terrence Coghlin et al, *Time Charters* (Informa Law from Routledge 2014) [26.21].

¹⁶ *Sylvia Shipping Co Ltd* (n 10) [54]-[55] (‘As the decision in *The Nema* [1982] AC 724 makes clear, on an arbitration appeal there are only limited circumstances in which the court will interfere with a conclusion of mixed fact and law’). *Sylvia Shipping Co Ltd* at [55] further quoted *The Aegean Dolphin* (n 9) 184 (on the issue of repudiation) (‘The owners accepted that the burden of persuasion which they had to meet upon this mixed question of fact and law was a heavy one. (*The Nema*, [1981] 2 Lloyd’s Rep. 239; [1982] A.C. 724). The owners have to show that there must have been a failure by the arbitrators to apply the correct legal test by demonstrating that their conclusion was necessarily inconsistent with the application of that test.’); *CTI Group Inc v Transclear SA* [2007] EWHC 2340 [13] (affirmed on appeal) (phrasing the same test as ‘no tribunal properly instructed as to the relevant law could have come to the determination reached’); *MRI Trading AG v Erdenet Mining Corporation LLC* [2012] EWHC 1988 [15] (‘when a tribunal has reached a conclusion of mixed fact and law, the court cannot interfere with that conclusion just because it would not have reached the same conclusion itself. It can interfere only when convinced that no reasonable person, applying the correct legal test, could have reached the conclusion which the tribunal did: or, to put it another way, it has to be shown that the tribunal’s conclusion was necessarily inconsistent with the application of the right test: The “Sylvia” [2010] 2 Lloyd’s Rep 81 at [54]-[55] ... It is only if the correct application of the law leads inevitably to one answer, and the tribunal has given another, that the court can interfere. Once a court has concluded that a tribunal which correctly understood the law could have arrived at the same answer as the one reached by the arbitrator, the fact that the individual judge himself would have come to a different conclusion is no ground for disturbing the Award: *The Chrysalis* [1983] 1 Lloyd’s Rep 503 at 507’.); *CVLC Three Carrier Corp & Anor v Arab Maritime Petroleum Transport Company* [2021] EWHC 551 [48] (‘That question is a question of mixed law and fact capable of being appealed’).

11. Sometimes the ‘no reasonable person’ test in *The Nema* is phrased differently as whether the arbitrator’s decision is within the ‘range of solutions’, but in essence they are referring to the same test.¹⁷ For example, Coulson J (as he then was) held in *Majorboom Ltd v National House Building Council* that:

‘mixed question of law and fact *may* be the subject of a section 69 application, although in such circumstances the courts have repeatedly said that there can be no error of law if the solution reached by the arbitrator is within the permissible range of solutions open to him in the circumstances: see *The Matthew* [1992] Lloyds Rep 323 and *Foleys Limited v City and East London Family and Community Services* [1997] ADRLJ 401.’ (original emphasis)¹⁸

12. Given the complicated notions involved (which could easily lead to mistakes as noted in following quote), it is always helpful to lay down Moulder J’s clarification of the relationship between (1) the ‘error of law’ or ‘no reasonable person’ test in *The Nema* discussed above and (2) the ‘obviously wrong’ or ‘open to serious doubt’ test under s.69(3):

‘For the avoidance of doubt (and contrary to the written submission for the appellant), I make clear that the question for this court is whether or not an error of law has been established. The question of whether the decision is “obviously wrong or at least open to serious doubt” is a threshold question on the application for permission to appeal. It is not the test for this court hearing the appeal.’¹⁹

¹⁷ See eg *CTI Group Inc* (n 16) [15]-[16] (applying and phrasing the same test as ‘permissible range of solutions’).

¹⁸ *Majorboom Ltd v National House Building Council* [2008] EWHC 2672 [8].

¹⁹ *Fehn Schiffahrts GmbH & Co KG* (n 3) [15]. The same confusion between the tests for the leave stage and for substantive appeal was also noted by the court in *El Group Plc v Clarke & Anor (Rev 1)* [2020] EWHC 1858 [30]-[31].

13. To those who favour codification of common law, the law being settled is a supporting argument.²⁰ It fulfils all of the major criteria for codification. This is firstly because the well-established nature means there is no ongoing common law development which will be restricted by the codification. Additionally, when the law is unambiguous, codification is more feasible as there is no need to reconcile inconsistent views and rulings.²¹ There is also no risk of inadvertently changing the law or causing issues of statutory interpretation as this issue is simple.²²

14. One might counter-argue that the law needs no codification when it is trite.²³ But for the present context, there remains a strong case for codification because the law can at times be confusing, as explained below. The desire for more clarity is a compelling justification for codification.²⁴

C. The law at times seem to be framed in complicated manner, easily giving rise to confusion

15. Without a direct and affirmative inclusion of mixed questions in s.69, this area of law can sometimes seem misleading. On the one hand, Coulson J's quote from *Majorboom* in para.11 above confirms the possibility of appeal against mixed questions. On the other hand, one can argue the quote leaves room for ambiguity. For unknown reason, Coulson J used the word 'may' and emphasized it in italics, as opposed to straightforwardly saying that mixed questions 'can' be the basis for a s.69 appeal.

²⁰ See eg Andrew P. Morriss, 'Codification and Right Answers' (1999) 74 Chicago-Kent Law Review 355, 378, 381.

²¹ Paula Giliker, 'Codification, Consolidation, Restatement? How best to systemise the modern law of tort' (2021) 70(2) International and Comparative Law Quarterly 271, 302 ('It is difficult to "restate" unsettled law. All one can give is an overview of different views and a suggestion for a way forward.').

²² Ibid 296 (warning the 'danger that in restating established common law tests one might unwittingly change the law'); H R Hahlo, 'Codifying the Common Law: Protracted Gestation' (1975) 38 Modern Law Review 23, 23-24.

²³ Ibid 293 ('Legislation will not generally seek to be all-embracing nor revisit well-established fundamental principles... Nor does it address established matters such as contract formation or breach.'). 294 (but Giliker also noted that '[l]egislation will therefore generally supplement and refine existing case-law. It can provide structure, clarify uncertainty arising from conflicting case law (and undo case-law mistakes)').

²⁴ The prime considerations for codification are 'certainty, clarity, and accessibility', which are all relevant here. For the justifications of codification, see Hahlo (n 22) 23.

16. Besides, except the 2021 judgement of *CVLC Three Carrier Corp* which precisely stated ‘a question of mixed law and fact capable of being appealed’,²⁵ there had not been a very neat judicial statement in *The Nema* or in many other subsequent cases (mentioned in footnote 16) which directly said ‘s.69 allows appeal on mixed questions’.²⁶ Whilst the law is settled, the judicial remarks have always been rather reserved, arguably because the ‘no reasonable person’ threshold in *The Nema* is rather high.²⁷ This difficulty explains why Coulson J used ‘may’, in the sense of unlikelihood of success. That said, the practical difficulty of passing *The Nema* test does not rationalize any ambiguity over whether s.69 includes mixed question.

17. There is another illustrative example where confusion may arise. Sir Eder KC has commented on this very issue of whether s.69 should be reformed to cover also mixed questions. He answered in the negative:

‘To expand the right of appeal now *to include not only a “pure” question of law but also a mixed question of law and fact would be setting the clock back almost 40 years and would, in my view, be totally unacceptable. As stated by Longmore LJ in *The New Flamenco* at [20]: “In appeals from an arbitrator’s award a court has to be particularly respectful of the boundaries between fact and law which the parties, by their choice of tribunal, have created.”* (emphasis added)²⁸

²⁵ *CVLC Three Carrier Corp* (n 16) [48].

²⁶ See also *London Underground Ltd v Citylink Telecommunications Ltd Rev 1* [2007] EWHC 1749 which is an illustrative example of the court considering an appeal against mixed questions—i.e. implicitly reflecting the correct law that mixed questions can be appealed against—but without explicitly stating that s.69 covers such. On the facts, one of the arbitrator’s dispositions on appeal was whether the completion of the contractual requirement was done within reasonable time. At [241], the court merely mentioned that whether the dates are reasonable is not a question of law, but ‘essentially a question of fact but could amount to a mixed question of fact or law’. The court then went on to consider if the arbitrator applied the correct legal test of contractual interpretation by taking into account the appropriate circumstances: [250]-[251]. To those who do not know *The Nema* well, it would be tremendously difficult to distill that s 69 covers mixed questions. The same confusion happens in many other cases as mentioned in n 16.

²⁷ Apart from Coulson J’s use of ‘may’, see n 16 for, eg, the emphasis of ‘only limited circumstances’ in *Sylvia Shipping Co Ltd* (n 10) [54]. See also Terrence Coghlin et al (n 15) 475 (noting that *The Nema* test ‘is a ground of appeal that hardly ever succeeds in practice’).

²⁸ Sir Bernard Eder, ‘Does arbitration stifle development of the law? Should s.69 be revitalised?’ (Chartered Institute of Arbitrators (London Branch) AGM Keynote Address, 28 April 2016)

18. Sir Eder KC's remark could easily lead to confusion as it implies that s.69 does not currently cover mixed questions, otherwise there is no need to discuss whether to expand. This would go against the settled legal position mentioned in Section B. Whilst it is not easy to reconcile this, it is possible that he was raising important conceptual distinctions.²⁹ To explain this, it is necessary to dwell on the practicalities of the case law.

- A. For questions of fact, appeal or reconsideration is plainly not possible under s.69; whereas for questions of law, the test on appeal would be whether the arbitral tribunal has misdirected itself on a point of law.³⁰ Whilst there will be deference to the arbitrator's decision,³¹ inevitably 'there might be somewhat more *leeway* to *reconsider* [the tribunal's reasoning and decision] on appeal'.³²
- B. In relation to mixed questions, when there is no error of law, the test is, as outlined above in Section B, whether the application of law *to the facts* falls within the permissible range of solutions (or the 'no reasonable person' test). In other words, unlike for questions of law, there is simply no room—not

<<https://arias.org.uk/wp-content/uploads/2016/05/CIArb-EDER-AGM-Keynote-Address-28-April-2016-AMND.pdf>> [26].

²⁹ It is crucial to clarify that there is no chance for Eder KC to mistake the law. This is because he was the judge in the case of *MRI Trading AG* (n 16) (which was affirmed on appeal) which noted the principles well-summarized by the counsel. The compendious principles are oft-cited, for example in *Halcrow Group Ltd v Blackpool Borough Council & Anor* [2016] EWHC 3596 [109]; *John Sisk & Son Ltd v Carmel Building Services Ltd* [2016] EWHC 806 [31], [36].

³⁰ Eder 2014 (n 2) [40]; *Fence Gate Ltd* (n 1) [39] ('a question of law... can also arise if it is contended that the arbitrator misdirected himself by taking into account factors which he should not have done or by failing to take into account factors he should have done'); *Ziegler* (n 13) [37]-[38] ('When the case comes before the court it is its duty to examine the determination having regard to its knowledge of the relevant law. If the case contains anything *ex facie* which is bad law and which bears upon the determination, it is, obviously, erroneous in point of law... This approach has been...applied in other related contexts, such as, for example, appeals from arbitration awards.').

³¹ It is trite that the courts should not read an arbitration award 'with a meticulous legal eye endeavouring to pick holes, inconsistencies and faults in awards, and with the objective of upsetting or frustrating the process of arbitration'. This classic exposition on deference originated from Bingham J (as he then was) in *Zermatt Holdings SA v Nu-Life Upholstery Repair Limited* [1985] 2 EGLR 14; [1985] 275 EG 1134. It has been repeatedly cited in cases such as *MRI Trading AG v Erdenet Mining Corporation LLC* [2013] EWCA Civ 156 [23]; *National Iranian Oil Company v Crescent Petroleum Company International Ltd & Anor* [2022] EWHC 1645 [61].

³² *CVLC Three Carrier Corp* (n 16) [30] (citing *Agile Holdings Corporation v Essar Shipping Ltd* [2018] EWHC 1055 [31]) (emphasis added).

even ‘leeway’—for reconsideration *of fact* (and of course law when there is no error of law). This is arguably the most suitable way to make sense of Eder KC’s reform point, especially when he added that ‘a court has to be particularly respectful of the boundaries between fact and law’.³³ Accordingly, to uphold that boundary, Eder KC’s remark should be taken to mean that the current ‘no reasonable person’ test (which has a highly restrictive scope) should be kept—as opposed to *reconsidering* whether there is any error of fact even though it has a legal implication.³⁴

19. The proper focus here is not how Eder KC’s point should be understood. Instead, the inherent complicated nature of this area of law (such as the difficult boundaries between ‘law’, ‘fact’ and mixed ones, and their different legal treatments) could easily lead to confusion. A practitioner may not always be able to obtain a quick answer on whether a mixed question can be appealed under s.69. This is especially the case when the complexity mentioned in the next section is also taken into account. Furthermore, it does not matter whether there will be many practitioners who find this issue confusing, because there should be no room for confusion for this simple little point.

D. Varying international approaches

20. The absence of a straightforward answer on the face of the Arbitration Act 1996 makes it less convenient for international practitioners to ascertain the accurate position (e.g. when advising clients on the possibility of appeal for arbitration seated in England and Wales).³⁵ This is especially the case when other jurisdictions have taken a different approach to the England one.

³³ The jurisdictional boundary between arbitrators and the courts has long been established. See *The Balears* (n 2) 227-28 (Steyn LJ) (affirmed and applied in *Guangzhou Dockyards Co Ltd v ENE Aegiali I* [2010] EWHC 2826 [13]) (‘On an appeal the Court must decide any question of law arising from an award on the basis of a full and unqualified acceptance of the findings of fact of the arbitrators. It is irrelevant whether the Court considers those findings of fact to be right or wrong... The principle of party autonomy decrees that a Court ought never to question the arbitrators’ findings of fact.’).

³⁴ *CTI Group Inc* (n 16) [13] (where the court refused to ‘decide *de novo* a mixed question of law and fact’ under s.69).

³⁵ This matters to international practitioners also because foreign lawyers are free to represent parties for arbitrations seated in England and Wales. See Wilmer Cutler Pickering Hale and Dorr, ‘International Arbitration 2022: England & Wales’ (Chambers and Partners 2022), para 7.4,

21. Other jurisdictions which have adopted a similar appeal mechanism to s.69 have interpreted 'question of law' literally and therefore restrictively.

- A. In the Canadian provinces of Ontario and British Columbia, it is not possible to appeal against a mixed question of law and fact.³⁶
- B. Similarly, in Australia, only pure questions of law can be appealed, but not mixed questions.³⁷ The Australian court will refuse leave to appeal where 'the isolation of the question of law involves the melding of documents and the consideration of factual issues'.³⁸

22. Without statutory clarification providing a firm answer, it enhances the risk of mistaking the correct law. It may also cause discrepancies and uncertainty. For example, in New Zealand, the judiciary has complained that there were conflicting decisions: some have held that leave to appeal will only be granted for a pure question of law; whilst others allowed leave for mixed questions.³⁹

<https://practiceguides.chambers.com/practice-guides/comparison/434/9385/15035-15041-15044-15049-15055-15063-15067-15072-15076-15078-15082-15086-15090>.

³⁶ *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53 (Supreme Court of Canada) [42]; Ontario Arbitration Act 1991, s 45 (allowing appeal on question of law); *Teal Cedar Products Ltd* (n 3) [5].

³⁷ *John Holland Pty Ltd v Adani Abbot Point Terminal Pty Ltd* [2016] QSC 292 [125]-[126] ('The misapplication of the correct law to the facts to arrive at an erroneous conclusion as to an ultimate fact or a mixed question of law and fact is not a question of law, per se'). Australia has a similar provision to s 69 Arbitration Act 1996. See eg Commercial Arbitration Act 2010 (New South Wales), s 34A; Commercial Arbitration Act 2017 (Australian Capital Territory), s 34A; Commercial Arbitration Act 2013 (Queensland), s 34A; Commercial Arbitration Act 2013 (South Australia), s 34A.

³⁸ *Natoli v Walker* (1994) 217 A.L.R. 201 [221] (Mahoney JA) (emphasis added) (affirmed in *Bovis Lend Lease Pty Ltd v Wge Pty Ltd* [2002] NSWSC 566 [31]); Peter Gillies and Niloufer Selvadurai, 'Reasoned Awards: How Extensive Must the Reasoning Be?' (2008) 74 *Arbitration* 125, 128.

³⁹ Kwan (n 5) 105; *Home Builder BOP Ltd v Forman* [2017] NZHC 2155 [12] ('It is contentious whether a mixed question of fact and law is a question of law and is thus appealable. There are conflicting decisions of this Court. The following passage in Williams & Kawharu on Arbitration illustrates that point: "In some cases, the High Court has regarded a question of mixed fact and law as a question of law capable of founding an appeal under cl 5, that is, essentially, a question whether the facts satisfy the legal test relevant to the dispute. This has particular significance in disputes over the construction of contracts, as these disputes are usually resolved against a background of relevant facts. The position is not free from doubt, however, as there is also judicial support for the view that only pure questions of law may be appealed." There are arguments both for and against allowing appeals in respect of mixed questions of fact and law'); New Zealand Arbitration Act 1996, sch 2, cl 5 (allowing appeal on question of law).

23. Though not as problematic as New Zealand, one could argue that there are already some early signs for the same inconsistency in England and Wales. In *Rollitt (t/a CD Consult) v Ballard*, there were some puzzling remarks:

‘whether the arbitration agreement was invalid under the [Unfair Terms in consumer Contract Regulations 1999], raises mixed questions of law and fact which fall outside the proper scope of a challenge under section 69 of the Act.’⁴⁰

24. This is legally wrong as mixed questions are not automatically outside the scope of s.69. Under the correct law, the ‘no reasonable person’ test in *The Nema* should be applied to determine whether the arbitrator has made an error of law on the mixed question. However, *The Nema* or other equivalent authority was not cited for this point.

25. Apart from *Rollitt*, a similar confusing statement can be found in another English case *Guangzhou Dockyards Co Ltd*, which might be misunderstood to suggest mixed questions are not appealable under s.69.⁴¹ The point to be made from these cases is that, there will be no confusion if s.69 has been restated to clarify this simple point.

26. One major reason for the varying international approaches derives from the same difficulty in distinguishing questions of fact and law.⁴² Generally, the courts are wary of the dressing up of question of fact as one of law, and mixed questions

⁴⁰ *Rollitt (t/a CD Consult) v Ballard* [2017] EWHC 1500 [38]. It is unknown if the court was merely regurgitating the issue as framed by the claimant. However, the court in *Rollitt* dismissed this issue without actually touching on any mixed question. The court explained that the appellant’s complaint was in substance about the arbitrator’s ‘inadequate explanation’, which the court rightly found the latter not as errors of laws.

⁴¹ *Guangzhou Dockyards Co Ltd* (n 33) [13] (‘The principle that the arbitrators’ findings of fact are conclusive was set out very plainly in the judgment of Steyn LJ in *The Balears* [1993] 1 Lloyd’s Rep. 215. In that case, charterers’ sought to appeal the arbitrators’ findings on foreseeability and remoteness. This was held to be illegitimate because these were issues of fact (or, at least, mixed fact and law) and thus not appealable as questions of law’.).

⁴² The same difficulty exists, for example, in Australia. See Justice M J Beazley AO, ‘The distinction between questions of fact and law: a question without answer?’ (Land and Environment Court Conference, Kiama, 24 May 2013, Kiama) (‘no panacea for the difficult aspects of the distinction between questions of law and fact’).

which fall in between—may therefore become less readily acceptable.⁴³ Another reason raised by the Supreme Court of Canada is that mixed questions have less precedential value given the facts-specific component, and therefore there is less justification for judicial intervention.⁴⁴ These considerations are sensible and would be equally applicable to the English context. In fact, in *Majorboom* and other cases, the English courts have similarly warned against the tendency to disguise questions of fact as one of law.⁴⁵ With these considerations in common, it would not be illogical for an international practitioner to start with the assumption that their legal positions would be the same.

27. In sum, the point here is not to compare the differences between the jurisdictions, but to emphasize that common law approaches have taken different turns. This might be surprising to some practitioners because the common law in this field has become increasingly internationalized due to international practitioners⁴⁶ and calls

⁴³ Regarding the observations of the Australian courts, see n 38; *John Holland Pty Ltd v Adani Abbot Point Terminal Pty Ltd* [2016] QSC 292 [178] ('The true nature of the complaint made is that the arbitrator did not make the factual findings for which the applicant contends...the applicant's submissions should be recognised as an attempt to dress up a question of fact as a question of law'). For the insights of the Canadian courts, see *Teal Cedar Products Ltd* (n 3) [45] ('Courts must be vigilant in distinguishing between a party alleging that a legal test may have been altered in the course of its application (an extricable question of law; *Sattva*, at para. 53), and a party alleging that a legal test, which was unaltered, should have, when applied, resulted in a different outcome (a mixed question)').

⁴⁴ *Sattva* (n 36) [51] ('The purpose of the distinction between questions of law and those of mixed fact and law further supports this conclusion. One central purpose of drawing a distinction between questions of law and those of mixed fact and law is to limit the intervention of appellate courts to cases where the results can be expected to have an impact beyond the parties to the particular dispute...For this reason, *Southam* identified the degree of generality (or "precedential value") as the key difference between a question of law and a question of mixed fact and law. The more narrow the rule, the less useful will be the intervention of the court of appeal').

⁴⁵ *Majorboom Ltd* (n 18) [8] ('applications under section 69 can still have the effect of dressing up findings of fact as an issue of pure law'). See also *The Baleares* (n 2) 227 (noting 'the need for the Court to be constantly vigilant to ensure that attempts to question or qualify the arbitrators' findings of fact, or to dress up questions of fact as questions of law, are carefully identified and firmly discouraged'.) This quote from *The Bealeares* has been widely applied with approval in, eg, *Dolphin Tanker Srl v Westport Petroleum Inc* [2010] EWHC 2617 [29]; *Guangzhou Dockyards Co Ltd* (n 33) [13]; *Haley v Haley* [2020] EWCA Civ 1369 [25].

⁴⁶ It is notable that international practitioners increasingly tap into common law as a resource for further insights in the arbitration field. See eg Darius Chan and Jim Yang Teo, 'Re-formulating the test for ascertaining the proper law of an arbitration agreement: A comparative common law analysis' (2022) 17(3) *Journal of Private International Law* 439; Steven Lim, *Time to Re-Evaluate the Common Law Approach to the Proper Law of the Arbitration Agreement* (*Kluwer Arbitration Blog*, 5 July 2020) arbitrationblog.kluwerarbitration.com/2020/07/05/time-to-re-evaluate-the-common-law-approach-to-the-proper-law-of-the-arbitration-agreement/. Interestingly, Lim seemed to have interchangeably labelled the English approach as the 'common law' approach.

for harmonisation in arbitration laws,⁴⁷ especially when the statutes in these jurisdictions all similarly allow appeals only on points of law.

Codification is highly desirable

28. Codifying the possibility of appeal against mixed questions in s.69 (or s.82) would serve as a very clear, user-friendly starting point for parties and practitioners to refer to. Furthermore, this point is simple and already settled with no need for further development, so there is not any theoretical bar to codification such as obstructing common law development.⁴⁸ It would provide extra clarity to also codify *The Nema* guidelines (i.e. the 'no reasonable person' test) applicable to mixed questions.

29. The arguments for codification in the article is largely based on convenience and clarity for practitioners. One possible counter-argument is that practitioners are supposed to research and know the law well, so statutory law does not have to cater for their needs. But this is not true because there remains room for confusion, as highlighted in Sections C and D.

A. The cases of *Rollitt (t/a CD Consult)* and *Guangzhou Dockyards Co Ltd* mentioned in Section D show early signs of potential inconsistency. If left unattended, the inconsistency could substantiate just as in New Zealand.

B. Moreover, Moulder J's quote in para.12 of Section B reveals that practitioners do make mistakes on the applicability of *The Nema* test and others.⁴⁹ Notably, Moulder J was not critical of the mistake at all, but instead felt the need to clarify the tests in s.69. This demonstrates that judges agree that the law can become confusing.

⁴⁷ Richard Garnett, 'International Arbitration Law: Progress towards Harmonisation' (2002) 3(2) Melbourne Journal of International Law 400.

⁴⁸ See eg Giliker (n 21) 271 (who points out that one of the major theoretical objection to codification is to maintain the flexibility of common law development); Aubrey L Diamond, 'Codification of the Law of Contract' (1968) 31(4) Modern Law Review 361, 380 ('The most telling objection to a code in a common law jurisdiction is that it limits the development of the law').

⁴⁹ See n 19.

C. An additional example is *CTI Group Inc*, where the court rightly refused to review the mixed question ‘*de novo*’ after reiterating the proper ‘no reasonable person’ test.⁵⁰ From another perspective, the petitioner’s request to review the mixed question perhaps signals not just the difficulty to distinguish between pure questions of law from mixed ones, but also the confusion about *whether* and *how* mixed questions (which overlaps with questions of law) will be entertained.

30. Very importantly, convenience has been judicially acknowledged as a weighty ground for codification, as the law is supposed to be clear and accessible.⁵¹

Martin YC Kwan

Honorary Fellow, University of Hong Kong’s Asian Institute of International Financial Law

⁵⁰ *CTI Group Inc* (n 16) [13].

⁵¹ Justice Scarman of the Law Commission of England, *Codification and Judge-Made Law: A Problem of Coexistence* (1967) 42(3) *Indiana Law Journal* 355, 356. See also Jan van Zyl Smit and Aradhya Sethia, ‘Partial Codification of Administrative Law: What are the Rule of Law Opportunities and Risks of the IRAL’s Remit? Part One’, (*UK Constitutional Law Blog*, 20 October 2020), <https://ukconstitutionallaw.org/2020/10/20/jan-van-zyl-smit-and-aradhya-sethia-partial-codification-of-administrative-law-what-are-the-rule-of-law-opportunities-and-risks-of-the-irals-remit-part-one/> (despite speaking in the administrative law context, they make the point that codification ‘would appear to be an opportunity for legislation to advance Rule of Law values of certainty and accessibility. After all, codification can make some areas of law clearer, more precise and more coherent, as well as more accessible by replacing an assorted mix of common law and statutory provisions with a systematic statutory framework.’); Giliker (n 21) (noting the goal of codification is to ‘render the law more accessible to its users’); Diamond (n 48) 363, 370 (codification would make the law more accessible to the legal profession and the public).

Response ID ANON-PT57-RUB2-B

Submitted to Law Commission Consultation: Review of the Arbitration Act 1996
Submitted on 2022-12-15 09:51:51

About you

What is your name?

Name:
Toby Landau KC

What is the name of your organisation?

Enter the name of your organisation:
Duxton Hill Chambers, Singapore

Are you responding to this consultation in a personal capacity or on behalf of your organisation?

Personal response

If other, please state::

What is your email address?

Email:
[REDACTED]

What is your telephone number?

Telephone number:
[REDACTED]

If you want the information that you provide in response to this consultation to be treated as confidential, please explain to us why you regard the information as confidential. As explained in our privacy notice, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

Please explain to us why you regard the information as confidential:

Consultation questions

Consultation Question 1: 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?

Agree

Please share your views below.:

I believe the Act should not include provisions on confidentiality for three key reasons:

1. As noted in the Consultation Paper, the exceptions to confidentiality are myriad; complex; not readily susceptible of exhaustive definition; and not necessarily fixed. This was precisely why no provision on confidentiality was included in the Act when drafted - after a very detailed analysis by the DAC.

[REDACTED]

The complex and fluid nature of the exceptions to confidentiality have been repeatedly noted by the Courts. And the Courts remain the best fora to allow the exceptions to develop over time.

Equally, attempting to codify existing exceptions at this stage would spawn further litigation, as new statutory language is tested and applied, and could actually destabilise those aspects of confidentiality that have already become settled law.

Perhaps for all these reasons, it is to be recalled that the UNCITRAL Model Law provides no statutory guidance on confidentiality.

2. In the modern practice of international arbitration, there is now less consensus than previously as to the merits of confidentiality, and in certain sectors

an increasingly vocal call for transparency. In this regard, the position is now different to that in 1996. Most obviously, the rise of investor-state arbitration in the last 15 years or so has brought with it a marked shift towards open and accessible dispute resolution, and this trend is already bleeding into other areas of international arbitration that involve public or state interests. Notably, when the UNCITRAL Rules on Transparency were negotiated, there was much debate on the definition of "treaty arbitration", and a recognition that segregating this form of arbitration for the purposes of the new rules was in many ways arbitrary. It follows that codifying and imposing confidentiality at this point in time could actively damage England as an arbitral seat, and is likely to appear increasingly out of step going forward.

3. As noted when the Act was drafted, the solution is to cater for confidentiality by agreement or in institutional rules. "Arbitration" is an umbrella term that encompasses a wide range of very different processes (e.g. insurance and re-insurance; maritime; rent-review; investor-state; sport / Formula 1; commodities; construction; etc). The Act must therefore cater for the lowest common denominator, and allow for party autonomy to shape the detail for each case. If parties to a particular kind of arbitration regard confidentiality as important, they are free to contract for this, or to incorporate appropriate rules in their agreement, but there is no basis to impose this on other arbitral processes where transparency is now key.

Consultation Question 2: We provisionally conclude that the Arbitration Act 1996 should not impose a duty of independence on arbitrators. Do you agree?

Agree

Please share your views below.:

The same debate as between "independence" and "impartiality" took place when the 1996 Act was drafted. The reasons for including "impartiality" but not "independence" as set out in the DAC Report of February 1996 remain as compelling today. Nothing has changed in this regard.

Consultation Question 3: 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. Do you agree?

Agree

Please share your views below.:

This has been a contentious issue. Codifying Halliburton would be a good PR exercise.

Consultation Question 4: Should the Arbitration Act 1996 specify the state of knowledge required of an arbitrator's duty of disclosure, and why?

No

Please share your views below.:

This is complex. Having been counsel in Halliburton, I consider that this is best left to be developed by the Courts.

Consultation Question 5: 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?

Not Answered

Please share your views below.:

Consultation Question 6:

More broadly justified

Please share your views below.:

Consultation Question 7:

Agree

Please share your views below.:

Consultation Question 8: Should arbitrators incur liability for resignation at all, and why?

Other

Please share your views below.:

If a resignation is unreasonable or unjustified, there should be the possibility of liability. Resignations can cause very significant losses to parties. And they can be in bad faith, or in collusion with one of the arbitrating parties. [REDACTED]

There is no perceptible need to extend immunity here. I am unaware of any general concern about the ability to resign. In contrast, there is recent and notable experience with unjustified resignations.

I believe the current scheme in Sections 25 and 29 of the Act remain adequate.

Consultation Question 9: Should arbitrators incur liability for resignation only if the resignation is proved to be unreasonable?

Yes

Please share your views below.:

Consultation Question 10: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 11: 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. Do you agree?

Agree

Please share your views below.:

This is much needed.

Arbitration is the subject of increasing criticism in terms of its cost, time and inflexibility. Many arbitrations suffer from a lack of procedural discipline or rigour, and are permeated with procedural redundancy. They are on occasion a poor comparison to competing commercial courts, where judges will more readily get to grips with the cases before them, and curtail hopeless claims.

In fact, no change in law is required, since Sections 33 and 34 of the 1996 already empower, and mandate, tribunals to adopt procedures appropriate to the particular dispute before them, so as to minimise delay and ensure a fair process. But our hope in 1996 that Tribunals would step up to this duty has been - sadly - in vain. No doubt because of "due process paranoia", and a general lack of imagination and courage, tribunals rarely step in to establish tailored procedures.

Introducing a specific mechanism for a summary procedure will - one hopes - provide encouragement, and go some way to alleviating the due process paranoia.

It would also be a good selling point for English (and Welsh / Northern Irish) arbitration.

Consultation Question 12: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 13: We provisionally propose that the Arbitration Act 1996 should stipulate the threshold for success in any summary procedure. Do you agree?

Disagree

Please share your views below.:

There are many different types of summary procedure. For example:

- Court style summary judgment, with a specified threshold
- Expedited procedure
- Strike outs, on assumed facts.

There is a danger in constraining tribunals into only one form of summary process. And no need to do so.

Further, there is an even more serious danger in trying to replicate, or borrowing from, a court summary process. In drafting the 1996 Act, we were very careful not to make any linkages to English Court process, as this would require foreign users and foreign counsel to have to understand English process (and perhaps instruct English counsel in this regard). For the Act to remain international and readily accessible, there must be no need at all to consult (e.g.) the White Book, or caselaw on Court concepts.

In my view, the better approach is along the lines of Article 39 of the SCC Rules (Stockholm):

"Article 39 Summary procedure

(

1) A party may request that the Arbitral Tribunal decide one or more issues of fact or law by way of summary procedure, without necessarily undertaking every procedural step that might otherwise be adopted for the arbitration.

(2) A request for summary procedure may concern issues of jurisdiction, admissibility or the merits. It may include, for example, an assertion that:

(i) an allegation of fact or law material to the outcome of the case is manifestly unsustainable;

(ii) even if the facts alleged by the other party are assumed to be true, no award could be rendered in favour of that party under the applicable law;

or (iii) any issue of fact or law material to the outcome of the case is, for any other reason, suitable to determination by way of summary procedure.

(3) The request shall specify the grounds relied on and the form of summary procedure proposed, and demonstrate that such procedure is efficient and appropriate in all the circumstances of the case.

(4) After providing the other party an opportunity to submit comments, the Arbitral Tribunal shall issue an order either dismissing the request or fixing the summary procedure in the form it deems appropriate.

(5) In determining whether to grant a request for summary procedure, the Arbitral Tribunal shall have regard to all relevant circumstances, including the extent to which the summary procedure contributes to a more efficient and expeditious resolution of the dispute.

(6) If the request for summary procedure is granted, the Arbitral Tribunal shall seek to make its order or award on the issues under consideration in an efficient and expeditious manner having regard to the circumstances of the case, while giving each party an equal and reasonable opportunity to present its case pursuant to Article 23 (2)."

Consultation Question 14: 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. Do you agree?

Disagree

Please share your views below.:

See comments above.

Consultation Question 15: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 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?

Yes

Please share your views below.:

This is a very important aspect of s.44. As one of the draftsman of s.44, I can confirm that this was always intended. As there is doubt, it should be clarified.

Consultation Question 17: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 18: We provisionally conclude that the provisions of the Arbitration Act 1996 should not apply generally to emergency arbitrators. Do you agree?

Agree

Please share your views below.:

For the reasons set out in the Consultation Paper.

Consultation Question 19: 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?

Agree

Please share your views below.:

Best left to institutional rules.

Consultation Question 20: Do you think that section 44(5) of the Arbitration Act 1996 should be repealed, and why?

No

Please share your views below.:

s.44(5) is a critical part of the balancing in s.44 between Court and Arbitrator powers. It is certainly not redundant since it guides the exercise of the Court's discretion.

And repealing it would send completely the wrong message.

Consultation Question 21:

Peremptory order

Please share your views below.:

Consultation Question 22:

Disagree

Please share your views below.:

This would be a serious mistake. It would do fundamental damage to English law, and render it out of line with most respected and trusted arbitration regimes.

1. There is a fundamental point of principle at stake here: kompetenz-kompetenz allows for a tribunal to rule on its own jurisdiction in the first instance, in terms of chronological priority. But it simply cannot have the final say - because of the bootstraps principle. If in fact the purported tribunal is not a tribunal at all, there is no part of its decision whatsoever that is valid. And so a de novo hearing MUST be available in all cases. To remove this basic tenet makes no sense at all - it would be utterly unprincipled.

2. It would also be very dangerous. There are many cases in which tribunals - even the most respected - find jurisdiction incorrectly (e.g. *Dallah*, in which Lord Mustill was an arbitrator). In all such cases, there has to be a full safeguard of a de novo review. To restrict this to a mere appeal would mean that the Court would be disabled from a full review. So, for example, if in the unquestioned exercise of its procedural discretion, a tribunal excluded certain evidence before deciding on its jurisdiction, a Court would be confined by that decision. It would have no basis to second-guess the procedural discretion, and would be unable to consider the excluded evidence when assessing jurisdiction. This cannot be correct if - in fact - the tribunal is not a legitimate tribunal!

3. The call for reform here focuses on cases where a tribunal is the legitimate tribunal, and costs are needlessly expended on a full re-hearing. But there can be no such concern if in fact the tribunal is not legitimate.

4. The better way to address the concern is to distinguish between (a) principle and (b) case management powers.

(a) As a matter of principle, there must always be available a de novo review.

(b) But, as in Singapore, the Court can easily be given broad case management discretion to consider each case, and to decide whether a full re-hearing is actually required in that particular case, in all the circumstances. In some cases it will be. In others, the Court may be satisfied that it can rely on all or part of the arbitral record (e.g. using existing transcripts of witness examinations).

This would be a principled and perfectly workable solution.

5. The proposed reform would also set up a very difficult tension with New York Convention cases (s.103 of the Act).

Consultation Question 23: 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?

No

Please share your views below.:

Same points as above.

Consultation Question 24: We provisionally conclude that our proposed change to section 67 of the Arbitration Act 1996 would not require any similar change to section 103. Do you agree?

Other

Please share your views below.:

See points above. Having two parallel regimes would introduce unwelcome complexity.

Consultation Question 25: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 26: 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?

Agree

Please share your views below.:

Consultation Question 27: 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?

Agree

Please share your views below.:

Consultation Question 28: Do you think that section 7 of the Arbitration Act 1996 (separability of arbitration agreement) should be mandatory, and why?

No

Please share your views below.:

The separable nature of an arbitration agreement depends upon the law that governs it.

A choice of foreign law may constitute an "agreement otherwise" (under s.4(5)).

There is no basis to impose separability by virtue of a choice of seat, if in fact a foreign law governs the arbitration agreement.

Consultation Question 29: 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?

Agree

Please share your views below.:

Consultation Question 30: 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?

No

Please share your views below.:

The current provisions reflect a critical balancing in the relationship between court and arbitration - to be respected by tribunals as well as judges.

Consultation Question 31: 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?

No

Please share your views below.:

Not needed.

This level of micromanagement is also harmful, as it will not be comprehensive. Matters omitted may be misunderstood as being beyond the tribunal's powers.

Consultation Question 32: Do you think that section 39 of the Arbitration Act 1996 should be amended to refer to "orders" (rather than "awards"), and why?

Yes

Please share your views below.:

This was a glitch in the drafting of the 1996 Act.

Consultation Question 33: Do you think that section 39(1) of the Arbitration Act 1996 should be amended to refer to “remedies” (rather than “relief”), and why?

No

Please share your views below.:

Not needed.

Consultation Question 34: 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?

Agree

Please share your views below.:

Consultation Question 35: 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?

Agree

Please share your views below.:

Consultation Question 36: We provisionally propose that sections 85 to 87 of the Arbitration Act 1996 (on domestic arbitration agreements) should be repealed. Do you agree?

Agree

Please share your views below.:

Consultation Question 37: Do you think that any of the suggestions discussed in Chapter 11 needs revisiting in full, and if so, why?

Please share your views below.:

No.

Consultation Question 38: 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?

Please share your views below.:

No.

Response ID ANON-PT57-RUB6-F

Submitted to Law Commission Consultation: Review of the Arbitration Act 1996
Submitted on 2022-12-14 16:40:06

About you

What is your name?

Name:
Louise Lanzkron

What is the name of your organisation?

Enter the name of your organisation:
Bird & Bird LLP

Are you responding to this consultation in a personal capacity or on behalf of your organisation?

Personal response

If other, please state::
On behalf of partner Nick Peacock (and myself)

What is your email address?

Email:
[REDACTED]

What is your telephone number?

Telephone number:
[REDACTED]

If you want the information that you provide in response to this consultation to be treated as confidential, please explain to us why you regard the information as confidential. As explained in our privacy notice, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

Please explain to us why you regard the information as confidential:

Consultation questions

Consultation Question 1: 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?

Agree

Please share your views below.:

The paper proposes that the Act should not include a codification of the law of confidentiality in arbitration. Not least since this would need to be qualified by mandatory exceptions, so that the law could override a confidentiality agreement between parties if necessary. Given the fact-sensitive nature of such an exercise, and the difficulty of combining a general duty with a list of exceptions, we agree with the Law Commission that codifying the law in its current state would have little practical value and would not improve the current, functioning confidentiality regime

Consultation Question 2: We provisionally conclude that the Arbitration Act 1996 should not impose a duty of independence on arbitrators. Do you agree?

Agree

Please share your views below.:

Consultation Question 3: 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. Do you agree?

Agree

Please share your views below.:

We agree with the Law Commission that there could be a codification of existing case law to state a continuing duty on an arbitrator to disclose any circumstances relevant to the dispute which might reasonably give rise to justifiable doubts as to their impartiality. This could be along the lines of the statement of the law set out in *Halliburton v Chubb*.

Consultation Question 4: Should the Arbitration Act 1996 specify the state of knowledge required of an arbitrator's duty of disclosure, and why?

Yes

Please share your views below.:

We are of the view that the Act should specify the state of knowledge required of an arbitrator's duty of disclosure otherwise the point will be litigated as to what is the (new) statutory standard.

Consultation Question 5: 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?

Actual knowledge

Please share your views below.:

We consider that the duty should be based upon an arbitrator's actual knowledge because anything else is unworkable in practice and places too great an onus on arbitrators in ongoing proceedings

Consultation Question 6:

More broadly justified

Please share your views below.:

We consider that the requirement of a protected characteristic in an arbitrator should be more broadly justified (as suggested by the House of Lords) More broadly, but recognising that some characteristics (e.g. gender, sexual orientation) are likely to be harder (or impossible) to justify compared to others (e.g. religious background in a matter to be decided by religious principles).

Consultation Question 7:

Other

Please share your views below.:

We agree but with hesitation given the potential for such provisions to be used by disappointed parties to challenge arbitral awards.

Consultation Question 8: Should arbitrators incur liability for resignation at all, and why?

Other

Please share your views below.:

Only in the limited circumstances see answer to question 9 below.

Consultation Question 9: Should arbitrators incur liability for resignation only if the resignation is proved to be unreasonable?

Yes

Please share your views below.:

This seems to be a reasonable and workable compromise, and an improvement on the current position.

Consultation Question 10: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 11: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 12: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 13: We provisionally propose that the Arbitration Act 1996 should stipulate the threshold for success in any summary procedure. Do you agree?

Agree

Please share your views below.:

We consider that this will help to avoid a further dispute as to what the threshold is.

Consultation Question 14: 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. Do you agree?

Disagree

Please share your views below.:

We consider that it would be preferable to align with the international consensus of "manifestly without merit", rather than take an England & Wales only legal standard that is increasingly likely to differ from that in institutional rules and other arbitration centers.

Consultation Question 15: 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. Do you agree?

Other

Please share your views below.:

No view

Consultation Question 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?

Other

Please share your views below.:

No view

Consultation Question 17: 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. Do you agree?

Other

Please share your views below.:

No view

Consultation Question 18: We provisionally conclude that the provisions of the Arbitration Act 1996 should not apply generally to emergency arbitrators. Do you agree?

Agree

Please share your views below.:

We agree that the Act should not generally apply to emergency arbitrators but we consider there could be an argument that the duty at s.33 should apply to them, even if other parts of the Act do not.

Consultation Question 19: 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?

Agree

Please share your views below.:

Consultation Question 20: Do you think that section 44(5) of the Arbitration Act 1996 should be repealed, and why?

Yes

Please share your views below.:

The tension was highlighted in the case of *Gerald Metals v Timis & ors* [2016] EWHC 2327 (Ch) and 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. This is an unwelcome concern where the overarching objective should be to provide choice of remedies to parties using arbitration without precluding recourse to the court where that remains the best option (even if it is not the only option).

Consultation Question 21:

Peremptory order

Please share your views below.:

Consultation Question 22:

Agree

Please share your views below.:

We agree with the Law Commission that this should instead take place as an appeal of the tribunal's decision so as to avoid a "dress rehearsal" situation where a party asks the tribunal to rule on its own jurisdiction in full knowledge that it will disagree with an unsuccessful ruling, and may then obtain new evidence and develop its arguments for a rehearing at court. This problem, and the associated time and costs of a full rehearing, could be avoided if jurisdictional challenges are heard by the court as an appeal, where no new evidence can be submitted, and the court will only review the tribunal's decision.

However, while we agree with the proposal we do have some concerns with this approach. For example, how might this work if the tribunal has given an award without reasons? How is an appeal to work then?

Consultation Question 23: 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?

No

Please share your views below.:

We do not consider that the same limitation should apply to s.32. Section 32 is by its nature a request for an early determination by the court made either with consent, or in circumstances where there are likely to be costs savings and good reasons for the court to make the decision. In each case, it is appropriate for the court to consider the issue *de novo*, most likely instead of the tribunal.

Consultation Question 24: We provisionally conclude that our proposed change to section 67 of the Arbitration Act 1996 would not require any similar change to section 103. Do you agree?

Agree

Please share your views below.:

Consultation Question 25: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 26: 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?

Agree

Please share your views below.:

We consider that this proposal will plug an important lacuna for a party dragged to an arbitration which succeeds on arguments that the tribunal has no jurisdiction over the substantive dispute.

Consultation Question 27: 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?

Agree

Please share your views below.:

While the provision is somewhat unusual by international standards, amongst other potential benefits, it provides a route for the development of the common law by the courts even from cases heard in arbitration. The paper proposes that no changes be made to section 69. We agree as we consider that there currently exists a fair compromise between ensuring the finality of awards by arbitral tribunals and allowing for an error of law to be corrected where the parties have not opted-out of the provision.

Consultation Question 28: Do you think that section 7 of the Arbitration Act 1996 (separability of arbitration agreement) should be mandatory, and why?

Yes

Please share your views below.:

In view of the complications regarding the law governing the arbitration agreement which on current jurisprudence (*Enka v Chubb*; *Kout v Kabab-Ji*) may often not be the law of the seat, making s.7 mandatory would help to underpin the choice of London/England & Wales as a pro-arbitration seat.

Consultation Question 29: 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?

Agree

Please share your views below.:

We consider that this would help to clarify existing law.

Consultation Question 30: 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?

Yes

Please share your views below.:

We agree as we consider it will give primacy to party autonomy (including the views of the party-appointed tribunal).

Consultation Question 31: 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?

Yes

Please share your views below.:

We consider that while the powers are arguable already in the Act, an explicit reference would be a helpful signpost.

Consultation Question 32: Do you think that section 39 of the Arbitration Act 1996 should be amended to refer to "orders" (rather than "awards"), and why?

Yes

Please share your views below.:

We consider this amendments should be made for the reasons given by the Law Commission; at present the heading is confusing and suggests a power that is unlikely to exist.

Consultation Question 33: Do you think that section 39(1) of the Arbitration Act 1996 should be amended to refer to "remedies" (rather than "relief"), and why?

Yes

Please share your views below.:

We consider this amendments should be made for consistency.

Consultation Question 34: 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 appellants was notified of the result of that request. Do you agree?

Agree

Please share your views below.:

Consultation Question 35: 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?

Agree

Please share your views below.:

Consultation Question 36: We provisionally propose that sections 85 to 87 of the Arbitration Act 1996 (on domestic arbitration agreements) should be repealed. Do you agree?

Agree

Please share your views below.:

Consultation Question 37: Do you think that any of the suggestions discussed in Chapter 11 needs revisiting in full, and if so, why?

Please share your views below.:

We would favour a provision of the Act to reverse *Enka v Chubb* in favour of a clear default that the law of the arbitration agreement be the law of the seat, save where an express choice is made to the contrary to govern the arbitration agreement. This would support the choice of London/England & Wales as a pro-arbitration seat and give parties the default benefit of the commercial construction of arbitration agreements (per *Fiona Trust*). Conversely, 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.

Consultation Question 38: 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?

Please share your views below.:

No

Name:

[REDACTED]

What is the name of your organisation?

The Law Society of England & Wales

Are you responding to this consultation in a personal capacity or on behalf of your organisation?

This response is on behalf of the Law Society of England & Wales, which was founded in 1825 to be the independent professional body for solicitors in England and Wales. Our objectives are to promote the value of the profession, protect the justice system and support our members. Throughout this nearly 200-year history we have been run by and for our members and although with the passage of time the needs of our members have become increasingly more complex and diverse, we still strive to abide by our objectives, as we will do in this response.

If other, please state:

What is your email address?

Email:

[REDACTED]

What is your telephone number?

Telephone number:

N/A

If you want the information that you provide in response to this consultation to be treated as confidential, please explain to us why you regard the information as confidential. As explained in our privacy notice, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances. Please explain to us why you regard the information as confidential:

Consultation questions

Consultation Question 1: 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?

Agree

Please share your views below:

There are difficulties in drafting a suitable confidentiality provision in a statute to cover the potential requirements of all users of arbitration. We are also conscious of the negative perception in certain quarters of confidentiality agreements (such as non-disclosure agreements), and we consider that it would give the wrong impression if there was an express provision to this effect in the Act. We think it would be preferable for parties to have to turn their minds to what is specifically needed for their arbitration (and in many cases, what is desired is privacy rather than a duty of confidentiality). To the extent that a general implied duty of confidentiality is needed in arbitration, this can be left to the courts to work out.

Consultation Question 2: We provisionally conclude that the Arbitration Act 1996 should not impose a duty of independence on arbitrators. Do you agree?

Disagree

Please share your views below:

The requirement for both independence and impartiality in arbitration is now commonly accepted across the world and English law may be perceived as an outlier in only referring to impartiality. Also, there is a difference (albeit subtle) between independence and impartiality; and it would be consistent with party autonomy for arbitrators to have to disclose against a duty and then the parties can choose whether to waive the issue or not.

Consultation Question 3: 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. Do you agree?

Agree

Please share your views below:

We agree with the Law Commission that an express duty to this effect would provide useful clarification in an area that has been much debated in recent years.

Consultation Question 4: Should the Arbitration Act 1996 specify the state of knowledge required of an arbitrator's duty of disclosure, and why?

No

Please share your views below:

This is a difficult area which might best be left to the courts to develop, as noted in *Halliburton v Chubb*.

Consultation Question 5: 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?

What they ought to know after making reasonable inquiries.

Please share your views below:

A duty to make reasonable inquiries would be consistent with other duties required of professionals, and our members would be used to such a duty required of solicitors. The Law Commission's report notes this.

Consultation Question 6: 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 by the House of Lords)?

If it can be more broadly justified

Please share your views below:

This will likely depend on the particular circumstances of a case, so a broader test is probably needed.

Consultation Question 7: We provisionally propose that: (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. Do you agree?

Agree

Please share your views below:

One of the Strategic Objectives of our 2022-2025 Corporate Strategy is that "*We will protect the justice system and make sure it applies to everyone equally*". We believe that not only is justice (including Equality, Diversity and Inclusion) and the rule of law a basic underpinning of our own

democracy, but it is also at the heart of the UK's international reputation and reach and therefore of huge value economically and strategically. Therefore, the proposed changes are in line with our ethos as the Law Society and would be a positive demonstration of the values inherent in the administration of justice in England.

Consultation Question 8: Should arbitrators incur liability for resignation at all, and why?

No liability for resignation

Please share your views below:

Given the trend in recent years of arbitrators being joined into litigation arising out of arbitration, we are wary of the possibility of further litigation being stimulated by the resignation of arbitrators. We also believe that the possibility of liability in the part of arbitrator may deter candidates (particularly those starting out as arbitrators, which may limit diversity) and lead to an increase in insurance premiums. On the other hand, the vast majority of resignations are for good reason, such as ill health, so the disadvantages would outweigh the advantages.

Consultation Question 9: Should arbitrators incur liability for resignation only if the resignation is proved to be unreasonable?

Please see answer to question 8 above.

Please share your views below:

Please see answer to question 8 above.

Consultation Question 10: 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. Do you agree?

Agree

Please share your views below:

This logically follows on from the immunity that is presently granted to arbitrators.

Consultation Question 11: 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. Do you agree?

Agree

Please share your views below:

There are advantage and disadvantages to summary procedures (particularly when there is no possibility of appealing an arbitrator's award); and arbitrators already have powers to adopt the procedure in an individual case to suit the particular circumstances, so it could be left to arbitrators to decide. Nonetheless, there is probably an advantage for the Arbitration Act to refer to summary procedures in the manner suggested by the Law Commission.

Consultation Question 12: 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. Do you agree?

Please see answer to question 11 above.

Please share your views below:

Please see answer to question 11 above.

Consultation Question 13: We provisionally propose that the Arbitration Act 1996 should stipulate the threshold for success in any summary procedure. Do you agree?

Please see answer to question 11 above.

Please share your views below:

Please see answer to question 11 above.

Consultation Question 14: 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. Do you agree?

Please see answer to question 11 above.

Please share your views below:

Please see answer to question 11 above.

Consultation Question 15: 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. Do you agree?

Agree

Please share your views below:

This is a useful clarification of the Act, as noted in the Law Commission's report.

Consultation Question 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?

Yes

Please share your views below:

This would be another useful clarification, as noted in the Law Commission's report.

Consultation Question 17: 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. Do you agree?

Agree

Please share your views below:

Third parties should have their usual rights of appeal, as noted in the Law Commission's report.

Consultation Question 18: We provisionally conclude that the provisions of the Arbitration Act 1996 should not apply generally to emergency arbitrators. Do you agree?

Agree

Please share your views below:

Emergency arbitration has become a significant part of international arbitration; it is less important in domestic arbitration. This suggests that if the Arbitration Act 1996 is to be amended, there should be a carefully worded and tailored provision in the Act. Also, we are wary of unintended consequences arising from a general application of the Act to emergency arbitration.

Consultation Question 19: 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?

Agree

Please share your views below:

One of the main attractions of emergency arbitration for users is that it is separate from the courts, and this would be undermined by any legislative provisions for the court to administer the scheme.

Consultation Question 20: Do you think that section 44(5) of the Arbitration Act 1996 should be repealed, and why?

Yes

Please share your views below:

For the reasons set out in the Law Commission's report, section 44(5) does not add anything of value; and on the other hand, it has the potential to create confusion and uncertainty, now that there is the possibility of emergency arbitration.

Consultation Question 21: 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.

(2) Permission under section 44.

Please share your views below:

This would be aligned with the position as regards tribunals.

Consultation Question 22: We provisionally propose that:

- (1) where a party has participated in arbitral proceedings and has objected to the jurisdiction of the arbitral tribunal; and**
- (2) 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.**

Do you agree?

Agree

Please share your views below:

We are concerned about the increased costs resulting from the repetition of arguments in a rehearing. An appeal also gives due weight to the findings of the arbitrators on jurisdictional questions.

Consultation Question 23: 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?

Yes

Please share your views below:

This would ensure consistency.

Consultation Question 24: We provisionally conclude that our proposed change to section 67 of the Arbitration Act 1996 would not require any similar change to section 103. Do you agree?

Disagree

Please share your views below:

We think that there would be merit in treating awards made in England and awards made in other countries in the same way.

Consultation Question 25: 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. Do you agree?

Agree

Please share your views below:

This would be appropriate for the reasons set out in the Law Commission's report.

Consultation Question 26: 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?

Agree

Please share your views below:

The arbitral tribunal is often in the best position to make a ruling on costs in these circumstances.

Consultation Question 27: 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?

Agree

Please share your views below:

Section 69 has an important function in many types of arbitration that are significant in England, such as maritime arbitration and domestic arbitrations under various industry schemes. Further, in those types of arbitration where section 69 is less important, such as international arbitrations in the energy sector, parties are sufficiently familiar with the provision in order to be able to choose whether to exclude it or not, which aligns with party autonomy.

Consultation Question 28: Do you think that section 7 of the Arbitration Act 1996 (separability of arbitration agreement) should be mandatory, and why?

Yes

Please share your views below:

This would be consistent with arbitration laws across the world.

Consultation Question 29: 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?

Agree

Please share your views below:

This would be a useful clarification.

Consultation Question 30: 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?

No

Please share your views below:

It does not seem necessary to change these sections of the Act.

Consultation Question 31: 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?

Yes

Please share your views below:

We believe that it is important for England to be seen to be at the forefront of the use of technology in the legal sector and the resolution of disputes. A reference in the Act to the use of technology in this respect will give a strong message. On the other hand, we would wish any such provision to be sufficiently broad as to be "future-proofed" and allow for the development of new (and possibly unanticipated) technologies in the future.

Consultation Question 32: Do you think that section 39 of the Arbitration Act 1996 should be amended to refer to "orders" (rather than "awards"), and why?

Yes

Please share your views below:

The use of the word "award" in different contexts can cause confusion, particularly among those who are unfamiliar with arbitration. It would be best to clarify and simplify this.

Consultation Question 33: Do you think that section 39(1) of the Arbitration Act 1996 should be amended to refer to "remedies" (rather than "relief"), and why?

Yes

Please share your views below:

As above, use of the word "relief" in different contexts can cause confusion, particularly among those who are unfamiliar with arbitration. It would be better to clarify and simplify this.

Consultation Question 34: 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?

Agree

Please share your views below:

This brings the Act into line with caselaw.

Consultation Question 35: 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?

Agree

Please share your views below:

The Law Commission's interpretation as set out in its report appears correct.

Consultation Question 36: We provisionally propose that sections 85 to 87 of the Arbitration Act 1996 (on domestic arbitration agreements) should be repealed. Do you agree?

Agree

Please share your views below:

We do not think these sections add anything (as has been shown by the fact that they have not been brought into force), and so they can be removed.

Consultation Question 37: Do you think that any of the suggestions discussed in Chapter 11 needs revisiting in full, and if so, why? Please share your views below:

No, although we would encourage the Law Commission to keep in view the possibility of technology (artificial intelligence) being used to resolve disputes, as noted in the Law Commission's paper. While the technology may not be at a level to require an amendment to the Arbitration Act at this stage, there is a good possibility that it may reach that level in future and, as noted above, it is important for the legal services in England & Wales to remain at the forefront of the use of lawtech.

Consultation Question 38: 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?

We consider that it may be useful to consider further the point about the governing law of the arbitration agreement.

If so, what is the topic, and why does it call for review?

Please share your views below:

As the Law Commission is aware, this is a controversial topic that has been the subject of a considerable amount of litigation in recent years. The Law Society recommends a default choice of English law (as in the Scottish Act), subject to the contrary express agreement of the parties.

Submitted to Law Commission Consultation: Review of the Arbitration Act 1996
Submitted on 2022-10-06 17:53:50

About you

What is your name?

Name:
Michael Lever

What is the name of your organisation?

Enter the name of your organisation:

Michael Lever
The Rent Review Specialist
(Established 1975)

Are you responding to this consultation in a personal capacity or on behalf of your organisation?

Response on behalf of organisation

If other, please state::

What is your email address?

Email:
[REDACTED]

What is your telephone number?

Telephone number:
[REDACTED]

If you want the information that you provide in response to this consultation to be treated as confidential, please explain to us why you regard the information as confidential. As explained in our privacy notice, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

Please explain to us why you regard the information as confidential:

Consultation questions

Consultation Question 1: 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?

Agree

Please share your views below.:

I am a commercial property surveyor, specialising in rent review and business tenancy advice for landlords and tenants in England and Wales. At rent review for dispute resolution there are two methods: arbitration and independent expert. Which of the two methods are to be used would be stipulated in the particular lease. In some leases, the landlord can elect for either before or after the appointment but generally the lease will stipulate one or the other, not both. I established my practice in 1975 and have over the years been involved with dozens of arbitrators (myself acting as expert witness or advocate (or a combination of both provided I make it at all time clear in which capacity I am acting).

If the 1996 Act were to dispense with confidential then the risk is that the award (which would normally contain reasons) would fall into the wrong hands; the information often detailed to be used in other matters with the consent of the parties to the arbitration.

Consultation Question 2: We provisionally conclude that the Arbitration Act 1996 should not impose a duty of independence on arbitrators. Do you agree?

Agree

Please share your views below.:

As your provision conclusion says, it is impartiality rather than independence However, whether possible to be impartial when for example the arbitrator personally is a landlord so may have views regard tenant conduct is a moot point. Bias, conflict of interest in opinion and attitude ought not enter the proceedings but may well do so.

Consultation Question 3: 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. Do you agree?

Agree

Please share your views below.:

Definitely, I consider it essential that the parties to the arbitration are properly informed before the body or organisation responsible to making the appointment does so or any circumstances arise after the appointment that reasonably give rise to impartiality. For example in a matter i was dealing with the arbitrator 'x' was instructed to act for a tenant of another property where i was acting for the landlord, i suggested X should resign by reason of conflict. X refused and said his business partner (C) would act for the tenant. I accepted the position reluctantly but was concerned that because C would be privy to my stance in the other matter C would discuss my stance with X.

It would be good if the 1996 Act would prevent an arbitrator or any of his colleagues accepting instructions on any other unconnected matter where one or more of the parties and/or their representatives to the arbitration were also involved.

Consultation Question 4: Should the Arbitration Act 1996 specify the state of knowledge required of an arbitrator's duty of disclosure, and why?

Yes

Please share your views below.:

For rent review, the principal instructing organisation is the Royal Institution of Chartered Surveyors which as a panel of chartered surveyors that act as arbitrators. Although leases will sometimes contain special requirements as to the arbitrator's experience or knowledge, mostly the lease does not. It is very much pot luck whether the appointed arbitrator has sufficient knowledge, in a matter where I was acting for the landlord, the arbitrator at the previous review (where i was not involved) but whose award my client sent me, the arbitrator was evidently so inexperienced that he considered it necessary to obtain legal assistance on some very basic points thereby adding to the parties' costs unnecessarily.

Consultation Question 5: 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?

What they ought to know

Please share your views below.:

Actual knowledge requires good memory. It doesn't take much to make reasonable inquiries, to ascertain for example where one or both of the parties if corporate are group companies.

Consultation Question 6:

More broadly justified

Please share your views below.:

Quotes from an article by Professor Martin Hunter, "Ethics of the International Arbitrator", ASA Bulletin, Kluwer Law International 1986, Vol 4 Issue 4, pp 173-196, at p 189, in which the author draws a distinction between impartiality and neutrality and states:

"Indeed, when I am representing a client in an arbitration, what I am really looking for in a party-nominated arbitrator is someone with the maximum predisposition towards my client, but with the minimum appearance of bias."

Consultation Question 7:

Other

Please share your views below.:

Don't know.

Consultation Question 8: Should arbitrators incur liability for resignation at all, and why?

No liability for resignation

Please share your views below.:

The full facts might not have been disclosed to the arbitrator before the appointment was accepted such that the arbitrator does not consider himself/herself sufficiently knowledgeable.

The arbitrator might be taken unwell or a close member of his family similarly.

Consultation Question 9: Should arbitrators incur liability for resignation only if the resignation is proved to be unreasonable?

Yes

Please share your views below.:

The liability should be extended to paying the parties' costs incurred.

Consultation Question 10: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 11: 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. Do you agree?

Disagree

Please share your views below.:

At rent review, who is to say whether the application has merit. Arbitration is not a step to be taken lightly, it is costly. For a landlord or a tenant to be denied having their respective case judged by someone with no vested interest in the outcome would be inequitable.

If your proposal were to become law then leases would circumvent by stating that regardless of the merits of the case the arbitration would have to proceed. however, that would not enable leases granted prior to the legislative change to qualify.

Subject to the agreement of the parties when the parties have not been able to agree to the extent of needing arbitration is a tall order.

Consultation Question 12: 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. Do you agree?

Disagree

Please share your views below.:

Arbitrators are fond of overriding the parties' views on procedure etc. The Act already allows an arbitrator to adopt a robust approach. Your proposal would add to the costs, with respect, unnecessarily bearing in mind arbitrator is also for rental disputes. Perhaps if the AA96 could be amended to treat rent review disputes differently then a different set of rules could be formulated.

Consultation Question 13: We provisionally propose that the Arbitration Act 1996 should stipulate the threshold for success in any summary procedure. Do you agree?

Disagree

Please share your views below.:

For the reasons above.

Consultation Question 14: 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. Do you agree?

Disagree

Please share your views below.:

For the reasons above.

Consultation Question 15: 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. Do you agree?

Other

Please share your views below.:

Do not know

Consultation Question 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?

Other

Please share your views below.:

Do not know

Consultation Question 17: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 18: We provisionally conclude that the provisions of the Arbitration Act 1996 should not apply generally to emergency arbitrators. Do you agree?

Agree

Please share your views below.:

Consultation Question 19: 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?

Other

Please share your views below.:

Do not know

Consultation Question 20: Do you think that section 44(5) of the Arbitration Act 1996 should be repealed, and why?

No

Please share your views below.:

Nothing wrong with it.

Consultation Question 21:

Other

Please share your views below.:

Do not know

Consultation Question 22:

Agree

Please share your views below.:

Unless a point of law a tribunal that gets it wrong to begin with is unlikely to get it right on a rehearing.

Consultation Question 23: 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?

Yes

Please share your views below.:

Consultation Question 24: We provisionally conclude that our proposed change to section 67 of the Arbitration Act 1996 would not require any similar change to section 103. Do you agree?

Other

Please share your views below.:

Do not know

Consultation Question 25: 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. Do you agree?

Agree

Please share your views below.:

What would be the point in going to court if the court is not able to declare the award to be of no effect in whole or in part?

Consultation Question 26: 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?

Agree

Please share your views below.:

To deter proceedings where the party's agenda is delay.

Consultation Question 27: 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?

Agree

Please share your views below.:

Consultation Question 28: Do you think that section 7 of the Arbitration Act 1996 (separability of arbitration agreement) should be mandatory, and why?

Other

Please share your views below.:

No idea

Consultation Question 29: 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?

Agree

Please share your views below.:

Equitable

Consultation Question 30: 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?

Yes

Please share your views below.:

Agreement of the parties would avoid the tribunal wracking up extra costs at the expense of the parties.

Consultation Question 31: 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?

Yes

Please share your views below.:

Would be helpful. Also that electronic documentation as an alternative to printed but not both. In a recent matter where i acted for the tenant, the arbitrator directed electronic and print. As electronic can be same day before the time deadline, whereas in print and by post would have to be no later than the day before or 2-3 days before if the closing date were a Monday, for an arbitrator to require both added to the costs.

Consultation Question 32: Do you think that section 39 of the Arbitration Act 1996 should be amended to refer to "orders" (rather than "awards"), and why?

No

Please share your views below.:

Awards is ok.

Consultation Question 33: Do you think that section 39(1) of the Arbitration Act 1996 should be amended to refer to "remedies" (rather than "relief"), and why?

Other

Please share your views below.:

Do not know

Consultation Question 34: 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?

Agree

Please share your views below.:

Fair and reasonable.

Time running that predates notification is inequitable.

Consultation Question 35: 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?

Disagree

Please share your views below.:

Leave to appeal within 28 days of the date of the award is sometimes an impossible deadline to meet.

frankly I do not understand why there has to be an intermediary step to take before appeal, a step that requires the appellant to incur costs of 'persuading' a court to grant leave. It seems to be a convoluted process that acts as a deterrent for other than a party whose legal representative are available at short notice. I can understand the need to prevent spurious appeals but as it stands comes over as unfair.

Consultation Question 36: We provisionally propose that sections 85 to 87 of the Arbitration Act 1996 (on domestic arbitration agreements) should be repealed. Do you agree?

Other

Please share your views below.:

Do not know

Consultation Question 37: Do you think that any of the suggestions discussed in Chapter 11 needs revisiting in full, and if so, why?

Please share your views below.:

Do not know

Consultation Question 38: 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?

Please share your views below.:

As i have said, I advise on rent review at arbitration. The scope of the AA96 is in my view too wide and general for rent review. As the Commission proposes to do away with the domestic arbitration sections, it could replace them with procedure for rent review in a lease of residential and/or commercial property. Whereby for example, instead of the arbitrator having jurisdiction on costs including the parties' own costs, the costs would be limited to the arbitrator's costs only and better still shared 50:50. Such would prevent (surveyors and other advisers for) landlords and tenants applying the threat of going to arbitration as a negotiating ploy to get the other side to concede for fear of extra costs.

If the Law Commission would like my further suggestions for this particular topic then please contact me.

Law Commission Review of the Arbitration Act 1996: Consultation Response from Linklaters LLP

1 Introduction & executive summary

1.1 Linklaters LLP is pleased to respond to the Law Commission's consultation paper entitled "Review of the Arbitration Act 1996" (published September 2022).

1.2 Linklaters is one of the world's leading law firms with offices in 20 countries. Our response has been prepared by London based members of our International Arbitration practice. That practice regularly acts as counsel and as arbitrators in complex arbitral proceedings (both commercial and investment treaty) in all of the key seats throughout the world and across a large variety of commercial sectors. We also have extensive experience in advising on the use, and drafting, of arbitration agreements in commercial transactions.

1.3 Thank you for the opportunity to respond to the consultation paper. In our response, we have limited ourselves to submissions on those aspects of the consultation paper on which we have substantive observations from the perspective of international commercial arbitration in England. Because of the breadth of the consultation paper, this is not all aspects, but we nonetheless hope that our observations are useful. Where we respond, we have done so under the themes/topics deployed in the consultation paper; so it should be intuitive to follow. To save repetition, all references to sections in legislation are, unless otherwise stated, to the Arbitration Act 1996 (the "AA").

1.4 In summary; our key points are as follows:

1.4.1 *Discrimination*: Whilst the Law Commission is absolutely correct that diversity in arbitral appointments is a real issue, we are not sure that the specific statutory intervention proposed is the right solution to this problem. It could, unintentionally, introduce significant uncertainty into commercial arbitration whilst, simultaneously, not achieving its wider, laudable, aims.

1.4.2 *Summary disposal*: This is a positive proposal and easily implemented.

1.4.3 *Section 44 (court powers exercisable in support of arbitral proceedings)*: Clarifying the extent to which these powers apply to third parties would be extremely beneficial. It is somewhat unclear what the separate proposals concerning the application of the AA to emergency arbitrators, and the deletion of s.44(5), would lead to and, accordingly, those proposals may be better omitted.

1.4.4 *Challenging jurisdiction under s.67*: On balance, we would support the principle that, where jurisdiction before the tribunal is contested, it would be acceptable to limit challenge of the award before the court to an appeal. If this change is made, the AA will, however, need provisions concerning how the tribunal assesses its jurisdiction so that the court can rule on whether the *tribunal was wrong* (as opposed to determining the matter of jurisdiction itself).

Linklaters LLP is a limited liability partnership registered in England and Wales with registered number OC326345. It is a law firm authorised and regulated by the Solicitors Regulation Authority. The term partner in relation to Linklaters LLP is used to refer to a member of Linklaters LLP or an employee or consultant of Linklaters LLP or any of its affiliated firms or entities with equivalent standing and qualifications. A list of the names of the members of Linklaters LLP together with a list of those non-members who are designated as partners and their professional qualifications is open to inspection at its registered office, One Silk Street, London EC2Y 8HQ or on www.linklaters.com and such persons are either solicitors, registered foreign lawyers or European lawyers.

Please refer to www.linklaters.com/regulation for important information on Linklaters LLP's regulatory position.

1.4.5 *Law applicable to the arbitration agreement:* The decision in *Enka* is sound in principle and practice. The case for a statutory reversal of it is, on analysis, not compelling and may simply give rise to other practical complexities that *Enka* avoids.

1.4.6 In a final section we also make some shorter comments on other areas including independence/impartiality, minor reforms, and highlight the need to consider appropriate transitional provisions.

1.5 In the rest of this response, we consider those issues in more detail.

2 Discrimination (consultation questions 6 & 7)

2.1 In summary, our understanding of the Law Commission's core proposal in this area is that any agreement that the parties make in relation to an arbitrator's protected characteristics (as defined in section 4 of the Equality Act 2010) would be unenforceable, subject to justification on the basis that, in the context of that arbitration, it is a proportionate means of achieving a legitimate aim.¹

2.2 This would be a partial reversal of the UKSC's decision in *Jivraj v Hashwani* [2011] UKSC 40; partial because it would, in effect, adopt the *obiter* position of the UKSC's judgment; broadly speaking that *if* arbitrator appointments were within the scope of equality legislation then a test of legitimate justification (rather than essential requirement) could apply to the restriction (in that case the precise requirement before the UKSC was based on religion).

2.3 The motivations behind this proposal are the issues set out at paragraph 4.4 of the consultation paper. We entirely agree that, from the perspective of commercial arbitration, diversity in tribunal appointments needs to improve. It is a goal which can only improve arbitration by helping to ensure that its processes, standing, and community remain in touch with, and relevant to, the society that it serves.

2.4 The specific question that the consultation raises, however, is a different one. It is whether the proposal is an appropriate solution to the above problem. Unfortunately, it may not be. This is for two general reasons.

2.5 **First**, the proposal carries a significant potential downside; the uncertainty it could create for commercial arbitration seated in England. This is because many commercial arbitration agreements *do* contain limited restrictions to which, on the face of it, the proposal would apply. In particular, it is common for such agreements to place restrictions on the degree to which arbitrators (often a sole arbitrator, or the presiding arbitrator) may be of the same nationality of the parties.²

2.6 These are present in many rules of major arbitral institutions³ and are often replicated in *ad hoc* arbitration agreements (particularly in contracts with state entities). Generally speaking, their purpose is linked to commercial arbitration's character as a neutral, international, form

¹ The proposal would also prohibit any challenge to an arbitrator on the basis of a protected characteristic. As, however, the most likely basis upon which such a challenge might proceed would be a pre-existing agreement between the parties, it is, to a degree, the corollary of that issue and so we don't address the challenge proposal separately.

² Nationality constitutes a protected characteristic under the Equality Act 2010; see s.9(1)(b) of that Act.

³ In addition to the examples already cited at footnotes 22-23 of the consultation paper, see also the rules of the SCC (2017) Article 17(6)-(7) and DIS Arbitration Rules.

of dispute resolution and the removal of a potential source of bias on the panel.⁴ It seems clear that such provisions are different in nature from those that the consultation paper has as its principal concern.⁵ In that respect, the proposal then caters for such a difference by suggesting a test of legitimate justification. The application of that test to nationality provisions in commercial arbitration agreements would, however, in itself, create uncertainty. Views may differ on the precise application of a test which would be newly minted in the arbitration context. No definitive answers concerning the treatment of such nationality provisions would be available until points were litigated, and simply asserting that parties can assume objective justification can be made out may not be realistic – such matters are contested in discrimination cases and subject to evidence and argument. Furthermore, the reference to justification “*in the context of that arbitration*” raises further uncertainty about the degree to which any blanket answers can be given.⁶

2.7 Although the proposal is not precisely on all fours with the approach of the Court of Appeal in *Jivraj*,⁷ the reaction to that judgment (before the UKSC’s ruling) provides relevant historical context about the potential effect. It was a difficult experience for England as a seat. It led to significant concerns across the arbitration community as to the efficacy of institutional arbitration clauses, including whether remedial drafting was needed to disapply their provisions on nationality, questions about the comparative advantages of other seats (which did not take such an approach), and the intervention of both the LCIA, and the ICC, in the proceedings before the UKSC.⁸ Reopening these issues therefore raises the possibility of a similar reaction as, although the precise bar may be different, the overall principle – applying a legal test derived from equalities legislation, is the same.

2.8 More generally, two important issues of scope also arise which the proposal does not consider in depth, but which merit further thought in assessing its potential impact.

2.8.1 First, direct and indirect discrimination. Parties may sometimes stipulate qualifications for arbitrators in an arbitration clause and paragraph 4.20 of the consultation paper seems to indicate that such a practice could remain untouched. It gives an example of an agreed requirement that an arbitrator is a “chartered philanthropist” and states that (in contrast to an earlier example of an agreement that an arbitrator must be a man) this would not be within the scope of the proposal as no protected characteristic is referenced and indirect discrimination is not caught.

⁴ See e.g. “It is axiomatic that for international arbitration to be seen to be a neutral forum, the sole or presiding arbitrator should not (save by express agreement of the parties) have the nationality of either (or any) of them” (Turner and Mohtashami – A Guide to the LCIA Arbitration Rules (2009) at 4.50) “The independence of arbitrators, and likewise their neutrality, can be enhanced by their nationality: if their nationality is different from that of the parties, it can be assumed that they will have greater freedom of judgment. This explains the requirement found in some arbitration rules that a third or sole arbitrator must not share the nationality of any of the parties.” (Fouchard, Gaillard and Goldman on International Commercial Arbitration (1999) at para 1037).

⁵ The consultation paper gives, as examples, agreements that arbitrators must be “commercial men”.

⁶ In any such litigation, a further question may be the degree to which severance would be possible if the justification test was not met. In the Court of Appeal in *Jivraj* [2010] EWCA Civ 712, the arbitration clause did not survive severance of the requirement as to religion before the court. The conclusion may be context sensitive but would be another source of uncertainty in the application of any test.

⁷ The main practical differences being (i) that it involves a specific rule of arbitration law which refers to protected characteristics, rather than the direct application of equalities legislation (ii) that, relatedly, the rule intends to be limited to cases of direct discrimination and (iii) that a test of legitimate justification, rather than necessity, would be applied to any restriction within the rule. In relation to (iii), the proposal also canvasses views on whether the test should be *necessity*. If that were adopted then the issues discussed above would become even more acute as, for most practical purposes, the position of the Court of Appeal would have been reinstated.

⁸ At appendix 1, we have attached a copy of an external bulletin produced by this firm following the UKSC’s decision as further detail on the issues. Many other examples can be found in the public domain.

These examples seem to presuppose the proposal could operate on the basis of a division between terms which reference a protected characteristic expressly and those which do not. However, in practice, it may not be so straightforward to draw that distinction. As case law has shown, requirements can constitute direct discrimination even when phrased in a less overt way and, moreover, whether that is the case can provoke debate.⁹

2.8.2 Second, the legal *categorisation* of the proposal. A decision would have to be made as to how it is treated under s.2.¹⁰ Would the rule only be subject to s.2(1) i.e. limited to arbitrations with a domestic seat? or *also* subject to s.2(5). The former option would appear to be inconsistent with the aims stated in paragraph 4.35 of the consultation paper. If, however, the latter course of action is taken the consequence would be its application as a substantive rule of English law and so applicable in foreign seated arbitrations where the applicable law of the arbitration agreement was English law. That would introduce significant complexity, more generally, to the use of English law in agreements subject to arbitration provisions.

2.9 Overall, as to the above, the effect could be that parties, before taking the step of entering into arbitration agreements containing common provisions as to arbitrator requirements, should consider aspects of discrimination and objective justification in, for example, a similar way to an organisation making policy on employment decisions. This would be a significant shift in the complexity involved in drafting and negotiating what are commonly perceived as “boilerplate” terms. Therefore, rather than engage in those complexities, a potential reaction of commercial parties might be that they, first, consider avoiding any party agreed requirements at all and, then, appreciate that, as this is not consistent with international practice, a change in seat is an alternative step which could be taken.

2.10 Our **second** general reason involves assessing the aforesaid against the potential benefits of the proposal. The issue here, however, is that we are not sure that the proposal would help achieve its goal. The proposal addresses party agreed restrictions but, in our experience, lack of diversity in international commercial arbitration is not a consequence of these. In the process of drafting arbitration agreements, beyond the limited (and well-established) provisions discussed above, it is not our experience that parties would request a restriction targeting the protected characteristics of an arbitrator (even more so in the context of clauses which are generally regarded as “boilerplate” in any event), and we would be surprised at any such attempt.¹¹ In the process of making tribunal appointments in a dispute, the obstacles are normally more endemic issues such as a lack of diversity in the legal profession more generally, or a caution-first approach on the part of parties which leads them to make appointments from a familiar pool (rather than a positive hurdle posed by the parties’ agreement).

2.11 To recap, there are issues with diversity on arbitral tribunals which the consultation paper correctly recognises. Unfortunately the *specific* solution proposed seems to be one which

⁹ See, for example, *Bull v Hall* [2013] UKSC 73.

¹⁰ The way in which separability is treated in s.2, discussed at 10.6 of the consultation paper, provides an analogous illustration of this point.

¹¹ The consultation paper does cite two cases from the commercial context, where the arbitration agreement referred to “commercial men”, as examples of such a practice. We are not, however, entirely sure that these cases are clear evidence for the conclusion that the consultation paper draws about them. Given the age of the decisions, the use of the male pronoun might be evidence of lawyers’ lack of sensitivity to gender neutral drafting at the time; rather than firm contractual intent (as noted in the consultation paper, the issue in those cases was whether the arbitrator’s qualifications/background fit the meaning of “commercial”, not the different question of construction as to whether the arbitration had to be a man).

may not help solve the problem, whilst having a significant impact elsewhere. Instead, the main impact of the proposal may be felt on the types of limited provisions discussed above, with the attendant potential consequences.

- 2.12** Accordingly, instead of the proposed statutory intervention, this is an area in which the international arbitration community itself needs to continue to strive to effect the necessary underlying cultural and socio-economic change; for example through initiatives, in which our firm and others are involved, such as the Equal Representation Pledge, the work of organisations such as Arbitral Women, and (as also noted by the consultation paper) the positive steps that the main institutions have taken to improve representation in cases in which they make appointments.¹²

3 Summary disposal (consultation questions 11-14)

- 3.1** It would be beneficial for the AA to expressly address this. A common concern of commercial parties is for arbitrations to be resolved as quickly as possible, and this can only assist. Furthermore, although it is likely within the default procedural powers of arbitrators under the AA, and parties often agree to it where they have chosen institutional rules which provide for the same, its presence in the AA will help encourage tribunals to resolve disputes in the most expeditious way. It is a straightforward, easily implemented, reform which may have beneficial results.

- 3.2** We agree that this should be a non-mandatory provision, to cater for the possibility that parties may wish to opt-out, and to accommodate the provisions which already exist in institutional rules. It also seems entirely appropriate that it should operate on the application of a party, and for the tribunal to have discretion, in consultation with the parties, to determine the procedure to be adopted. We also agree that the AA's provisions should set out the substantive test/standard to be applied otherwise there would be no guarantee of consistency; which may undermine confidence. As to what that is, we do not see a huge difference between one akin to summary judgment in court, or "manifestly without merit". The latter is the common formulation in institutional rules, which might commend it from an international perspective (although, if the parties have agreed to those rules, it would be incorporated in any event).

4 Section 44 (court powers exercisable in support of arbitration) (consultation questions 15-21)

- 4.1** We address three aspects of the consultation paper's proposals in this respect.

Third parties and s.44 (consultation questions 16 and 17)

- 4.2** As the consultation paper notes, there have been a number of judicial decisions which have considered the degree to which orders under s.44 can be made against third parties.

- 4.3** It would be beneficial to amend s.44 to make it absolutely clear that orders are available against third parties to the same extent that the order in question would be available in legal proceedings before the court. To the extent that the cases reveal any underlying doctrinal objection to this based on the nature of arbitration we suggest that this is misplaced. The *tribunal* is not being asked to act in such cases, rather the *court* is being asked to exercise its supervisory jurisdiction to provide effective support to English seated arbitrations. In such

¹² A further example from the ICC, post-dating the release of the consultation paper, appears [here](#).

Linklaters

arbitrations, the parties' need to secure effective relief against related third parties can be as great as in disputes between the court, and there seems no reason to grant preferential treatment to the latter, potentially at the expense of parties who choose arbitration. Furthermore, all that is being asked is that the court apply its usual tests and discretions to determine such relief.

- 4.4** It makes sense that, in such an event, the third party should have usual appellate routes available to it (rather than a restricted route reflecting the arbitration process between the parties). This seems like a sensible and natural recognition that third parties are not party to the arbitral process.

General treatment of emergency arbitrators (consultation questions 18-19, 21).

- 4.5** We agree that extending the provisions of the AA to emergency arbitrator provisions is likely to create undue delay and complexity and may impact on the efficacy of such provisions by subjecting them to statutory provisions which were not originally drafted with such procedures in mind. It would also be adding undue complexity to provide for a default, statutory, emergency arbitrator regime. Should they so wish, parties can select institutional rules with such provisions and we agree with the observation that a process which involves applications to the court to secure and manage the emergency arbitrator appointment (as opposed to the direct grant of an interim relief order under s.44) would likely be an unwieldy and inefficient means to an end.

- 4.6** As to whether anything needs to be done to improve compliance with the orders of emergency arbitrators, we think that, on balance, the merits of the two proposals in consultation question 21 may need more thought. The first; allowing, in urgent cases, the emergency arbitrator to convert its order into a peremptory order which can then be enforced by way of application to court seems convoluted. In particular, in an urgent situation, what (over and above a s.44 application to court) would such a multi-stage process fulfil?

- 4.7** Meanwhile, the second, giving an emergency arbitrator the ability, in non-urgent cases, to grant permission to an application for interim measures from the court appears simpler as it avoids any potential overlap in urgent cases. However, its aims seem somewhat misplaced; in *non-urgent* cases it is correspondingly less likely that an emergency arbitrator will exist at all.

- 4.8** Accordingly, it seems that the first solution would more directly address the nub of the issue, albeit it might operate more efficiently if it were a solution which allowed direct enforcement of the emergency arbitrator's initial order with permission of the court.¹³ In that form, however, one might still legitimately question what that might add over, in the event of non-compliance with an order of the emergency arbitrator, obtaining an interim order from the court under s.44. In some respects the duplication may not be helpful as it would add another factual layer to the court's consideration of whether the emergency arbitrator can grant effective relief.

Proposed repeal of s.44(5) (consultation question 20).

- 4.9** The consultation paper tentatively suggests that s.44(5) should be repealed on the basis that it may be redundant, and that its removal is necessary to help remove a perception that emergency arbitrator provisions preclude access to court interim relief.

¹³ Which is, for example, the approach under s.22B of the Hong Kong Arbitration Ordinance.

- 4.10** If it is correct that the degree to which the tribunal (or any arbitral institution, or person vested with authority) can act is a factor for the court in assessing *urgency*, that there might be something in the former point. However, as to the latter, we are not sure that the reform would then help. If the degree to which the tribunal can act is part of “urgency” in any event then removing s.44(5) is unlikely to achieve anything as the consideration of whether the tribunal can act effectively would still be present in this form.
- 4.11** Therefore, the only reform which would entirely remove such a perception would be to completely eliminate the need for the court to consider whether the tribunal might act effectively, but this would be a radical move which may fundamentally alter the balance of cases where it is appropriate for the court to intervene. In this respect a deletion of s.44(5) may not, therefore, be as neutral a step as is supposed; it may actually trigger arguments that a move in such a direction was the intention of the reform; or signal that the English courts should take a different approach.
- 4.12** To a degree, it appears to us that the identification of any issue in this area may be more concerned with, and be driven by, perceptions of *Gerald Metals*. We agree with the Law Commission’s view that this, particularly in light of the facts in that case, was an orthodox decision, rather than the roadblock it is sometimes characterised as.¹⁴ In that light, retaining the status quo would seem better to promote certainty.

5 Challenging jurisdiction under s.67 (consultation questions 22-26)

- 5.1** In Chapter 8 of the consultation paper, the principal proposal is that where a party participates in arbitral proceedings, objects to the tribunal’s jurisdiction; and the tribunal has ruled on its jurisdiction in an award, then any subsequent challenge under s.67 should be by way of an appeal and not a *de novo* rehearing (as is currently the case).
- 5.2** In other words, as outlined in paragraph 8.41 of the consultation paper, this is limited to the situation where the tribunal’s jurisdiction has been contested before it.
- 5.3** The ability of a party to have recourse to a court hearing to assess the tribunal’s jurisdiction is a topic which raises fundamental issues because, if there is no valid arbitration agreement, then, in principle, the corollary is access to the court. This is reflected in the AA’s provisions on the matter; of which s.67 is one.
- 5.4** Whilst that principle is important, the immediate question is whether the balance, in the specific circumstances contemplated by the consultation’s proposal, is correct. We tend to agree that, in a situation where the matter has been contested before the tribunal, then it is somewhat anomalous for there to be a ground up re-run before the court. Moreover, in our experience, this is not something which commercial parties caught up in such situations necessarily appreciate experiencing. Doctrinal concerns in the situation where a party alleges there is no arbitration agreement and does not want to take part in the arbitral proceedings should be allayed by the continuing availability of s.72(1) and s.67 (via s.72(2)) (in both cases the hearing would be *de novo*).
- 5.5** Accordingly we think that the proposed reform may, particularly in light of its limited scope, provide a proportionate solution which would be beneficial in terms of the efficiency gains, and reduction in costs and time, for arbitration proceedings seated in England.

¹⁴ An external briefing note on the case produced at the time by our international arbitration practice, and broadly consistent with the Law Commission’s view, is available [here](#).

- 5.6** The appeal proposal does, however, overlook one important point which goes to the difference between a *de novo* hearing and an appeal. In the former situation the court assesses the tribunal's jurisdiction itself applying, for example, its (English) conflict of law rules to determine the laws applicable to the arbitration agreement and weighing up the tribunal's jurisdiction in the light of them. In an *appeal* the question is fundamentally different; as a matter of principle it should (broadly speaking and allowing for, for example, a margin of appreciation in matters of discretion) be whether the *tribunal* correctly applied whatever rules it was obliged to apply and reached a correct decision on the facts before it. In whatever way this is expressed, the point of principle is that, a *test/grounds* for *appeal* would need to be set out for the reform to work properly.
- 5.7** In terms of *procedural standards* this would perhaps not be problematic; the AA already sets minimum procedural standards which can apply to a jurisdiction hearing as much as any other. Substantively, there is more of an issue. Although the AA confirms the tribunal's competence-competence¹⁵ it does not contain any provision dealing with the legal rules the tribunal should apply to issues of its *jurisdiction*, most notably what conflict of laws rules it should apply to determine issues such as the applicable law of the arbitration agreement.¹⁶ On one view, it, currently, doesn't need to as the ultimate possibility of the award on jurisdiction being referred to the English court (which will then apply its own rules on the matter) fulfils this function. This means that, whilst it may not be obliged to, an English seated tribunal should adopt the same approach as the court (and, in our experience they do) for obvious practical reasons (to lessen the possibility that an award on jurisdiction susceptible to challenge under the AA's mechanisms is rendered).
- 5.8** In this way the AA's current provisions therefore provide a control mechanism which (indirectly, and directly) ensure that issues of the tribunal's jurisdiction will be resolved in a certain way. By contrast, what is to happen under a s.67 *appeal* if, for example, a tribunal were to apply a third state's conflict of law rules in determining the law applicable to the arbitration agreement when assessing the jurisdiction of the tribunal. This might seem odd, but left without more, would it be *appealable*? If it is not, then this would be a significant change from the rights/remedies that the parties to an English seated arbitration have and would make assessing the taking of jurisdiction by such a tribunal more uncertain. We therefore suggest that, at the least, a rule to fill this gap would be needed which would require the tribunal, in assessing its jurisdiction, to apply the same law(s) as would be applicable before the English court.
- 5.9** For completeness, if it were thought that such a rule is not needed because, ultimately, a route back to a *de novo* hearing would still always exist via s.72, then we note that such a counter-point does not seem correct: For valid risk/tactical reasons, a respondent might, in any particular case, determine that its interests are best served by arguing jurisdiction before the tribunal, thereby eliminating the option of s.72. In any event, claimants seeking to uphold the jurisdiction of the tribunal also need certainty and, assuming the respondent participates, such a claimant would also only be left with an appeal if the tribunal *declines* jurisdiction. Finally, the existence of other routes in the AA to court determination of the issue illustrates

¹⁵ S.30 AA. Provisions confirming this principle also appear in the main arbitration rules (Article 23 LCIA Rules, Article 6(3) ICC Rules, Article 23 UNICTRAL Rules).

¹⁶ S.46 AA deals with the substantive law applicable to the merits of the dispute between the parties, not laws applicable to questions of the tribunal's jurisdiction – most notably how to assess the law applicable to the arbitration agreement. Similar provisions can be found in the main arbitration rules (for example, LCIA Rules 22.3, ICC Rules 21 (1), UNCITRAL Rules art. 35(1) but, again, these are concerned with the law applicable to the merits of the dispute, not the point under discussion.

another reason why this issue needs addressing - if not implemented it would appear that the rules applicable to the tribunal's jurisdiction might vary depending upon how these routes play out in any given case.

6 The law applicable to the arbitration agreement, and the UKSC's decision in *Enka*.

6.1 Although this is discussed in Chapter 11 of the consultation paper as a stakeholder suggestion currently *not* short-listed for review, it may still attract comment as it was the subject of a critique at a recent seminar hosted by Brick Court Chambers on 13 October 2022, its potential to trigger debate was noted by Dr Tamblyn at a meeting of ASK on 19 October 2022, and it has been discussed at other events on the consultation paper. Furthermore, this discussion is inexorably linked to two other points discussed in the consultation paper (separability, and the operation of s.4(5)) and we think that these should be considered together and dealt with consistently. We set out our views on these issues below.

6.2 Dealing first with the law applicable to the arbitration agreement and *Enka v Chubb* [2020] UKSC 38. Two preliminary points are worth making.

6.3 First, room for debate over this issue arises in situations where the law governing the main contract is not English law i.e. it doesn't "match" the choice of English seat (e.g. German law, English seat). To save repetition, this is an assumed state of affairs in our comments below (unless specifically stated otherwise).

6.4 Second, our understanding of the proposal in this area (not advocated by the consultation paper, but as made at the Brick Court seminar) is that the UKSC's ruling in *Enka* should be replaced by a statutory rule which would prescribe that the law applicable to the arbitration agreement will be that of the seat (English law) unless there is an express agreement to the contrary *over and beyond* a choice of a law to govern the main contract. In other words the proposal follows that set out in the final sentence of 11.11 of the consultation paper.

6.5 We make this distinction at the outset to be clear that the proposal is no replication of *Enka*'s "default" rule – it is different in nature. *Enka*'s "default" rule (that the law of the seat applies to an arbitration agreement) finds application where the parties are found to have made *no* choice of law (express or implied) in favour of their main contract or the arbitration agreement (i.e. the arbitration agreement is not specifically addressed and the law applicable to the main contract is determined by *absence of choice* rules). In *Enka* the majority found that, in such circumstances, the law of the seat would apply as it had the "closest and most real connection" to the arbitration agreement. That "default" rule therefore applies in more exceptional cases (the terminology of a "default" rule is perhaps, therefore, a little unhelpful) and, in any event, would not be affected by the proposal.

6.6 Instead, the proposal targets the far more common case in which the parties *will* have expressed a governing law of their main contract. In that situation *Enka* (assuming that the parties have not explicitly addressed the law applicable to their arbitration agreement) gives primacy to the law applicable to the main contract. It is this situation that the proposal would change. It may also have an indirect effect: in recent years parties have increasingly opted to explicitly address the law applicable to their arbitration clause in order to remove the possibility of the type of debates over interpretation that have arisen in the case law up to and including *Enka*. In doing so a choice needs to be made; in practice the principal

candidates being the law of the main contract, or the law of the seat.¹⁷ The reasons for the general law adopting one starting point over another may also influence that decision.

6.7 Is it, therefore, “better” for the law of the seat to be that starting point? We suggest not, for two reasons.

6.8 **First**, the general alignment with the law chosen by the parties to govern their main contract that *Enka* effects has important practical considerations behind it.¹⁸ In this respect the considerations set out in the majority judgment of Lords Hamblen and Leggatt at [53]¹⁹ are generally instructive. In particular, as pointed out at [53 (iv)] most commercial parties see a contract as a contract. This insight carries an important practical consequence which is that it is most reasonable to proceed on the basis that there is a general expectation that the applicable law of the contract will be what governs all aspects of it (including how these apply to an arbitration clause) such as: formation, substantive validity, who the parties are, interpretation and effect, and ancillary issues such as how a contract may be varied. In such circumstances, subjecting the arbitration agreement to the same law therefore minimises the potential for unforeseen consequences in respect of these issues – such as, for example, English law taking a different view as to which entities are party to the arbitration clause (as opposed to whom may be bound to the substantive contractual obligations under the main, foreign law, governed contract). Relatedly, a further consequence of the applicable law of the arbitration agreement differing from that of the main contract, would therefore also be potential additional cost, and complexity, at the drafting stage - as there may be a need for an English lawyer to advise on contractual aspects of the arbitration clause in the context of the operation of an (otherwise) foreign law governed contract.²⁰ This is avoided if the law applicable to the main contract is the same as that applicable to the arbitration clause.

6.9 In summary, as to this first point, the benefits of the alignment go to the contractual relationship between the main contract and the embedded arbitration agreement. Creating mismatches in that area raises the potential for issues in fundamental contractual aspects of the arbitration agreement to arise, such as formation and identity of parties. Separability, and scope (upon which the proposal tends to focus), are not the only components of an arbitration agreement.

6.10 **Second**, other reasons given for stepping away from *Enka*'s approach are, in our view, potentially overstated (in particular when weighed against the benefits of the main contract approach enumerated above). As we understand it, the reasons in support of the proposal are:

¹⁷ More exceptionally, provisions of institutional rules might effect a default choice. Generally the main institutions do not (whether placing provisions on such a matter in institutional rules is the most transparent approach might be open to debate) but the LMAA Terms (paragraph 6) are an example. Article 16.4 of the LCIA Rules is also sometimes cited as an example, but its wording (...law *applicable at the seat of arbitration*...) (emphasis added) might suggest that it is a provision of a subtly different nature; namely an anterior instruction to the tribunal to apply, to the arbitration agreement, the law which would be applied at the seat of arbitration as a result of the seat's rules conflict of law rules (c.f. Art 16.3 of the 2012 version of the rule of the, now defunct, LCIA-MIAC Rules referring to "...arbitration law of the seat of arbitration...").

¹⁸ To the extent that advocates for change suggest that *Enka* is only concerned to effect a correct result on the relevant conflict of laws rules, rather than about practical outcomes, these important aspects of the decision are overlooked.

¹⁹ Lord Burrows makes similar points at [235-239]. Unlike the majority, he (and Lord Sales) thought that the “main contract” approach could *also* be read through into the no choice/closest and most real connection scenario. However, it is apparent that issues in these were also given by him in support of reading that approach into situations where there is a choice in favour of the main contract (see [257(iii)]).

²⁰ The applicable law of the arbitration agreement will determine matters such as, for example, whether it is validly formed; as examples see *Midgulf International Ltd v Groupe Chimiche Tunisien* [2010] EWCA Civ 66; *Abuja International Hotels Ltd v Meridian SAS* [2012] EWHC 87 (Comm).

6.10.1 *The main contract approach involves more complexity as it requires pleading of the relevant foreign law, instead of English law, if issues concerning, for example, interpretation and scope of the arbitration agreement arise. This does not seem a particularly significant consideration; the parties substantive relationship will be governed by that foreign law in any event so they will have already have obtained advice, and be pleading, that law for the purposes of the dispute. In some ways, the point therefore works the other way (i.e. it is more “efficient” to continue with foreign law in all contractual aspects). Also, insofar as points need to be taken before the English courts, the UKSC has recently paved the way for a more flexible procedural treatment of such issues.²¹*

6.10.2 *The main contract approach introduces complexity as, due to Enka’s approach to s.4(5), it requires a process of characterisation of the non-mandatory provisions of the AA into substantive provisions (which are disapplied in favour of the law applicable to the arbitration agreement, including insofar as that law is silent on the point) and those which are procedural (which are not). As to this:*

- (i) It is important to note that, in *Enka*, the majority’s judgment was clear that the law applicable to the arbitration agreement determines issues of its “*validity and scope*”²². Accordingly, where the parties have chosen a law applicable to their arbitration agreement, it is *those issues* that the choice covers. In turn, it is that choice, and its scope, which then falls to be applied within the context of s.4(5) and the assessment of which non-mandatory provisions are affected. That is apparent from the fact that this was the test/criterion applied to determine whether the non-mandatory provisions cited in support of Enka’s case on this aspect of applicable law were “substantive or procedural”.²³
- (ii) Whilst the UKSC did accept,²⁴ in line with the DAC’s observations, that the process might not always be straightforward, we suggest that this approach provides a workable, narrowly framed, framework test which should have many non-mandatory provisions outside its ambit. Accordingly, it would be an overstatement to suggest that this is a test which draws into doubt the application of every non-mandatory provision of the act, and [92] provides an illustration of its working, and its likely reach. Furthermore, even on Enka’s case before the Court of Appeal and UKSC (which would have been formulated before the above observations of the UKSC) it does not appear that a vast number of provisions of the AA were invoked in support of its case

²¹ *FS Cairo (Nile Plaza) LLC v Lady Brownlie* [2021] UKSC 45 at [148]. See also the Commercial Court Guide (2022) at H3.

²² See, for example, [1,2 and 69]

²³ *Enka* at [92], in particular “Of these provisions, only section 7 which codifies the principle of separability *concerns the validity or scope* of the arbitration agreement” (emphasis added). To explain the context of this paragraph: part of Enka’s argument in support of a general rule in favour of the law of the seat where the parties have chosen a law to govern their main contract was that, in light of the combination of the UKSC’s approach to applicable law and s.4(5), “numerous” non-mandatory provisions of the AA would be disapplied. This part of the UKSC’s reasoning was, therefore, part of the Court’s analysis as to whether that was the case. As can be seen from [91-93] it did not agree with Enka’s analysis on this point.

²⁴ At [93].

that many provisions were susceptible to “substantive/overlap” characterisation.²⁵

- 6.11** Therefore, to summarise, it appears that the proposal would have the effect of substituting in *contractual* complexity in favour of, potentially, lessening issues concerning *dispute procedure*, which, in any event, may be tolerably provided for by the general law. We do not see that equation as justifying a statutory overrule of the position established by *Enka*.
- 6.12** Finally, we deal with two related issues that arise in the consultation paper.
- The proposals regarding separability (consultation question 28).*
- 6.13** As the UKSC recognised in *Enka*, s.7 *does* concern the validity and scope of the arbitration agreement, is non-mandatory, and is, therefore, under s.4(5), sensitive to a foreign applicable law of the arbitration agreement.
- 6.14** Making s.7 mandatory would, therefore, albeit to a limited extent, be a manifestation of a rule that the arbitration agreement should be governed by the law of the seat. Although this appears as a stand-alone issue in Chapter 10 (Minor Reforms) of the consultation paper we suggest it would be more consistent to consider it, holistically, alongside the above issues.
- 6.15** In that respect, the case for a different approach here also forms part of the case for a different approach to *Enka* – that it would be *better* to move away from an approach which allows an application of foreign law to “oust” separability (or, to take another example, *Fiona Trust* principles of interpretation of scope). It is not clear why this is so. That view is somewhat parochial as it ignores the competing principle in play; that of party autonomy. If the parties have chosen a law which takes a different approach to this issue, why should the AA impose it on them, and why this aspect of validity and scope and not others? Where the parties choose foreign law to govern their contract, if this follows through into their arbitration agreement (whether by a general choice of law of the main contract, or a specific choice in the arbitration agreement), then it is open to them, in that choice, to choose a law which operates in a way that they see fit (whether including principles of separability or not) and the AA’s regime will give effect to that. As a matter of principle and practice there is nothing objectionable to that, and is consistent with an general approach to applicable law which gives primary to party choice. Of course, to avoid issues, parties will be well advised to check their arbitration agreement works appropriately under their chosen law, but that is no extra burden insofar as parties, in any event, need to consider the appropriate law to govern their contractual relationship more generally.
- 6.16** Finally, the case for making s.7 mandatory tends not to look at separability in the round; it only considers the fact pattern where the applicable law takes a narrower view to separability than English law. It is conceivable that the applicable law takes a *wider* view; for example in “contract formation” cases²⁶ an applicable law that does not apply strict contractual principles (e.g. French law) might take a different view and see an arbitration agreement as having been formed. A mandatory application of English law on separability would however, presumably, deny that effect. It is not clear why that should be the case if the parties have chosen such a law. This illustrates one benefit of leaving the AA to reflect an over-arching

²⁵ See, for example, the Court of Appeal’s judgment [2020] EWCA Civ 574 at [96]. The discussion and categorisation of the sections in this paragraph would now need to be read differently in light of the UKSC’s approach to s.4(5) and its observations at [92].

²⁶ See the terminology, and reasoning, of the Court of Appeal in its recent decision in *DHL v Gemini* [2022] EWCA Civ 1555.

principle of party autonomy, rather than enacting what is, ultimately, a value judgment as to which system of national law has a best approach.

The observations concerning s.4(5) at 116-117 of the consultation paper.

- 6.17** In light of the observations regarding *Enka*, above, we agree that there is not a clear case for reforming this section to be in line with the (somewhat difficult) interpretation adopted in, for example, *NIOC v Crescent Petroleum* [2016] 2 Lloyd's Rep 146. *Enka* has provided important clarification to the process of categorisation. Furthermore, as a matter of principle, it would be a significant step away from the result, and regime, contemplated by the DAC report; *toward* one which gives primacy to rules of the seat (and, in this case, in favour of rules which are generally non-mandatory in any event).

7 Other reforms

- 7.1** In this section we make some shorter comments on other areas in the consultation paper as follows

Independence and impartiality (consultation questions 2-4)

- 7.2** We agree that a new duty of independence in the AA may add little to the current regime. If properly framed and qualified it would likely, consistent with the observations of the DAC, bleed into considerations of impartiality in any event (as, in this regard, it is not our understanding that absolute independence, which would likely be unworkable, is under consideration).

- 7.3** Conversely, we are not entirely convinced of the need for the AA to expressly address an arbitrator's duty of disclosure. The principle of disclosure is stated in the AA insofar as it is part of the duty of impartiality; and attempts to codify a flexible, fact sensitive duty (as set out by the UKSC in *Haliburton v Chubb* [2020] UKSC 48) seem to present similar issues as the consultation paper gives for declining to address confidentiality. Even if this is limited to a codified general duty, that poses the question of whether any departure from previous cases was intended, particularly the further the provision progresses into providing more specific detail, such as relevant state of knowledge.

Section 39 (power to make provisional awards) (consultation question 32)

- 7.4** In general, the debate surrounding this section appears to be whether its wording can extend to the situation in which the parties have agreed the tribunal can make a provisional *award* (the wording of the section seems to raise no such doubts about a procedural order short of that). In a recent decision, post-dating the consultation paper, Andrew Baker J was of the view that it would; albeit on his view, the parties agreement in that case did not actually extend to provisional *awards*; so the interim payment award in that case could only stand as a procedural order.²⁷

- 7.5** Given that s.39 is a provision which expressly *facilitates* party agreement (rather than provides default rules), we are not sure that it is a problem if awards made under this section would be subject to the various methods of challenge under the AA. That would just be the consequence of the parties' choice. Likewise the nature of the section means that this needn't be an either/or debate. In line with the observations above, and the nature of the section, the better view would appear to be that it might benefit from being reworded to

²⁷ See *GF v HVF and others* [2022] EWHC 2470 (Comm)

expressly confirm, and consistently in the title, that the parties are free to agree that the tribunal has power to make provisional orders *or awards*.

Transitional provisions

- 7.6** The consultation paper also asks for input on any other issues which occur to respondents. In this respect, we would like to highlight the need for consideration of appropriate transitional provisions. Generally speaking these can be very helpful in reducing any uncertainty surrounding the application of new law.
- 7.7** The AA incorporated provisions which, generally speaking, meant that the previous law continued to apply to arbitral proceedings, or court applications, commenced before 31 January 1997 (and court applications made on or after that date but related to arbitral proceedings commenced before).²⁸ The Law Commission might consider a similar approach would be appropriate to any reform, particularly insofar as it is procedural. Insofar as any reform might go to imposing solutions as to the validity and scope of an arbitration agreement, it may be more appropriate to tie that aspect to arbitration agreements concluded on or after the reform comes into force in order to avoid any unforeseen, and retrospective effect to parties' concluded bargains.
- 7.8** A final, prosaic, but practical, suggestion is that any reform could usefully avoid renumbering sections of the AA. Sometimes, for example, parties will refer, in arbitration agreements, to non-mandatory provisions by section number and so avoiding renumbering would avoid any issues in that regard.

Linklaters LLP, 15 December 2022

²⁸ S.109(2) and The Arbitration Act 1996 (Commencement No.1) Order 1996 SI 1996/3146

Response ID ANON-PT57-RUBU-E

Submitted to Law Commission Consultation: Review of the Arbitration Act 1996
Submitted on 2022-12-15 19:21:52

About you

What is your name?

Name:

[REDACTED]

What is the name of your organisation?

Enter the name of your organisation:

Lloyd's Market Association

Are you responding to this consultation in a personal capacity or on behalf of your organisation?

Response on behalf of organisation

If other, please state::

What is your email address?

Email:

[REDACTED]

What is your telephone number?

Telephone number:

[REDACTED]

If you want the information that you provide in response to this consultation to be treated as confidential, please explain to us why you regard the information as confidential. As explained in our privacy notice, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

Please explain to us why you regard the information as confidential:

Consultation questions

Consultation Question 1: 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?

Agree

Please share your views below.:

We agree that an obligation of confidentiality should not be codified. There is a risk in codifying something which has a list of exceptions, and potentially missing an exception could lead to uncertainty.

Consultation Question 2: We provisionally conclude that the Arbitration Act 1996 should not impose a duty of independence on arbitrators. Do you agree?

Agree

Please share your views below.:

In the insurance industry, the pool of arbitrators available to choose from is shallow. Frequently, the qualification requirement for an arbitrator in an (re)insurance dispute is at least 10 years' experience as a market practitioner in the (re)insurance industry. Introducing a requirement of independence would make it much harder to find suitably qualified arbitrators. Furthermore, independence is not a requirement of our judiciary. For example, judges (or practising lawyers in the case of deputy judges which work part time in the judiciary) often adjudicate cases where one or more of the advocates know the judge either socially or through work.

Consultation Question 3: 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. Do you agree?

Agree

Please share your views below.:

It is sensible to codify the duty so that the duty is set out in one place. It also emphasises the requirement.

Consultation Question 4: Should the Arbitration Act 1996 specify the state of knowledge required of an arbitrator's duty of disclosure, and why?

Yes

Please share your views below.:

It should mean that there is less uncertainty around the exact extent of the obligation.

Consultation Question 5: 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?

What they ought to know

Please share your views below.:

Consultation Question 6:

More broadly justified

Please share your views below.:

Ultimately, arbitration clauses are creatures of agreement and the agreement of the parties should be respected to the maximum extent possible. The "more broadly justified" test allows for that principle to be acted upon.

Consultation Question 7:

Agree

Please share your views below.:

We would agree with the proposal, which would appear to strike the right balance between diversity, equality and the right of the parties to come to their own agreement as to the qualities of an arbitrator in all the surrounding circumstances.

Consultation Question 8: Should arbitrators incur liability for resignation at all, and why?

Liability for resignation

Please share your views below.:

Yes- if they have been negligent in accepting the appointment.

Consultation Question 9: Should arbitrators incur liability for resignation only if the resignation is proved to be unreasonable?

Yes

Please share your views below.:

We believe arbitrators should incur liability if they have been negligent in accepting the appointment and in particular if that has put the parties to expense before agreeing to resign. We consider it will encourage more care in the acceptance of appointments at the time that the arbitration is commenced.

Consultation Question 10: 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. Do you agree?

Disagree

Please share your views below.:

If the arbitrator refuses to resign and has to be removed they should pay the costs. However if one of the parties supports them in refusing to resign the costs should be paid by that party to avoid the risk that arbitrators feel under pressure to resign due to the potential costs.

Consultation Question 11: 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. Do you agree?

Agree

Please share your views below.:

We believe that summary disposal will save time and costs in terms of disposing of unmeritorious claims, or narrowing the issues between the parties.

Consultation Question 12: 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. Do you agree?

Agree

Please share your views below.:

This will narrow the scope for arguments by a party whose case has been struck out as a result of the summary procedure to argue that they were railroaded into the summary procedure in the first place, by giving all parties an opportunity to air the views as to the appropriateness of such procedure at the outset.

Consultation Question 13: We provisionally propose that the Arbitration Act 1996 should stipulate the threshold for success in any summary procedure. Do you agree?

Agree

Please share your views below.:

We think this is necessary to promote certainty and consistency.

Consultation Question 14: 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. Do you agree?

Agree

Please share your views below.:

We agree that the "no real prospect of success" test is appropriate. It is consistent with the test in CPR 24.2(i).

Consultation Question 15: 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. Do you agree?

Agree

Please share your views below.:

We agree with the proposal to clarify s44(2)(a) on the basis that there appears to be overlap with s43. However, we do not believe this amendment to be crucial.

Consultation Question 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?

Yes

Please share your views below.:

Given the varying authorities on the point, we believe that such clarification would be welcome.

Consultation Question 17: 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. Do you agree?

Agree

Please share your views below.:

We agree with the proposal. Third parties against whom an order of the Court has been made should have the usual rights of appeal.

Consultation Question 18: We provisionally conclude that the provisions of the Arbitration Act 1996 should not apply generally to emergency arbitrators. Do you agree?

Other

Please share your views below.:

It is not clear how the actions of an emergency arbitrator are governed if the Arbitration Act does not apply to them. However, it may be necessary to specifically disapply some time scales.

Consultation Question 19: 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?

Disagree

Please share your views below.:

If there is a dispute about for instance the appointment of an emergency arbitrator or their jurisdiction it is not clear how this would be handled.

Consultation Question 20: Do you think that section 44(5) of the Arbitration Act 1996 should be repealed, and why?

No

Please share your views below.:

We do not agree with the proposal to repeal s44(5) of the Act on the basis of redundancy. We note what is said about the perception of stakeholders, but we believe that removing the provision will bring about its own uncertainties.

Consultation Question 21:

Peremptory order

Please share your views below.:

The purpose of an emergency arbitrator is to deal with matters quickly. A peremptory order that can be enforced by the Court would be appropriate

Consultation Question 22:

Agree

Please share your views below.:

It would be unfair to allow a rehearing with the extra costs and risks of inconsistency involved, especially with regard to oral witness evidence

Consultation Question 23: 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?

Yes

Please share your views below.:

We think that that conclusion in relation to s32 follows naturally on from any conclusion that rights under s67 should be restricted.

Consultation Question 24: We provisionally conclude that our proposed change to section 67 of the Arbitration Act 1996 would not require any similar change to section 103. Do you agree?

Agree

Please share your views below.:

There appears to be no reason to necessitate the application of the same restriction to s103 and this means that we continue to be aligned to Article V of the New York convention.

Consultation Question 25: 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. Do you agree?

Agree

Please share your views below.:

If a party succeeds in its challenge as to the substantive jurisdiction of the tribunal, there should be no further work for that tribunal to do. We believe that the risk, however, is theoretical because if an award is set aside on the basis of a lack of jurisdiction, it would be foolhardy of the losing party to seek to rely on the work of the same tribunal, if that tribunal accepted such work in the first place.

Consultation Question 26: 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?

Agree

Please share your views below.:

We agree with the Commission's proposal. It is the most efficient way of disposing of proceedings.

Consultation Question 27: 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?

Disagree

Please share your views below.:

We take the view that the test for allowing appeals is too strict as it is operating as a bar to development of precedent in insurance and reinsurance. While issues are being considered in arbitrations, they are not becoming part of the body of English case law.

The number of section 69 applications issued in the Commercial Court as a whole (i.e. not just for insurance / reinsurance) for the 2019, 2020, and 2021 years was 54, 47 and 35 respectively. Of those, permission was granted in 9, 4, and 5 applications for each of the named years respectively (the 2021 figures were incomplete).

Whilst it is not possible to draw concrete conclusions from these numbers without more research, the number of times permission was granted did appear to us to be much lower than expected, given that this represented the totality of all applications and insurance / reinsurance applications would form a subset of this number.

Traditionally parties have used English law for insurance and reinsurance disputes because of the certainty and pragmatism built up by a substantial body of case law. This is becoming diminished as disputes are dealt with in arbitration and do not guide subsequent disputes. We believe that an appeals on points of law are necessary for the development of the law. Robert Finch made the following point in his Cedric Barclay memorial lecture of 2004:

"The Commercial Court needs to have a regular throughflow of commercial cases derived from the sort of everyday commercial disputes that arise in arbitrations in order to continue to develop and refine English commercial law in a way that is most relevant to the market."

This was echoed, as the Commission points out, by Lord Thomas in his Bailii Lecture of 2016. On the numbers of successful applications quoted above, at least on a superficial level, this throughflow is not happening.

We do not agree with the Commission's reasons for not accepting these concerns. For example, at 9.38 of its paper, the Commission suggests that the answer is not modification of s69, but rather for the parties to choose Court proceedings instead of arbitration. It discounts the multitude of reasons why parties choose arbitration, one of the main ones being that the parties wish to gain the benefit of the New York convention to avoid the risk that if they stipulate the English Courts, this might be ignored by the US Courts. Insurers and reinsurers often stipulate arbitration to ensure that they do not end up in a jurisdiction which has little experience of insurance and reinsurance. It is also generally easier to enforce an arbitration award in a foreign jurisdiction without the risk that the Court in the insured or reinsured's jurisdiction might require a rehearing in the "home" Court.

Parties may also choose arbitration if they wish for disputes to be heard by experienced market practitioners, given that the London market (and especially the Lloyd's market) has many customs and practices which are unique to (re)insurance.

The choice of arbitration as a dispute resolution mechanism does not indicate that the parties wish to have their dispute subject to a lesser form of law, one where mistakes as to law are tolerated. Rather, the parties expect the arbitral panel to have made its decision in accordance with the law. If they do not wish to have the law strictly applied they have the option to use an honourable engagement clause.

In the event of any perceived error of law by an arbitral tribunal, the parties ought to be able to have that concern aired, and the appropriate place for that to happen is before the Court.

We also think that the UK's approach in allowing appeals on points of law is a unique selling point contributing to the UK's status as a top arbitration destination – it offers, in the words of Robert Finch, "something different". It is notable that Singapore, a jurisdiction which competes with England for the position of top arbitration destination, is currently considering whether to allow appeals on points of law.

Section 69(3)(c) of the Act sets out the criteria which must be met for the Court to grant leave to appeal as follows:

"(3)Leave to appeal shall be given only if the court is satisfied—

- (a)that the determination of the question will substantially affect the rights of one or more of the parties,
- (b)that the question is one which the tribunal was asked to determine,
- (c)that, on the basis of the findings of fact in the award—
 - (i)the decision of the tribunal on the question is obviously wrong, or
 - (ii)the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and
- (d)that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question."

In *HMV UK Limited v Propinvest Friar Limited Partnership* [2011] EWCA Civ 1708, Arden LJ held that "obviously wrong" meant "being unarguable or making a false leap in logic or reaching a result for which there was no reasonable explanation". This, absent a question of general public importance, makes it very difficult to obtain leave, and it would appear to be borne out by the numbers of times permission to appeal on the basis of s69 is granted (see above).

We understand that s69 is a codification of the principles set out in the *Nema*, which itself restricted the flow of appeals following the Arbitration Act 1979. However, we believe that the pendulum has now swung too far in the opposite direction and the current restrictive approach to giving leave to appeal should be re-examined.

We would suggest that the burden to allow an appeal from an arbitration award under 3(c)(i) should be wider such as “a good arguable case that the decision of the tribunal on the question is wrong”

Finally, it should be borne in mind that the parties can contract out of s69 should they so wish, if finality was an overriding concern.

Consultation Question 28: Do you think that section 7 of the Arbitration Act 1996 (separability of arbitration agreement) should be mandatory, and why?

Yes

Please share your views below.:

This would be a clear position for the parties and avoid any risk of a dispute

Consultation Question 29: 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?

Agree

Please share your views below.:

Amendment in this regard would be a tidy up given the comments of Lord Nicholls in *Inco Europe Ltd v First Choice*.

Consultation Question 30: 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?

Yes

Please share your views below.:

We agree with the Commission’s observation that it is peculiar that permission of the tribunal for the Court to consider the application in question is not enough. We take into account that sub sections 2(b)(i)to(iii) in both sections 32 and 45 are simply hurdles to the Court considering the application but do not provide guidance / rules to the Court as to how it should decide applications under these sections.

Consultation Question 31: 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?

Yes

Please share your views below.:

Although not strictly necessary it would provide clarity and would assist foreign courts in ensuring that the arbitration award is valid.

Consultation Question 32: Do you think that section 39 of the Arbitration Act 1996 should be amended to refer to “orders” (rather than “awards”), and why?

Yes

Please share your views below.:

This would be a simple tidy up amendment and would remove any ambiguity.

Consultation Question 33: Do you think that section 39(1) of the Arbitration Act 1996 should be amended to refer to “remedies” (rather than “relief”), and why?

Yes

Please share your views below.:

We agree with the Commission’s proposal to use ‘remedies’ instead of ‘relief’ for consistency and the avoidance of any confusion. We do not see any adverse consequences of making this change.

Consultation Question 34: 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?

Agree

Please share your views below.:

The amendment will provide useful clarification.

Consultation Question 35: 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?

Other

Please share your views below.:

The Commission's paper suggests that there is some doubt as to how s70(8) should be applied. We therefore think that the section could benefit from being clarified.

Consultation Question 36: We provisionally propose that sections 85 to 87 of the Arbitration Act 1996 (on domestic arbitration agreements) should be repealed. Do you agree?

Agree

Please share your views below.:

The provisions have never been made effective and therefore not used so are otiose.

Consultation Question 37: Do you think that any of the suggestions discussed in Chapter 11 needs revisiting in full, and if so, why?

Please share your views below.:

Consultation Question 38: 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?

Please share your views below.:



London Beth Din

Court of the Chief Rabbi

305 Ballards Lane, London, N12 8GB

Tel: +44 (0)20 8343 6270 Fax: +44 (0)20 8343 6257

Email: info@bethdin.org.uk

8th December 2023

arbitration@lawcommission.gov.uk

Law Commission Review of Arbitration Act 1996

Law Commission Review of the Arbitration Act 1996

We are writing as the London Beth Din, the Court of the Chief Rabbi, being an ecclesiastical Court dealing, inter alia, with Jewish divorce, conversions to Judaism, the certification of food as kosher and certification of Jewish status for Synagogue membership, marriage etc.

However, for over a century we have also been holding arbitrations, applying Jewish law to civil disputes between Jewish parties. In recent decades, such arbitrations have been administered within the terms of the Arbitration Act and our Awards have been enforced by the Courts of England and Wales.

Additionally, our Awards have often been upheld by English Courts when a losing party has sought to challenge the Award on legal or procedural grounds.

Importantly, when litigants apply to us to adjudicate their dispute, they do so pursuant to an obligation in Jewish law to resolve such disputes before a Jewish Court, with Jewish law applying. It should be stressed however that Jewish law will often apply English Law in commercial disputes, where it is understood that parties entered transactions and legal relationships, within the context of English civil law.

We should point out that in general, it is parties who already have a dispute, who then apply to us to adjudicate that dispute, in the knowledge of how our panel is constituted, ie that it will be three Dayanim (Orthodox rabbinical judges, who will always be both Jewish and male). In rare cases, a contract or other legal agreement between Jewish parties will incorporate an arbitration clause, whereby disputes arising out of or in relation to the contract are to be decided by our Beth Din. In this case too, the parties are aware of the essential constitution of the panel that will be hearing the arbitration.

We are concerned that under the Discrimination proposals in the Law Commission Review (1.31 to 1.38) we may be precluded from holding such arbitrations, or the awards would be rendered unenforceable in English law, because the Dayanim, being both Jewish and male, exhibit two protected characteristics under the Equality Act 2010.

We are not reassured by the proposal that 'discrimination' may be permitted when constituting 'a proportionate means of achieving a legitimate aim,' not least because this is bound to lead to

litigation and consequent uncertainty as to what constitutes 'proportionate means' and what amounts to a 'legitimate aim'.

In Consultation Question 7 there is a proposal that

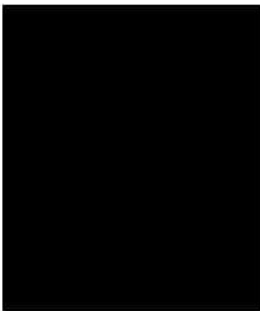
(2) any agreement between the parties in relation to the arbitrator's protected characteristic(s) should be unenforceable unless in the context of that arbitration, requiring the arbitrator to have that protected characteristic is a proportionate means of achieving a legitimate aim. "Protected characteristics" would be those identified in section 4 of the Equality Act 2010.

If applied, this could render all our arbitration Awards unenforceable and would negate the ability of the Beth Din to arbitrate on matters where the parties specifically wish them to do so. This will likely not result in parties turning to a different panel; they would likely still come to a Bath Din (this one or another) but without the protection and support of the Arbitration Act. We doubt that this is the intended aim of these proposals.

We therefore respectfully ask the Law Commission to take in to account our Beth Din and the other Jewish Religious Tribunals (collectively known as Batei Din) which adjudicate disputes. We are also aware that other religious communities may also have similar tribunals, in which the same or similar concerns may apply.

More generally, and with respect, we are a little surprised that these proposals were published without anyone from the Law Commission approaching our Beth Din, given the well-known and important role which it had played in the legal community of this country for many decades.

It goes without saying that we are happy to assist the Law Commission with its further work - indeed, we are anxious to do so, in order that the needs of our community are both understood, and respected.



The LCIA's Response to the Law Commission's Consultation Paper: Review of the Arbitration Act 1996

The LCIA has reviewed the Law Commission's Consultation Paper dated 22 September 2022 ("Consultation Paper") and has reconsulted its users. While we have already provided some feedback to the Law Commission, this written response integrates that prior feedback with additional comments that aim to address some of the Law Commission's proposals and consultation questions. In addition, we address certain points reflected in the Consultation Paper that have been raised by other stakeholders and points which have been discussed publicly in the arbitration community.

Accordingly, in this written response, we: (i) reiterate where we consider that no change to the Arbitration Act 1996 ("Act") is necessary; (ii) make additional observations in light of some of the Law Commission's proposals; and (iii) address one issue referenced in the Consultation Paper that was not short-listed for review, an issue we did not address previously, and which warrants further discussion. This note is not a comprehensive response to all of the consultation questions raised; rather we have distilled our responses to those issues that impact the LCIA and its users most significantly.

1. Duty of confidentiality: Chapter 2.

As set out previously, options include the following. (i) Do nothing, (ii) attempt a statement of a fulsome code (like Scotland or Australia or Hong Kong (see section 18 Arbitration Ordinance), or (iii) adopt a middle ground: unless the parties otherwise agree, arbitration proceedings are private and confidential as a general principle; those seeking to depart from such principle must show lawful reason.

We remain of the view that attempting a general statement of confidentiality is unlikely to be useful. A number of carve-outs or exceptions would need to be set out and it is not necessarily useful or viable to attempt a comprehensive definition that embraces them all. Further, to do so fixes the standard and removes the ability of the common law to vary the standard (or clarify and modify exceptions) as circumstances dictate.

Having reviewed the Consultation Paper and having considered submissions from other stakeholders as referenced both in the Consultation Paper and in public discussions, we understand that the Law Commission has come to the same conclusion. We are therefore fully supportive of the Law Commission's proposals not to include provisions dealing with confidentiality and leaving confidentiality in arbitration to be addressed by the courts.

2. Duties of independence and disclosure: Chapter 3.

As set out previously, options include the following: (i) provide an express duty of independence (as well as impartiality); (ii) provide that an arbitrator has a continuing duty to disclose any circumstance which might reasonably give rise to justifiable doubts as to their impartiality (or independence).

Independence

On balance, we remain of the view, and therefore agree with the Law Commission, that it is not necessary to introduce an express duty of independence. Impartiality is well understood and is a broad concept. Generally speaking, impartiality in English law is applied in line with international practice, and we consider that to be desirable. However, as we noted previously, a portion of our international users have suggested that the introduction of an express duty of independence (alongside impartiality) might be helpful as it would align expressly the UK with international practice, where duties of independence and impartiality often appear together.

Our conclusion that an explicit reference to a duty of independence is not necessary, is predicated on the understanding that, as the law stands currently, the notion of apparent bias in international arbitration encompasses both lack of impartiality and independence. Moreover, case law demonstrates that independence is intertwined with duties of fairness and impartiality (and indeed the Consultation Paper states that the two concepts are “tied up”).¹ It is on this basis that the LCIA Rules contain explicit obligations of both independence and impartiality (Article 5.3).²

However, and for the reasons set out below, this does not imply that the duty of independence is not important (or secondary to the duty of impartiality) in international arbitration, as the Consultation Paper seems to suggest.³ We request therefore that this suggestion is corrected or clarified, failing which an explicit dual statutory provision should be reconsidered.

¹ *Halliburton Co v Chubb Bermuda Insurance Ltd* [2020] UKSC 48: “The 1996 Act contains no provision which directly addresses the arbitrator’s independence and prior knowledge, but it imposes the centrally important obligations of fairness and impartiality. Therefore, an arbitrator would be in breach of the requirements of the 1996 Act if his or her lack of independence compromised the duties of fairness and impartiality.” [126]; Para. 3.10.

² Article 5.3 of the LCIA Rules 2020 and LCIA Rules 2014 and Article 5.2 of the LCIA Rules 1998.

³ Para. 3.6.

Disclosure

Our position remains the same in that we favour the introduction of a statutory duty of disclosure. The scope of the duty at common law is unlikely to change and doing so promotes clarity. The provision should make clear that the duty of disclosure does not require an arbitrator to breach confidentiality in respect of other arbitration proceedings in which he or she may be involved.

Following our review of the Consultation Paper and the Law Commission's conclusions on this issue, we make three additional observations. First, regardless of the standard to be applied with respect to the obligation of disclosure, we favour an explicit and continuing disclosure obligation. Second, this should be based upon the arbitrator's actual knowledge *and* what the arbitrator ought to know after making reasonable enquiries, given that this aligns with international arbitration practice including LCIA practice.

Third, as the law stands arbitrators are under a legal duty to disclose facts and circumstances that would or might reasonably give rise to an appearance of bias. The notion of apparent bias encompasses both lack of impartiality and independence. Accordingly, it is recognised in international arbitration practice that arbitrators are under a duty to disclose any circumstances which might reasonably give rise to justifiable doubts as to their impartiality and/or their independence. It follows that a statutory duty of disclosure should also encompass both duties. It is on this basis that we do not consider it necessary for the Act to address explicitly disclosure against both impartiality and independence.

Nonetheless, the disclosure obligation should be framed in terms of "apparent bias" rather than the more limited notion of "impartiality" as proposed. For the reasons stated above, the more limited notion is inconsistent with the law as it stands currently and is undesirable. If the disclosure obligation is not framed in terms of apparent bias, a reference to both impartiality and independence will be necessary.

3. Discrimination: Chapter 4.

In our prior feedback we noted that we are in favour of the following potential amendments: provide that, in the context of arbitral appointments, parties cannot discriminate on the basis of a protected characteristic, unless it is an occupational requirement (such as nationality or religion might be); amend the language of the Act to be gender neutral.

We are in favour of all efforts to eradicate discrimination and are appreciative of the Law Commission's attention to this matter and desire to send a signal about diversity and equality. We therefore support the Law Commission's proposal of gender neutrality in the Act.

We obviously also support wholeheartedly, as a general proposition, the prohibition of discrimination in the appointment of arbitrators. We are not, however, convinced that the most effective way to achieve the aims set out in the Consultation Paper is to include an explicit and expressly confined obligation as currently proposed. In our view, it is not desirable to connect the Act to a national standard of anti-discrimination laws, namely the Equality Act 2010. Instead, the relevant standards should be left to evolve organically; particularly because there may be other standards that are relevant in any given case.

In addition, it is not desirable to import the inherent complexities of the Equality Act 2010 into the Act, not least because the Act is intended to attract users from overseas, who are not necessarily represented by English law qualified counsel. The interpretation and application of "protected characteristics" and what amounts to a "proportionate means of achieving a legitimate aim" is uncertain and we can reasonably foresee parties disputing the interpretation of these concepts which will increase inevitably the time and costs associated with resolution of the dispute.

In sum, our concern with the particular proposal in the Consultation Paper is that the standard as proposed may become outdated and counter-productive and also lead to a sub-category of disputes over the validity of protected characteristics.

In any event, we consider it important that the Law Commission clarifies its proposal with respect to nationality as a criterion in the selection of arbitrators. Our understanding of the Consultation Paper is that the Law Commission rightly supports the view that the requirement for an arbitrator to be of a certain nationality, or for nationality to be of a relevant consideration, may be considered to be "a proportionate means of achieving a legitimate aim", namely neutrality.⁴ However, given some uncertainty expressed about the meaning of the Consultation Paper on this point, we request respectfully that the Law Commission clarifies that contractual and institutional limitations relating to nationality are not discriminatory and thus are not prohibited by any explicit provision prohibiting discrimination.

⁴ Para. 4.15.

The Law Commission's proposed formulation also appears to create a presumption that an agreement in respect of a protected characteristic is unenforceable unless it can be justified as a "proportionate means of achieving a legitimate aim". The burden is therefore on the party seeking to rely upon the stipulated characteristic, rather than proceeding on the basis that a relevant agreement is valid. This presumption would be unhelpful and lead to uncertainty.

4. Section 29 (immunity of arbitrator): Chapter 5.

We remain in favour of providing that immunity extends to the costs of arbitration claims in court; and that immunity is retained following resignation, unless the resignation is shown to be unreasonable (or similar), and we accordingly support the Law Commission's proposals.

5. Summary disposal: Chapter 6.

In our previous feedback we suggested that the Act include provisions to empower expressly the tribunal, after giving the parties a reasonable opportunity to put their case, to proceed summarily to an order or award on the basis that: a statement of case/defence discloses no reasonable ground for bringing or defending the claim; or a matter has no real prospect of success or other compelling reason against its proceeding; or a matter is manifestly outside the jurisdiction of the tribunal.

Various institutional rules now include a provision allowing expressly early dismissal of a claim or defence on certain grounds; e.g. Art. 22.1(viii) of the LCIA Rules 2020.

On balance, even though the better view is that the law as it stands (in particular see sections 33 and 34 of the Act) allows for the tribunal to dismiss summarily claims or defences, in the interests of clarity we remain in favour of including a confirmatory statutory provision that, subject to the agreement of the parties, permits the tribunal to adopt a summary procedure to decide a claim or an issue. We therefore support the Law Commission's proposals in this regard.

However, we note that the statutory provision should also expressly empower the tribunal to proceed summarily to an order or award on the basis that a matter is manifestly outside the jurisdiction of the tribunal; a point that the Law Commission has not addressed specifically in the Consultation Paper.⁵ In order to avoid any suggestion that any statutory power is more limited than what is accepted in current law, the provision should also provide expressly for the power to dismiss summarily on the basis of jurisdiction.

As to the threshold for success in any summary procedure, while we are not suggesting that there is a material difference in practice, we consider that it is more appropriate to align the threshold to an existing international arbitration standard (such as “manifestly without merit” / “manifestly outside the jurisdiction of the tribunal”) than to import a national court-based standard such as “no real prospect of success” into international arbitration practice.

6. Emergency arbitrators: Chapter 7.

We remain of the view the Act should provide that section 44 (court powers in support of arbitral proceedings) is available despite the availability of emergency arbitration, by amending section 44(5).

Emergency arbitrator provisions did not exist when the Act was drafted or came into force. There are two main areas that we feel could be usefully clarified.

- a. That emergency arbitrators have the status of arbitrators under the Act (see for example the definition of “arbitral tribunal in section 2(1), Singapore International Arbitration Act (Cap. 143A)).
- b. In respect of section 44(5), amend it to make clear that an application to the court is not prohibited in circumstances where an application to an emergency arbitrator is available or may also be available (see in particular *Gerald Metals v Timis* [2016] EWHC 2327 (Ch); the court rejected an application for injunctive relief on the basis that the applicant had the ability to make an application to an emergency arbitrator).

⁵ While the Consultation Paper does propose provisionally that there be a non-mandatory provision which gives the arbitrators the power to adopt a summary procedure “to decide issues” which have no real prospect of success and no other compelling reason to continue to a full hearing (para. 6.2), it is not entirely clear whether the Law Commission intended “issues” to cover matters that are “manifestly outside the jurisdiction of the tribunal”. For the reasons stated, our preference is for the provision to address expressly the power to dismiss summarily on the basis of jurisdiction.

Having reviewed the Consultation Paper, we do not favour a complete repeal of section 44(5). Clarification in terms of (b) above is welcome, but to go further than that risks diminishing the significance and number of applications made to tribunals in non-emergency arbitrator related situations. It remains desirable that the tribunal should be the principal forum for interim measures applications thus reinforcing its overall control of the process.

In respect of the status of emergency arbitrators and their decisions, which may take the form of orders or awards pursuant to the LCIA Rules,⁶ we consider that it is desirable to provide, at least, that decisions of emergency arbitrators can be entered as an order of the court (along the lines of section 22B(3) of the Hong Kong Arbitration Ordinance (Cap. 609)). Experience in that jurisdiction suggests that this is a useful and well-regarded provision and gives teeth to decisions of emergency arbitrators, whether those decisions involve arbitrations seated in Hong Kong or elsewhere. We are not aware of difficulties that have arisen in terms of the court framing its order in similar terms to the decision of the emergency arbitrator, i.e., that the decision only subsists for a particular period of time or until a review by the main tribunal. We do not consider that the response to the suggestion at para. 7.46 of the Consultation Paper is therefore made out.

We also do not consider that there is any evidence that section 2 of the Singapore International Arbitration Act 1994 has caused difficulties in practice, in particular because appointments of emergency arbitrators are always made by institutions under their rules and hence court appointment powers do not come into play. Emergency arbitrators only exist because institutional rules provide for them; those institutions in turn deal with their appointment. The two points regarding appointment of emergency arbitrators at paras. 7.44-7.45 of the Consultation Paper are not likely to occur in practice; if it were thought otherwise, it could be clarified that the Act does not make provision for the appointment of emergency arbitrators. If a provision along the lines of the Hong Kong provision is included then we would not press for adoption of the Singapore approach, although we remain of the view that it is preferable to make it clear that at least some provisions of the Act do apply to emergency arbitrators; provisions of central importance include sections 33 and 34.

⁶ Article 9B of the LCIA Rules 2020 and LCIA Rules 2014.

7. Provide that section 44 can be used in respect of third parties: Chapter 7.

Section 44 sets out the court's powers to issue orders in support of the arbitral process (including by granting interim injunctions or assisting with the preservation and taking of evidence). There is some confusion in the case law about whether section 44 extends to third parties (*Cruz City v Unitech* [2014] EWHC 3704; *A and B v C, D and E* [2020] EWCA Civ 409, the Court of Appeal held that section 44(2)(a) does give the court the power to order the taking of evidence from a non-party – but left open the question of whether all orders under section 44(2) can be made against non-parties).

We continue to be in favour of making it clear that section 44 can be used in respect of third parties, without extending the actual powers of the court to make orders in respect of third parties or making any comment about the extent of such powers.

8. Section 67 (challenging jurisdiction): Chapter 8.

In our prior feedback, we considered whether the Act should be amended so that where a party participated in an arbitration and challenged jurisdiction, the tribunal's decision on jurisdiction could be challenged only by way of appeal. In these circumstances, permission to appeal would not be required, but the challenging party would not be entitled to a complete rehearing; rather some sort of threshold would have to be met.

We are not in favour of such an amendment. Jurisdiction is of course right at the very heart of the arbitral process. If a tribunal does not have jurisdiction, then it has no right or power to do anything. Introducing qualifications to a party's right to invoke the supervising court's right to consider this very basic question of whether a tribunal has jurisdiction introduces the risk that cases may then arise where a challenge under section 67 would fail even though a tribunal did not have or might not have jurisdiction. It would also raise difficult questions about the compatibility of this provision with a party's right to a jurisdictional review of an award upon enforcement under the New York Convention.

More generally, we do not consider that there are material difficulties with the way section 67 is operating, including that the courts have not obviously had to consider excessive numbers of unmeritorious challenges, with 15 challenges filed in 2020-2021 and 19 in 2019-2020.

Following our review of the Consultation Paper, we understand that the Law Commission has proposed provisionally that where there is a participating party and the tribunal has ruled on its jurisdiction in an award, any subsequent challenge under section 67 should be by way of appeal and not a rehearing.

We remain not in favour of such proposal and have not seen convincing opposing arguments either within the Consultation Paper or within wider discussions. This is an area of law, which is developing nationally and internationally. That development should not be stifled and as stated above, the demands on the legal system do not appear to be realistic concerns. Rather, given the importance of jurisdictional review, it is undesirable to curtail the right to review by connecting it to a national standard of appeal.

Nonetheless, we are in favour of the proposed reform to section 67(3) for the reasons provided in the Consultation Paper.

9. Section 69 (appeals on a point of law): Chapter 9.

As noted previously, options include the following. (i) Make no change to it. (ii) Delete it. (iii) Make it opt-in rather than opt-out. (iv) Limit it to questions of general public importance where there is a real prospect of showing successfully that the decision of the tribunal is wrong.

Section 69 has always been a controversial provision; some think it has no place in the Act; others would like to see it have a broader application, in the interests of promoting the growth of the common law. We do not propose to enter into that debate here.

Practically speaking, section 69 is not used extensively and of those applications that are made, it appears that only under half obtain permission (See Commercial Court Report 2020-2021: 35 applications. In 2019-2020, 37 applications were made, of which 18 had permission refused. In 2018-2019, 54 applications were made, of which 31 had permission refused. <https://www.judiciary.uk/wp-content/uploads/2022/02/14.50-Commercial-Court-Annual-Report-2020-21-WEB.pdf>).

A major reason why the provision is used comparatively little may well be that institutional users often agree in advance to opt-out in any event (see for example, Art. 26.8, LCIA Rules;⁷ Art. 35(6) ICC Rules, 2021) so section 69 arguably has little impact in institutional arbitration anyway.

⁷ Article 26.8 of the LCIA Rules 2020 and LCIA Rules 2014 and Article 26.9 of the LCIA Rules 1998.

It does not appear that there is sufficient momentum in the market for the provision to be removed altogether. Consideration may be given to making it an opt-in provision (as for example is the default position in Hong Kong, see section 99, Schedule 2, (5), (6), Arbitration Ordinance, Cap. 609). The effect of converting the provision from opt-out to opt-in will almost certainly be to reduce further and significantly its overall application.

If the provision became opt-in, then unlike the position in Hong Kong (Sch. 2, section 6(1)) consideration could be given to removing the leave requirement (section 69(2)).

Following our review of the Consultation Paper, we consider that, on balance, section 69 should not be amended. Section 69 remains fit for purpose. Whether opt-in or opt-out, section 69 allows users to choose whether to permit appeals on a point of law in a particular case and such party autonomy is welcomed.

10. Possible minor amendments (which we favour): Chapter 10.

We continue to be in favour of the following minor amendments, although we are not aware of specific problems regarding the current operation of the Act in this area.

- (a) Section 60 (agreement to pay costs in any event): allow the parties at least to agree in advance that each will bear their own costs (subject to necessary protections for consumers dealing with businesses).
- (b) Section 63 (recoverable costs): provide that costs must be reasonable *and proportionate*.
- (c) Section 70(3) (time period to challenge award): add that, if there has been a request under section 57 for a correction or additional award material to the application or appeal, any application or appeal must be brought within 28 days of the date when the applicant or appellant was notified of the result of that process.
- (d) Delete section 70(8) (allowing an appeal, against a decision to allow an appeal on terms, on terms).
- (e) Delete sections 85 to 88 (domestic arbitration agreements).
- (f) Ensure that the Act is compatible with new technology, for example: service by email (rather than post); virtual hearings can be required by the tribunal (rather than in-person).

11. Other stakeholder suggestions not short-listed for review: Chapter 11.

We endorse the choice of the Law Commission in its Consultation Paper not to short-list the issue of the law governing the arbitration agreement. However, we have since noted discussions in the public domain and therefore consider it prudent to share the LCIA's view and make the following observations.

We are not aware that this issue of law is included regularly in statute; we are only aware of a few jurisdictions addressing explicitly the law governing the arbitration agreement in legislation. In our view, this is with good reason. It is not desirable to fix the issue of the law governing the arbitration agreement at a statutory level. As illustrated by recent case law, the law is still in flux and there are a wide range of views amongst senior practitioners including among the judiciary. In addition, we consider that this approach aligns with the aims of the law reform which are not to restate the law comprehensively but rather to make certain amendments to ensure that the Act is fit for purpose and that it continues to promote the UK as a leading destination for commercial arbitrations.

In sum, as with other issues such as in respect of confidentiality, we consider that the better approach is to let users make their own choice as to the applicable law whether by adopting arbitral rules or making provision for the applicable law in the individual arbitration agreement.

[REDACTED]

Response by the LMAA to the Law Commission’s Consultation Questions 3, 4 and 5

Chapter 3: Arbitrator independence and disclosure

Disclosure

Consultation Question 3

Response

Our answer to Consultation Question 3 is no.

1. The LMAA makes no criticism of the judgment of the Supreme Court in *Halliburton v Chubb*. We recognise the importance of an arbitrator’s duty to disclose circumstances which might reasonably give rise to justifiable doubts as to their impartiality, as that duty is described in detail in the judgment. Indeed, even before the *Halliburton* judgment, we had already set out clear guidance for our members in our Advice on Ethics¹.
2. In our view, however, there would be significant risks in legislating for a duty of disclosure in general terms, and excessive complexity in going beyond that.
3. We note from paragraph 3.47 of the Consultation Paper that, given the variety of circumstances in which a duty of disclosure falls to be fulfilled, you do not propose reform which is prescriptive in technical detail. We support the view that it would be inappropriate to be prescriptive in detail, but we have serious reservations about defining the duty broadly.
4. Although a duty of disclosure exists already at common law, there is a danger that seeking to define it in general terms in a statute would have adverse effects. (See also Notes below.) A statutory duty could be seized on to suggest that it was independent of the common law duty. The Commission’s Consultation Paper might be treated as “*travaux préparatoires*”. An endorsement of the IBA Guidelines could mean that they were regarded as a source for the circumstances in which the statutory duty arises.² A statutory provision of this sort might encourage a greater number of challenges to appointments, and it might appear to impose on maritime and other arbitrators in certain trades or industries a greater duty than exists at common law. Either of these would have the potential to detract significantly from the attractiveness of London as a venue for maritime arbitration, by complicating the

¹ <https://lmaa.london/advice-on-ethics/>

² In paragraph 3.9, in the context of independence, the Consultation Paper refers to the IBA Guidelines as “*internationally recognised*”. They are widely used, but they are not without their detractors. As we understand it, they were drafted with lawyer-arbitrators in mind, particularly in disputes arising from projects, and not arbitrators in more numerous trade and industry disputes. The maritime exception appears only in the context of paragraph 3.1.3 of the Orange List. In our view, if maritime lawyers and arbitrators had been consulted in the preparation of the Guidelines, it is likely that the exception would have extended to other sections. Also, we do not consider that the exception adequately describes the relevant practice. It is not only, or even primarily, that there is a “*smaller...pool*” of arbitrators, but rather that users in the maritime sector choose arbitrators in whom they have confidence because of those arbitrators’ experience and expertise. Also, the relatively small number of specialised law firms contributes to arbitrators receiving repeat appointments from the same firms.

appointment process³ and by leading to greater delay and cost in dealing with challenges. They could also be a disincentive for people to become maritime arbitrators, because of the administrative burden and the risk of having to invest time and legal costs (probably uninsured) in dealing with challenges. This would be disproportionate, given the custom and practice in the maritime sector which are reflected in the *Halliburton* judgment, and the fact that parties have the protection of the common law in any event. In those circumstances, if there were to be legislation for a duty, we do not think it could avoid having to address the detail of *Halliburton*.

5. Any attempt to address that detail, in order to codify the common law, would lead to complexity. (See Notes below.)
6. We note Paragraph 2.45 of the Consultation Paper in relation to confidentiality:

“The law of confidentiality is complex, fact-sensitive, and in the context of arbitration, a matter of ongoing debate. In such circumstances, there is a significant practical advantage in relying on the courts’ ability to develop the law on a case-by-case basis. Far from being a weakness, we consider it one of the strengths of arbitration law in England and Wales that confidentiality is not codified.”

We believe that these considerations apply with at least equal force to the duty of disclosure. As with confidentiality, the nature and extent of the duty of disclosure should be matters for the courts.

7. If, nevertheless, a decision were taken to legislate for the duty of disclosure, then in our view it would be necessary carefully to consider the possibility of addressing at least the following key points.
 - a. The established custom and practice in, among others, maritime arbitrations, as discussed at length in *Halliburton*. Although the duty of disclosure applies generally, users have different expectations in different fields of arbitration as to what should be disclosed.

The custom and practice have to be applied in the particular context of each case. We refer to our Advice on Ethics (see paragraph 1 above). There are difficulties in attempting to be any more prescriptive, because the circumstances vary from case to case. Any statutory duty would have to be drafted in such a way that it did not detract from the custom and practice, and indeed recognised them explicitly.

³ As regards the importance of ease of appointment in maritime cases, we refer to the following observations of Mr Justice Foxton in *ARI v WXJ* [2022] EWHC 1543 (Comm): “As noted above, there are some forms of arbitration agreement which require a party to appoint its arbitrator as part of the process of commencing an arbitration. In those cases, the issue of whether and when an arbitrator has been appointed may have significant implications for limitation purposes. This is particularly likely to be the case **in the maritime context in which there are usually shorter time periods for bringing claims** ... Even when lawyers are involved in appointing an arbitrator, the process frequently involves no more than the exchange of a small number of very brief communications, which essentially involve the party asking the arbitrator if they are willing to accept the appointment, the arbitrator confirming their willingness to do so, and the appointment then being notified to the other party, with the arbitrator copied in. That is particularly the case in maritime arbitrations such as those conducted under the rules of the LMAA. **That rapid and informal process suits the needs of both parties to the interaction.** As I have stated, the appointing party may well be under time pressures, and be unable to engage in any lengthy interactions with potential arbitrators prior to appointment.” [Emphasis added.]

- b. The relationship between the statutory duty and confidences which arbitrators must respect, such as legal professional privilege.
- c. The difficulty for an arbitrator in the face of a challenge by one party: unless the other party consents to a resignation, the arbitrator cannot avoid in practice being drawn into a potentially lengthy and costly challenge. (See Notes below.)
- d. Given the suggestion that arbitral rules might “offer further particulars of how the general duty applies in the specific factual context of their own area of activity” (paragraph 3.47), would a provision be valid if it purported to reduce the circumstances in which disclosure was required in general terms by a mandatory statutory duty? The position regarding rules made by other arbitral organisations may be different if they provide for disclosure which is wider than, or co-extensive with, what may be required by the statute.

Although all of these may arise in relation to the existing common law duty, they would become more significant if there were a duty defined in general terms in a statute.

8. It is not clear to us whether there is pressure from any quarter to codify the common law in this respect. We see no need or justification for it and only potential downsides. The Supreme Court in *Halliburton* did not suggest that the duty of disclosure needed to be codified. On the contrary, it took the view that this duty already came within the existing statutory duties to act fairly and impartially in section 33 [paragraphs 76-77]. This reinforces our view that it would be undesirable to introduce unnecessary legislative change which might serve to increase challenges and create difficulties for practising arbitrators. We are not aware of any demand for codification from parties, lawyers or arbitrators in the overwhelming majority of arbitrations seated in London, namely non-institutional (including trade or industry association) arbitrations. We have heard elsewhere a reference to “optics”, which we understand in this context to refer to the way in which a measure is perceived, presumably by the arbitration community and users both domestically and internationally. In our view, it is already clear that the duty of disclosure is an essential part of English law and practice, as this appears from the common law and in particular the decision on *Halliburton*. In those circumstances, we do not believe that optics are a sufficient justification for enacting a statutory duty which might have detrimental effects. Indeed, given that such a statutory duty might appear to have been enacted by reference to the IBA Guidelines, it could create the wrong optics.

As for institutional arbitration, the Supreme Court noted the contrast between a subjective approach and the objective test under English law [paragraph 72]. In cases in which lawyers more accustomed to institutional rules encounter non-institutional arbitration (a term which includes LMAA arbitration) under the 1996 Act, they must be expected to familiarise themselves with the relevant customs and practices in the fields in which their clients’ disputes arise. The institutional arbitration minority might see a benefit for themselves in a new statutory duty being imposed on all arbitrators, which could be regarded as wider than the common law duty. However, any such benefit to them would be greatly outweighed by the difficulties which would be created for non-institutional arbitrators, as described above. In any event, the institutions are at liberty to introduce their own rules on disclosure if they choose to do so.

9. In summary, while we entirely support compliance with the common law duty as described in *Halliburton*, we are very concerned that a statutory duty would impose impossible burdens on maritime arbitrators, by contrast with institutional and other international arbitrators, who receive a much smaller number of appointments each year. It would not be an exaggeration to say that this could seriously undermine London's position as the preferred forum for maritime dispute resolution.

Notes

Where we refer in these notes to the risk that there are more challenges to appointments, the issue is not whether those challenges would succeed. A broad statutory duty might encourage unmeritorious challenges by parties wishing to delay references or make them excessively costly for their opponents.

Paragraph 4: a duty in broad, general terms

4.1. When considering the risk that a general statutory duty of disclosure might encourage a greater number of challenges, it is important to bear in mind the practical consequences of this for maritime arbitrators. Those consequences result in large part from the nature of their arbitration practices, in contrast to arbitrators conducting general international arbitration. We comment first on multiple appointments by one source.

By way of example, we are aware of a recent case in which a party requested from an LMAA arbitrator details of all cases on which that arbitrator had been appointed by a particular law firm over a period of ten years. The relevant cases were a relatively small proportion of the total appointments over that period: the total was such that it was administratively burdensome for the arbitrator to carry out the analysis requested, though they willingly did so. Maritime arbitrators regularly receive far more appointments than arbitrators in other fields. In 2021, there were 2,777 reported new appointments under LMAA Terms and Procedures in an estimated 1,657 references. The number of appointments from each firm often reflects the fact there are relatively few specialist maritime law firms in London dealing with disputes in arbitration. Experienced and well-regarded arbitrators are likely to get multiple appointments from those firms. We do not resile from the common law duty of disclosure. Where there are circumstances which might reasonably give rise to justifiable doubts as to an arbitrator's impartiality, it is entirely proper that they should be required to make disclosure. However, in the maritime sector, the mere fact of multiple appointments does not do so.

4.2. There would also be practical difficulties in deciding what constitutes a common source for the purpose of a general duty of disclosure. For example, would it be relevant that an arbitrator had been appointed in multiple references in which one or other party was backed by an FD&D Club, covering its legal costs? It is extremely difficult, if not impossible, for arbitrators to keep track of Clubs involved in all their references, and indeed an arbitrator may not know in any given case whether either party has the support of a Club, especially at the stage of appointment and often throughout the reference. In our experience, this is the sort of disclosure which maritime parties do not expect to receive, because of custom and practice. We note also that many maritime law firms, and all the Clubs, have overseas offices and teams with significant autonomy. This raises complications as to how these are to be treated.

4.3. One of the advantages of London maritime arbitration, which makes it by far the preferred forum internationally for maritime disputes, is the ease of appointment of arbitrators. This is in striking

contrast to the procedure in institutional arbitrations, which often requires a bureaucratic process of disclosure. By way of example, one of our members was recently nominated by a party for an institutional arbitration. That institution called for information, not only as to the number of appointments received from a single firm in the previous three years, but also the proportion of those appointments to the total in that period, and the percentage of the member's income which those appointments generated. Eventually, even though they were all maritime cases, the institution declined to appoint the member as arbitrator. It is important for parties in maritime disputes to be able to appoint arbitrators quickly and cost effectively. This is partly because there is a very large number of such disputes and it is important to minimise bureaucracy. It would be highly undesirable for parties to be forced to go through a costly and time-consuming disclosure process every time, not least because many such disputes do not progress beyond the stage of appointment. It is also important because it enables parties to start arbitration quickly where there is a degree of urgency, as is often the case in the maritime sector, for example when a ship is performing services in port or at sea, or a shipbuilding contract is approaching the delivery date. Please see also footnote 3 above in relation to time limits for claims. It would potentially be very damaging to London arbitration if there were a risk that a general statutory duty necessitated a process of disclosure which, by reason of custom and practice, was not significant to the parties.

4.4. The practical difficulties would not be limited to the stage of appointment of the arbitrator. If a statutory duty were introduced in broad, general terms, then the risk of imposing a greater burden on arbitrators would extend throughout the reference. Again, we recognise - and have no complaint about - the continuing nature of the duty at common law. If, however, there were a perception that the statutory duty was wider, or if it encouraged more challenges in practice, then maritime arbitrators would have to consider the potential need for disclosure in numerous existing references. This can be best illustrated by an example:

- (i) An arbitrator is appointed by a law firm in reference A.
- (ii) At the stage of appointment, the arbitrator discharges their duty of disclosure.
- (iii) In the course of the reference, one of the law firms in reference A appoints that arbitrator on one or more occasions in new, unrelated references.
- (iv) Alternatively, in the course of the reference, the arbitrator is appointed in one or more new references in which a party has backing from an FD&D Club which is supporting one of the parties to reference A.

This has the potential to place an enormous burden on maritime arbitrators, with no concomitant benefit to the parties or the administration of justice.

In our view, it is no answer to these concerns to say that an arbitrator can take account of the particular expectations of parties in the maritime sector, if there is a broadly defined duty which might be said to require more than the common law. Nor is it an answer to say that a maritime arbitrator should accept fewer appointments in order to make this burden more manageable. Parties in the maritime sector choose arbitrators for their experience and expertise, and they should not be forced to compromise on their choices. In any event, many maritime references do not progress beyond the stage of appointment: it is impossible to know when accepting a case how far it will run.

Paragraph 5: potential complexities and practical difficulties in relation to a statutory duty of disclosure

Any legislation would have to take into account the matters set out in the notes to paragraph 4 above. We draw attention also to the following.

5.1. The 1996 Act sets out the procedure for the appointment of arbitrators and the constitution of the tribunal in arbitrations in which those steps are not carried out under the auspices of an institution. When precisely in this process would the duty of disclosure come in? An arbitrator in a non-institutional arbitration does not normally communicate with both parties until the whole tribunal has been constituted. There is a danger that the duty of disclosure would impose an additional duty on an arbitrator in non-institutional arbitration to communicate directly with both sides even before the tribunal had been constituted.

5.2. How would the Act deal with the custom and practice in certain trades and industries, including maritime?

5.3. Would any qualification to the duty be limited to the fields referred to specifically in the IBA Guidelines and *Halliburton*, namely maritime, sports and commodities?

5.4. As regards the maritime sector specifically, would the Act simply adopt the Supreme Court's use of the word "*maritime*" in general terms? It may not always be clear whether or not a dispute is maritime in nature. LMAA arbitrators handle disputes, for example, under contracts for offshore construction in the energy industry, offshore services which are performed in a marine environment, and the sale and purchase of commodities⁴. This is an example of a fact-specific question. In practice, we usually approach it by asking whether the parties are from the maritime sector and as such likely to be aware of the relevant custom and practice, rather than by reference to the nature of the contract.

5.5. The exception in the IBA Guidelines (footnote 5 to paragraph 3.1.3) appears in the context of a guideline as to multiple appointments by a party. The Supreme Court in *Halliburton* dealt with disclosure in the context of multiple references concerning the same or overlapping subject matter with only one common party: "*LMAA terms give arbitral tribunals the power to order concurrent hearings where two or more arbitrations raise common issues of fact or law without requiring the consent of the parties. Disclosure of multiple appointments should be required only when it is arguable that the matters to be disclosed give rise to the appearance of bias ... There are practices in maritime, sports and commodities arbitrations, as the IBA Guidelines recognise (para 133 below), in which engagement in multiple overlapping arbitrations does not need to be disclosed because it is not generally perceived as calling into question an arbitrator's impartiality or giving rise to unfairness.*" Again, there may be difficulties in this respect if legislation provides for a duty of disclosure only in general terms, or complexity if there is an attempt to make specific provision for this.

Paragraph 7.c: resignation

7.1. If a statutory duty expressed in general terms were to encourage more challenges, then this would be problematic both for parties and for arbitrators. There was a recent example of this in a case involving an LMAA arbitrator. One party challenged his appointment and he had to consider whether to resign, even though he did not believe that there were circumstances which affected his impartiality. This is a situation to which the Consultation Paper refers in paragraph 5.17. Generally, it is undesirable that one party should be able to prompt an arbitrator to resign just by raising a challenge. At the same time, an arbitrator may find that they are locked into time and expense if the other party does not agree to their resignation. That expense can include uninsured legal costs of the arbitrator, as indeed it did in this recent example.

7.2. The problem might be alleviated if immunity is extended to liability for resignation, as discussed in the Consultation Paper; but that would not alter the fact that the arbitrator had a contractual

⁴ We assume that if the duty were to be qualified, then commodities might be dealt with as a separate category.

commitment. The better solution, in our view, is to avoid a legislative provision which might encourage more challenges.

Consultation Question 4.

Answer: no. Please see our response to Consultation Question 3.

We subscribe to the view expressed by Lady Arden in *Halliburton*, namely that if the courts are left to develop the law in this respect, it can keep pace with change, and take account of developing standards and expectations, particularly in international commercial arbitration.

We add that the courts can conveniently deal with fact-specific issues in relation to arbitration in particular trades and industries, including maritime. We can describe the sort of difficulty which may arise in maritime arbitration by the following example. An arbitrator often has no idea whether an entity on behalf of which an appointment is made is in the same group, or subject to the same beneficial ownership, as other entities on behalf of which other appointments have been made. This is common in the shipping industry, where (for example) many owners operate through one-ship companies, for legitimate reasons. Often there is no easy way of finding out. It would be onerous for arbitrators to make enquiries as to beneficial ownership of parties to arbitrations, but legislation as to state of knowledge would invite disputes as to whether they should do so.

Although the IBA Guidelines impose a duty on arbitrators to make reasonable inquiries to identify any conflict of interest, and they treat prior appointments by an “affiliate” of one of the parties as potentially relevant to disclosure, the Supreme Court in *Halliburton* was cautious about a duty to make inquiries as a matter of law (paragraph 107):

“I also agree with the Court of Appeal’s formulation of the duty of disclosure (para 74 above) subject to one qualification, which concerns the words ‘known to the arbitrator’. 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. For example, if a would-be arbitrator had a business relationship with a person (A), which, because of a financial interest, would have prevented him from being an arbitrator in a reference in which A was a party, he or she, if offered an appointment in an arbitration in which B was a party, might be under an obligation to make enquiry if he or she had grounds to think that B might be a business partner of A. Mr Kimmins, on behalf of LCIA, referred the court to the IBA Guidelines, Part I, General Standard 7(d), and 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.”

This further illustrates the complexity of seeking to legislate on the duty of disclosure, particularly in relation to state of knowledge.

Consultation Question 5.

Answer: actual knowledge.

We refer to the points which we make in response to Consultation Question 4. In any event, there can be no justifiable grounds for thinking that an arbitrator will be influenced by something of which they are not aware. The continuing nature of the duty is enough to ensure that an arbitrator will be required to disclose a circumstance which comes to their attention after appointment.

Request for meeting

The LMAA requests, please, an opportunity to meet the Commissioner to discuss Consultation Questions 3 to 5 before any decision is taken.

Response ID ANON-PT57-RURV-Y

Submitted to Law Commission Consultation: Review of the Arbitration Act 1996
Submitted on 2022-12-13 09:52:17

About you

What is your name?

Name:

[REDACTED]

What is the name of your organisation?

Enter the name of your organisation:

The London Maritime Arbitrators Association (LMAA)

Are you responding to this consultation in a personal capacity or on behalf of your organisation?

Response on behalf of organisation

If other, please state::

What is your email address?

Email:

[REDACTED]

What is your telephone number?

Telephone number:

[REDACTED]

If you want the information that you provide in response to this consultation to be treated as confidential, please explain to us why you regard the information as confidential. As explained in our privacy notice, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

Please explain to us why you regard the information as confidential:

Consultation questions

Consultation Question 1: 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?

Agree

Please share your views below.:

We agree with the reasons set out under the heading "Our preference" in paragraphs 2.41 to 2.46 of the Consultation Paper.

Consultation Question 2: We provisionally conclude that the Arbitration Act 1996 should not impose a duty of independence on arbitrators. Do you agree?

Agree

Please share your views below.:

We agree with the views of the DAC quoted in paragraph 3.5 of the Consultation Paper. As you say in paragraph 3.40, and as the DAC said, what matters is impartiality.

Consultation Question 3: 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. Do you agree?

Disagree

Please share your views below.:

Consultation Question 3

Please note: as we are not sure whether the online form will reflect the formatting of our response to Consultation Questions 3 to 5, we are sending it also in a separate document by email.

Response

Our answer to Consultation Question 3 is no.

1. The LMAA makes no criticism of the judgment of the Supreme Court in *Halliburton v Chubb*. We recognise the importance of an arbitrator's duty to disclose circumstances which might reasonably give rise to justifiable doubts as to their impartiality, as that duty is described in detail in the judgment. Indeed, even before the *Halliburton* judgment, we had already set out clear guidance for our members in our Advice on Ethics [footnote 1].

2. In our view, however, there would be significant risks in legislating for a duty of disclosure in general terms, and excessive complexity in going beyond that.

3. We note from paragraph 3.47 of the Consultation Paper that, given the variety of circumstances in which a duty of disclosure falls to be fulfilled, you do not propose reform which is prescriptive in technical detail. We support the view that it would be inappropriate to be prescriptive in detail, but we have serious reservations about defining the duty broadly.

4. Although a duty of disclosure exists already at common law, there is a danger that seeking to define it in general terms in a statute would have adverse effects. (See also Notes below.) A statutory duty could be seized on to suggest that it was independent of the common law duty. The Commission's Consultation Paper might be treated as "travaux préparatoires". An endorsement of the IBA Guidelines could mean that they were regarded as a source for the circumstances in which the statutory duty arises [footnote 2]. A statutory provision of this sort might encourage a greater number of challenges to appointments, and it might appear to impose on maritime and other arbitrators in certain trades or industries a greater duty than exists at common law. Either of these would have the potential to detract significantly from the attractiveness of London as a venue for maritime arbitration, by complicating the appointment process [footnote 3] and by leading to greater delay and cost in dealing with challenges. They could also be a disincentive for people to become maritime arbitrators, because of the administrative burden and the risk of having to invest time and legal costs (probably uninsured) in dealing with challenges. This would be disproportionate, given the custom and practice in the maritime sector which are reflected in the *Halliburton* judgment, and the fact that parties have the protection of the common law in any event. In those circumstances, if there were to be legislation for a duty, we do not think it could avoid having to address the detail of *Halliburton*.

5. Any attempt to address that detail, in order to codify the common law, would lead to complexity. (See Notes below.)

6. We note Paragraph 2.45 of the Consultation Paper in relation to confidentiality:

"The law of confidentiality is complex, fact-sensitive, and in the context of arbitration, a matter of ongoing debate. In such circumstances, there is a significant practical advantage in relying on the courts' ability to develop the law on a case-by-case basis. Far from being a weakness, we consider it one of the strengths of arbitration law in England and Wales that confidentiality is not codified."

We believe that these considerations apply with at least equal force to the duty of disclosure. As with confidentiality, the nature and extent of the duty of disclosure should be matters for the courts.

7. If, nevertheless, a decision were taken to legislate for the duty of disclosure, then in our view it would be necessary carefully to consider the possibility of addressing at least the following key points.

a. The established custom and practice in, among others, maritime arbitrations, as discussed at length in *Halliburton*. Although the duty of disclosure applies generally, users have different expectations in different fields of arbitration as to what should be disclosed.

The custom and practice have to be applied in the particular context of each case. We refer to our Advice on Ethics (see paragraph 1 above). There are difficulties in attempting to be any more prescriptive, because the circumstances vary from case to case. Any statutory duty would have to be drafted in such a way that it did not detract from the custom and practice, and indeed recognised them explicitly.

b. The relationship between the statutory duty and confidences which arbitrators must respect, such as legal professional privilege.

c. The difficulty for an arbitrator in the face of a challenge by one party: unless the other party consents to a resignation, the arbitrator cannot avoid in practice being drawn into a potentially lengthy and costly challenge. (See Notes below.)

d. Given the suggestion that arbitral rules might "offer further particulars of how the general duty applies in the specific factual context of their own area of activity" (paragraph 3.47), would a provision be valid if it purported to reduce the circumstances in which disclosure was required in general terms by a mandatory statutory duty? The position regarding rules made by other arbitral organisations may be different if they provide for disclosure which is wider than, or co-extensive with, what may be required by the statute.

Although all of these may arise in relation to the existing common law duty, they would become more significant if there were a duty defined in general terms in a statute.

8. It is not clear to us whether there is pressure from any quarter to codify the common law in this respect. We see no need or justification for it and only potential downsides. The Supreme Court in *Halliburton* did not suggest that the duty of disclosure needed to be codified. On the contrary, it took the view that this duty already came within the existing statutory duties to act fairly and impartially in section 33 [paragraphs 76-77]. This reinforces our view that

it would be undesirable to introduce unnecessary legislative change which might serve to increase challenges and create difficulties for practising arbitrators. We are not aware of any demand for codification from parties, lawyers or arbitrators in the overwhelming majority of arbitrations seated in London, namely non-institutional (including trade or industry association) arbitrations. We have heard elsewhere a reference to “optics”, which we understand in this context to refer to the way in which a measure is perceived, presumably by the arbitration community and users both domestically and internationally. In our view, it is already clear that the duty of disclosure is an essential part of English law and practice, as this appears from the common law and in particular the decision on Halliburton. In those circumstances, we do not believe that optics are a sufficient justification for enacting a statutory duty which might have detrimental effects. Indeed, given that such a statutory duty might appear to have been enacted by reference to the IBA Guidelines, it could create the wrong optics.

As for institutional arbitration, the Supreme Court noted the contrast between a subjective approach and the objective test under English law [paragraph 72]. In cases in which lawyers more accustomed to institutional rules encounter a non-institutional arbitration (a term which includes LMAA arbitration) under the 1996 Act, they must be expected to familiarise themselves with the relevant customs and practices in the fields in which their clients’ disputes arise. The institutional arbitration minority might see a benefit for themselves in a new statutory duty being imposed on all arbitrators, which could be regarded as wider than the common law duty. However, any such benefit to them would be greatly outweighed by the difficulties which would be created for non-institutional arbitrators, as described above. In any event, the institutions are at liberty to introduce their own rules on disclosure if they choose to do so.

9. In summary, while we entirely support compliance with the common law duty as described in Halliburton, we are very concerned that a statutory duty would impose impossible burdens on maritime arbitrators, by contrast with institutional and other international arbitrators, who receive a much smaller number of appointments each year. It would not be an exaggeration to say that this could seriously undermine London’s position as the preferred forum for maritime dispute resolution.

Notes

Where we refer in these notes to the risk that there are more challenges to appointments, the issue is not whether those challenges would succeed. A broad statutory duty might encourage unmeritorious challenges by parties wishing to delay references or make them excessively costly for their opponents.

Paragraph 4: a duty in broad, general terms

4.1. When considering the risk that a general statutory duty of disclosure might encourage a greater number of challenges, it is important to bear in mind the practical consequences of this for maritime arbitrators. Those consequences result in large part from the nature of their arbitration practices, in contrast to arbitrators conducting general international arbitration. We comment first on multiple appointments by one source.

By way of example, we are aware of a recent case in which a party requested from an LMAA arbitrator details of all cases on which that arbitrator had been appointed by a particular law firm over a period of ten years. The relevant cases were a relatively small proportion of the total appointments over that period: the total was such that it was administratively burdensome for the arbitrator to carry out the analysis requested, though they willingly did so. Maritime arbitrators regularly receive far more appointments than arbitrators in other fields. In 2021, there were 2,777 reported new appointments under LMAA Terms and Procedures in an estimated 1,657 references. The number of appointments from each firm often reflects the fact there are relatively few specialist maritime law firms in London dealing with disputes in arbitration. Experienced and well-regarded arbitrators are likely to get multiple appointments from those firms. We do not resile from the common law duty of disclosure. Where there are circumstances which might reasonably give rise to justifiable doubts as to an arbitrator’s impartiality, it is entirely proper that they should be required to make disclosure. However, in the maritime sector, the mere fact of multiple appointments does not do so.

4.2. There would also be practical difficulties in deciding what constitutes a common source for the purpose of a general duty of disclosure. For example, would it be relevant that an arbitrator had been appointed in multiple references in which one or other party was backed by an FD&D Club, covering its legal costs? It is extremely difficult, if not impossible, for arbitrators to keep track of Clubs involved in all their references, and indeed an arbitrator may not know in any given case whether either party has the support of a Club, especially at the stage of appointment and often throughout the reference. In our experience, this is the sort of disclosure which maritime parties do not expect to receive, because of custom and practice. We note also that many maritime law firms, and all the Clubs, have overseas offices and teams with significant autonomy. This raises complications as to how these are to be treated.

4.3. One of the advantages of London maritime arbitration, which makes it by far the preferred forum internationally for maritime disputes, is the ease of appointment of arbitrators. This is in striking contrast to the procedure in institutional arbitrations, which often requires a bureaucratic process of disclosure. By way of example, one of our members was recently nominated by a party for an institutional arbitration. That institution called for information, not only as to the number of appointments received from a single firm in the previous three years, but also the proportion of those appointments to the total in that period, and the percentage of the member’s income which those appointments generated. Eventually, even though they were all maritime cases, the institution declined to appoint the member as arbitrator. It is important for parties in maritime disputes to be able to appoint arbitrators quickly and cost effectively. This is partly because there is a very large number of such disputes and it is important to minimise bureaucracy. It would be highly undesirable for parties to be forced to go through a costly and time-consuming disclosure process every time, not least because many such disputes do not progress beyond the stage of appointment. It is also important because it enables parties to start arbitration quickly where there is a degree of urgency, as is often the case in the maritime sector, for example when a ship is performing services in port or at sea, or a shipbuilding contract is approaching the delivery date. Please see also footnote 3 above in relation to time limits for claims. It would potentially be very damaging to London arbitration if there were a risk that a general statutory duty necessitated a process of disclosure which, by reason of custom and practice, was not significant to the parties.

4.4. The practical difficulties would not be limited to the stage of appointment of the arbitrator. If a statutory duty were introduced in broad, general terms, then the risk of imposing a greater burden on arbitrators would extend throughout the reference. Again, we recognise - and have no complaint

about - the continuing nature of the duty at common law. If, however, there were a perception that the statutory duty was wider, or if it encouraged more challenges in practice, then maritime arbitrators would have to consider the potential need for disclosure in numerous existing references. This can be best illustrated by an example:

- (i) An arbitrator is appointed by a law firm in reference A.
- (ii) At the stage of appointment, the arbitrator discharges their duty of disclosure.
- (iii) In the course of the reference, one of the law firms in reference A appoints that arbitrator on one or more occasions in new, unrelated references.
- (iv) Alternatively, in the course of the reference, the arbitrator is appointed in one or more new references in which a party has backing from an FD&D Club which is supporting one of the parties to reference A.

This has the potential to place an enormous burden on maritime arbitrators, with no concomitant benefit to the parties or the administration of justice.

In our view, it is no answer to these concerns to say that an arbitrator can take account of the particular expectations of parties in the maritime sector, if there is a broadly defined duty which might be said to require more than the common law. Nor is it an answer to say that a maritime arbitrator should accept fewer appointments in order to make this burden more manageable. Parties in the maritime sector choose arbitrators for their experience and expertise, and they should not be forced to compromise on their choices. In any event, many maritime references do not progress beyond the stage of appointment: it is impossible to know when accepting a case how far it will run.

Paragraph 5: potential complexities and practical difficulties in relation to a statutory duty of disclosure

Any legislation would have to take into account the matters set out in the notes to paragraph 4 above. We draw attention also to the following.

5.1. The 1996 Act sets out the procedure for the appointment of arbitrators and the constitution of the tribunal in arbitrations in which those steps are not carried out under the auspices of an institution. When precisely in this process would the duty of disclosure come in? An arbitrator in a non-institutional arbitration does not normally communicate with both parties until the whole tribunal has been constituted. There is a danger that the duty of disclosure would impose an additional duty on an arbitrator in non-institutional arbitration to communicate directly with both sides even before the tribunal had been constituted.

5.2. How would the Act deal with the custom and practice in certain trades and industries, including maritime?

5.3. Would any qualification to the duty be limited to the fields referred to specifically in the IBA Guidelines and Halliburton, namely maritime, sports and commodities?

5.4. As regards the maritime sector specifically, would the Act simply adopt the Supreme Court's use of the word "maritime" in general terms? It may not always be clear whether or not a dispute is maritime in nature. LMAA arbitrators handle disputes, for example, under contracts for offshore construction in the energy industry, offshore services which are performed in a marine environment, and the sale and purchase of commodities [footnote 4]. This is an example of a fact-specific question. In practice, we usually approach it by asking whether the parties are from the maritime sector and as such likely to be aware of the relevant custom and practice, rather than by reference to the nature of the contract.

5.5. The exception in the IBA Guidelines (footnote 5 to paragraph 3.1.3) appears in the context of a guideline as to multiple appointments by a party. The Supreme Court in Halliburton dealt with disclosure in the context of multiple references concerning the same or overlapping subject matter with only one common party: "LMAA terms give arbitral tribunals the power to order concurrent hearings where two or more arbitrations raise common issues of fact or law without requiring the consent of the parties. Disclosure of multiple appointments should be required only when it is arguable that the matters to be disclosed give rise to the appearance of bias ... There are practices in maritime, sports and commodities arbitrations, as the IBA Guidelines recognise (para 133 below), in which engagement in multiple overlapping arbitrations does not need to be disclosed because it is not generally perceived as calling into question an arbitrator's impartiality or giving rise to unfairness." Again, there may be difficulties in this respect if legislation provides for a duty of disclosure only in general terms, or complexity if there is an attempt to make specific provision for this.

Paragraph 7.c: resignation

7.1. If a statutory duty expressed in general terms were to encourage more challenges, then this would be problematic both for parties and for arbitrators. There was a recent example of this in a case involving an LMAA arbitrator. One party challenged his appointment and he had to consider whether to resign, even though he did not believe that there were circumstances which affected his impartiality. This is a situation to which the Consultation Paper refers in paragraph 5.17. Generally, it is undesirable that one party should be able to prompt an arbitrator to resign just by raising a challenge. At the same time, an arbitrator may find that they are locked into time and expense if the other party does not agree to their resignation. That expense can include uninsured legal costs of the arbitrator, as indeed it did in this recent example.

7.2. The problem might be alleviated if immunity is extended to liability for resignation, as discussed in the Consultation Paper; but that would not alter the fact that the arbitrator had a contractual commitment. The better solution, in our view, is to avoid a legislative provision which might encourage more challenges.

Footnote 1:

<https://lmaa.london/advice-on-ethics/>

Footnote 2:

In paragraph 3.9, in the context of independence, the Consultation Paper refers to the IBA Guidelines as "internationally recognised". They are widely used, but they are not without their detractors. As we understand it, they were drafted with lawyer-arbitrators in mind, particularly in disputes arising

from projects, and not arbitrators in more numerous trade and industry disputes. The maritime exception appears only in the context of paragraph 3.1.3 of the Orange List. In our view, if maritime lawyers and arbitrators had been consulted in the preparation of the Guidelines, it is likely that the exception would have extended to other sections. Also, we do not consider that the exception adequately describes the relevant practice. It is not only, or even primarily, that there is a “smaller...pool” of arbitrators, but rather that users in the maritime sector choose arbitrators in whom they have confidence because of those arbitrators’ experience and expertise. Also, the relatively small number of specialised law firms contributes to arbitrators receiving repeat appointments from the same firms.

Footnote 3:

As regards the importance of ease of appointment in maritime cases, we refer to the following observations of Mr Justice Foxton in *ARI v WXJ* [2022] EWHC 1543 (Comm): “As noted above, there are some forms of arbitration agreement which require a party to appoint its arbitrator as part of the process of commencing an arbitration. In those cases, the issue of whether and when an arbitrator has been appointed may have significant implications for limitation purposes. This is particularly likely to be the case in the maritime context in which there are usually shorter time periods for bringing claims ... Even when lawyers are involved in appointing an arbitrator, the process frequently involves no more than the exchange of a small number of very brief communications, which essentially involve the party asking the arbitrator if they are willing to accept the appointment, the arbitrator confirming their willingness to do so, and the appointment then being notified to the other party, with the arbitrator copied in. That is particularly the case in maritime arbitrations such as those conducted under the rules of the LMAA. That rapid and informal process suits the needs of both parties to the interaction. As I have stated, the appointing party may well be under time pressures, and be unable to engage in any lengthy interactions with potential arbitrators prior to appointment.”

Footnote 4:

We assume that if the duty were to be qualified, then commodities might be dealt with as a separate category.

Request for meeting

The LMAA requests, please, an opportunity to meet the Commissioner to discuss Consultation Questions 3 to 5 before any decision is taken.

Consultation Question 4: Should the Arbitration Act 1996 specify the state of knowledge required of an arbitrator’s duty of disclosure, and why?

No

Please share your views below.:

Consultation Question 4.

Answer: no. Please see our response to Consultation Question 3.

We subscribe to the view expressed by Lady Arden in *Halliburton*, namely that if the courts are left to develop the law in this respect, it can keep pace with change, and take account of developing standards and expectations, particularly in international commercial arbitration.

We add that the courts can conveniently deal with fact-specific issues in relation to arbitration in particular trades and industries, including maritime. We can describe the sort of difficulty which may arise in maritime arbitration by the following example. An arbitrator often has no idea whether an entity on behalf of which an appointment is made is in the same group, or subject to the same beneficial ownership, as other entities on behalf of which other appointments have been made. This is common in the shipping industry, where (for example) many owners operate through one-ship companies, for legitimate reasons. Often there is no easy way of finding out. It would be onerous for arbitrators to make enquiries as to beneficial ownership of parties to arbitrations, but legislation as to state of knowledge would invite disputes as to whether they should do so.

Although the IBA Guidelines impose a duty on arbitrators to make reasonable inquiries to identify any conflict of interest, and they treat prior appointments by an “affiliate” of one of the parties as potentially relevant to disclosure, the Supreme Court in *Halliburton* was cautious about a duty to make inquiries as a matter of law (paragraph 107):

“I also agree with the Court of Appeal’s formulation of the duty of disclosure (para 74 above) subject to one qualification, which concerns the words ‘known to the arbitrator’. 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. For example, if a would-be arbitrator had a business relationship with a person (A), which, because of a financial interest, would have prevented him from being an arbitrator in a reference in which A was a party, he or she, if offered an appointment in an arbitration in which B was a party, might be under an obligation to make enquiry if he or she had grounds to think that B might be a business partner of A. Mr Kimmins, on behalf of LCIA, referred the court to the IBA Guidelines, Part I, General Standard 7(d), and 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.”

This further illustrates the complexity of seeking to legislate on the duty of disclosure, particularly in relation to state of knowledge.

Consultation Question 5: 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?

Actual knowledge

Please share your views below.:

Answer: actual knowledge.

We refer to the points which we make in response to Consultation Question 4. In any event, there can be no justifiable grounds for thinking that an arbitrator will be influenced by something of which they are not aware. The continuing nature of the duty is enough to ensure that an arbitrator will be required to disclose a circumstance which comes to their attention after appointment.

Consultation Question 6:

Other

Please share your views below.:

We have no strong view and make no comment.

Consultation Question 7:

Agree

Please share your views below.:

Consultation Question 8: Should arbitrators incur liability for resignation at all, and why?

Liability for resignation

Please share your views below.:

This reflects the contractual nature of an arbitrator's obligations to the parties, but it should be limited to unreasonable resignation: see below.

Consultation Question 9: Should arbitrators incur liability for resignation only if the resignation is proved to be unreasonable?

Yes

Please share your views below.:

The burden of proof should rest on the party alleging unreasonableness.

Consultation Question 10: 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. Do you agree?

Agree

Please share your views below.:

We agree with your view in paragraph 5.42 of the Consultation Paper that the line of case law is inconsistent with the wording and intention the Act. We agree that the liability is in practice uninsurable and this in itself presents an unacceptable risk for arbitrators. For the same reasons, the immunity should extend to costs in connection with any challenge to an arbitrator's resignation (see Consultation Questions 8 and 9 above).

Consultation Question 11: 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. Do you agree?

Disagree

Please share your views below.:

We maintain the views expressed in our submission of 27 July 2021, as follows. We have considered summary procedures of this sort when reviewing our own Terms and Procedures, and on balance we have decided not to introduce them. Any attempt to draft such powers is likely to be difficult. Furthermore, if wider powers were on offer, there is a real risk that they would be likely to generate skirmishing and satellite applications, creating a risk of additional cost and delay. Such powers could also be problematic at the stage of enforcement, if a London arbitration award had to be enforced in another jurisdiction. They might be considered by the enforcement court to be a form of impermissible default procedure.

Consultation Question 12: 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. Do you agree?

Other

Please share your views below.:

As noted in our answer to Consultation Question 11, we are not in favour of legislating for a summary procedure. If, however, the decision is taken to do so, then we agree with the provisional proposal in Consultation Question 12.

Consultation Question 13: We provisionally propose that the Arbitration Act 1996 should stipulate the threshold for success in any summary procedure. Do you agree?

Other

Please share your views below.:

As noted in our answer to Consultation Question 11, we are not in favour of legislating for a summary procedure. If, however, the decision is taken to do so, then we agree with the provisional proposal in Consultation Question 13.

Consultation Question 14: 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. Do you agree?

Other

Please share your views below.:

As noted in our answer to Consultation Question 11, we are not in favour of legislating for a summary procedure. If, however, the decision is taken to do so, then we agree with the provisional proposal in Consultation Question 14.

Consultation Question 15: 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. Do you agree?

Other

Please share your views below.:

We have no strong view on this and make no comment.

Consultation Question 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?

Yes

Please share your views below.:

It will be useful to place this beyond doubt.

Consultation Question 17: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 18: We provisionally conclude that the provisions of the Arbitration Act 1996 should not apply generally to emergency arbitrators. Do you agree?

Other

Please share your views below.:

We have no strong view and make no comment. Emergency arbitrators are not commonly used in maritime disputes, in our experience.

Consultation Question 19: 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?

Other

Please share your views below.:

We have no strong view and make no comment. Emergency arbitrators are not commonly used in maritime disputes, in our experience.

Consultation Question 20: Do you think that section 44(5) of the Arbitration Act 1996 should be repealed, and why?

No

Please share your views below.:

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).

Consultation Question 21:

Other

Please share your views below.:

We have no strong view and make no comment. Emergency arbitrators are not commonly used in maritime disputes, in our experience.

Consultation Question 22:

Agree

Please share your views below.:

Consultation Question 23: 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?

Yes

Please share your views below.:

We think that it is desirable to have consistency with section 67.

Consultation Question 24: We provisionally conclude that our proposed change to section 67 of the Arbitration Act 1996 would not require any similar change to section 103. Do you agree?

Agree

Please share your views below.:

Consultation Question 25: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 26: 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?

Agree

Please share your views below.:

Consultation Question 27: 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?

Agree

Please share your views below.:

We believe firmly that section 69 strikes the right balance.

Consultation Question 28: Do you think that section 7 of the Arbitration Act 1996 (separability of arbitration agreement) should be mandatory, and why?

Yes

Please share your views below.:

Please see our comments below on *Enka v Chubb* [2020] UKSC 38 in response to Consultation Question 37.

Consultation Question 29: 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?

Other

Please share your views below.:

We have no strong view and make no comment.

Consultation Question 30: 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?

Yes

Please share your views below.:

In our view, it is desirable that the Act should be amended to delete the requirements that the court be satisfied that the determination is likely to lead to a substantial saving in costs, made without delay, and for good reason. The court already has the power to refuse inappropriate applications, and we think that unnecessary content can be removed from the Act by deleting these specific requirements.

Consultation Question 31: 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?

No

Please share your views below.:

In our view, this is not necessary. All aspects of virtual and hybrid hearings and electronic documentation can be accommodated within the current provisions of the Act. We endorse your view in paragraph 10.41 of the Consultation Paper that section 34 is wide enough to include directions as to these.

In any event, we would not favour anything which would allow one party to insist on a hearing (as happens in Singapore) or, in a case where the tribunal agrees that a hearing is appropriate, for one party to insist that the hearing be in person, when the tribunal considers that it can be held equally well, and more cost-effectively, in a virtual form.

Consultation Question 32: Do you think that section 39 of the Arbitration Act 1996 should be amended to refer to "orders" (rather than "awards"), and why?

Yes

Please share your views below.:

We agree with your analysis in paragraph 10.46 of the Consultation Paper.

Consultation Question 33: Do you think that section 39(1) of the Arbitration Act 1996 should be amended to refer to "remedies" (rather than "relief"), and why?

Yes

Please share your views below.:

For internal consistency.

Consultation Question 34: 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?

Other

Please share your views below.:

We have no strong view and make no comment.

Consultation Question 35: 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?

Other

Please share your views below.:

We have no strong view and make no comment.

Consultation Question 36: We provisionally propose that sections 85 to 87 of the Arbitration Act 1996 (on domestic arbitration agreements) should be repealed. Do you agree?

Other

Please share your views below.:

We have no strong view and make no comment.

Consultation Question 37: Do you think that any of the suggestions discussed in Chapter 11 needs revisiting in full, and if so, why?

Please share your views below.:

1. Law governing the arbitration agreement

The current LMAA Terms (2021) provide as follows:

"6. In the absence of any agreement to the contrary, the parties to all arbitral proceedings to which these Terms apply agree:

(a) that the law applicable to their arbitration agreement is English and;

(b) that the seat of the arbitration is in England."

In view of the Supreme Court's decision in *Enka v Chubb*, we can see a risk that it might be argued that an implied choice of proper law prevails over the LMAA Terms. It might be suggested that our default term in favour of English law is displaced and a substantive foreign law applies to the arbitration agreement. For example, in an LMAA arbitration under a contract with a choice of foreign substantive law, that substantive law might be said to apply because it is a specific choice, albeit an implied one. Paragraph 6(a) applies "In the absence of any agreement to the contrary". We do not accept the validity of any such argument: we think the better view is that, where the LMAA Terms apply, there is an express choice of law which should prevail over any implied choice. Nevertheless, it would be useful to place the position beyond doubt.

We support the proposal to make section 7 mandatory (see above), but we think it is desirable also to go further by introducing a statutory provision that the law of the seat will govern the arbitration agreement, save where an express agreement to the contrary has been made in the arbitration agreement itself.

2. Section 78(5) (reckoning periods of time)

We invite you please to revisit the suggestion for section 78(5) on reckoning periods of time. In our view, the explanation in paragraphs 11.160-161 of the Consultation Paper does not sufficiently address the suggestion that the section's seven days (a full week) be replaced by five (a working week). The current wording is out of line with the CPR's regime ("Where the specified period is 5 days or less ...", CPR 2.8(4)) and international arbitration rules (eg ICC, Art 3(4)).

Consultation Question 38: 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?

Please share your views below.:

No, there is no significant topic within the Arbitration Act 1996, not addressed in this consultation paper, which we think is in need of review and potential reform.

[REDACTED]

From: MacMahon,PH [REDACTED]
Sent: 16 December 2022 11:24
To: arbitration
Subject: Short, late submission re: section 67

Dear Law Commission:

I understand that the deadline for the consultation on arbitration was yesterday, but perhaps you would consider my late response to just one of the questions. I suspect that many others are saying something similar, but maybe you could add this comment on review vs rehearing under section 67.

===
The consultation paper's "theoretical objections" would be better termed "fundamental objections". To the extent the existence or validity of the arbitration agreement is contested, the argument that the arbitrators are entitled to deference on these issues is circular. It is only because of the existence and validity of the arbitration agreement that the arbitrators are arbitrators rather than mere people wearing suits.

I would like to add two caveats:

- I can see the difficulty of parties producing new evidence not considered by the arbitrators. But a *de novo* review is consistent with a more restrictive approach to the furnishing of new evidence. It is probably better to let the courts develop this practice under their existing discretion rather than to write it into the statute.
- There is a stronger argument for deference to the arbitrators concerning the scope of the arbitration agreement. Where the parties have plainly agreed to arbitration, it is fundamentally permissible to construe their consent as conferring authority on the arbitrators to decide the scope of the agreement. (US law, for example, recognizes the idea of an agreement to arbitrate scope issues). On balance, however, it is probably best not to write this into the Arbitration Act as a default. Serious scope problems are rare enough given the *Fiona Trust* presumption of one stop adjudication, and it is probably better to keep the Act's approach simpler.

--

Dr Paul MacMahon, London School of Economics
Teacher of International Commercial Arbitration

Response to the Law Commission Consultation: Review of the Arbitration Act 1996

Review of the Arbitration Act 1996 | Law Commission

Dr Aygun Mammadzada,
PhD, LLM, LLM, Lecturer, Institute of Shipping and Trade Law,
Swansea Law School

15 December 2022

A. Chapter 8, Consultation Question 22

The Arbitration Act 1996 determines the parties' rights to apply to the court for challenging an arbitral award as to the tribunal's substantive jurisdiction and for an order to declare an award of no effect with regard to its merits due to the tribunal not having any substantive jurisdiction.¹ Addressing the question related to this section necessitates considering several issues such as the substantive jurisdiction and *kompetenz* of the tribunal, the relationship of the competence of the tribunal with the powers of the court at the seat, the party autonomy principle, furthermore, the principle of finality of awards as a perceived advantage of arbitration as a private dispute resolution tool. The latter is also linked to the speed of the arbitral process which is often considered one of the benefits of arbitration.

We strongly believe that upon appeals to challenge the substantive jurisdiction of an arbitral tribunal, any rehearing should be avoided. The following discussion highlights the reasons behind this argument. According to the Arbitration Act, the questions related to jurisdiction might arise before the arbitral proceedings have commenced (Sections 9, and 18), in the course of the ongoing proceedings (Sections 32, 44, and 72), and after an award has been granted (Sections 66, 67 and 101).

The Arbitration Act follows the UNCITRAL Model Law, Article 16² by recognising the tribunal's competence and at the same time, by presenting a broader and probably much clearer position toward the definition of the scope of the substantive jurisdiction. Sections 31 and 32 of the Arbitration Act jointly ensure parties' rights to object to the tribunal's substantive jurisdiction at the outset of the proceedings. The English court has interpreted the substantive jurisdiction accordingly and reasserted the tribunal's power to decide on its competence.³

¹ Arbitration Act, Section 67.

² UNCITRAL Model Law on International Commercial Arbitration of 1985 (as amended 2006).

³ According to the judgment in *Dallah Real Estate & Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46, regardless of the NYC's pro-enforcement policy and resting the burden of proof on the resisting party, the Court was not bound or limited by the arbitral tribunal's decision on its jurisdiction and had to conduct an independent investigation on the facts. Therefore, the ICC award, in that case, was enforceable in France but not in England. Similarly, in *Excalibur Ventures LLC v Texas Keystone Inc and others* [2016] EWCA Civ 1144, the court had jurisdiction to decide whether there was an arbitration agreement at all. See *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan* [2010] 2 Lloyd's Rep 691; [2011] 1 AC 763, [84] and [95]-[98]. See also: *Enka Insaat ve Sanayi AS v OOO "Insurance Company Chubb"* [2020] 2 Lloyd's Rep. 233[2020] Lloyd's Rep Plus 77, [53]; *The London Steam-Ship Owners' Mutual Insurance Association Ltd v The Kingdom of Spain (The "Prestige") (No 3)* – QBD (Comm Ct) (Henshaw J) [2020] EWHC 1582 (Comm), [39]; *Al-Naimi (t/a Buildmaster Construction Services) v Islamic Press Agency Inc* [2000] 1 Lloyd's Rep. 522, [2000] 1 WLUK 734; *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2011] EWCA Civ 647, [2012] 1 W.L.R. 920, [2011] 5 WLUK 826, at [40], per Lord Mance.

The tribunal has the competence to rule on the existence of a valid arbitration agreement, the proper constitution of a tribunal, the scope of the arbitration agreement, and which matters have been submitted to arbitration.⁴ The matters together unpack the definition given to the substantive jurisdiction of the tribunal by English law. Further, the Arbitration Act determines parties' right to object to the substantive jurisdiction of the arbitral tribunal at the outset of the proceedings and as soon as possible after the matter alleged to be beyond its jurisdiction has been raised.⁵ Upon any objection, the tribunal rules on its jurisdiction. Furthermore, based on Section 32, parties may apply to the court for the determination of any question related to the substantive jurisdiction of the tribunal. While an application to the court is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.⁶ Meantime, the court might decide on the question and this decision shall be treated as a judgment for the purposes of an appeal.⁷

This discussion primarily focuses on challenging the substantive jurisdiction of the tribunal and Section 67 of the Arbitration Act; on a side note, there is a matter of parallel/inconsistent decisions handed down by the court and tribunal and, of course, a waste of time and expenses. In one way and the other, the language of the Act stimulates redundant wastes – lost time and lost expenses: If the court, based on Section 67, varies or sets aside the award given by the tribunal, expenditures on the arbitral proceedings are wasted whereas the expenditures on litigation are wasted if no change is made and the award is confirmed.

According to Section 67, a party may make an application to challenge an award as to the substantive jurisdiction of the tribunal or to get an order declaring the awards on merits to be of no effect due to the tribunal not having any substantive jurisdiction. The fundamental authority of the UK Supreme Court relevant to the provision concluded that upon such applications, the court was not bound by the findings of the court, and it was up to the court to decide whether the tribunal had jurisdiction.⁸ A similar position was taken by Mr Justice Popplewell in *Sea Master Shipping Inc v Arab Bank (Switzerland) Limited*.⁹ According to the judgment, Section 67(1)(a) applies both when a tribunal finds that it has jurisdiction and when it declines jurisdiction.¹⁰

⁴ Arbitration Act 1996, Section 30.

⁵ Arbitration Act 1996, Section 31.

⁶ Arbitration Act 1996, Section 32(4).

⁷ Arbitration Act 1996, Section 32(5).

⁸ *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs (Pakistan)* [2010] UKSC 46

⁹ *Sea Master Shipping Inc v Arab Bank (Switzerland) Limited (The "SEA MASTER")* [2018] EWHC 1902 (Comm).

¹⁰ See also *LG Caltex v China National Petroleum* [2001] 1 WLR 1892 at paragraph [71].

The Section 67 challenges involve not a review of the tribunal's decision but a full rehearing of the question of the arbitral tribunal's jurisdiction which goes beyond the latter: upon such applications, the court decides whether or not the tribunal reached the correct decision.¹¹ Moreover, upon such challenges, the court may receive the evidence on which it decides a particular issue without any reference to the tribunal's findings. In contrast, upon appeals in accordance with Section 69 of the Arbitration Act, the court is bound by the arbitral tribunal's findings.¹²

Such practice has double edges: On the one hand, English law, and authorities as it stands, determine a threshold for the party who wants to challenge the substantive jurisdiction of the tribunal and award: The party shall make an objection to the arbitral tribunal at the outset of the proceedings and as soon as possible after the matter alleged to be beyond the substantive jurisdiction of the tribunal is raised per Section 31(1) and 31(2). The party shall object not later than the time he or she takes the first step in the proceedings to contest the merits of any matter in relation to which he or she challenges the tribunal's jurisdiction. Indeed, the party who takes place in arbitral proceedings expressly or impliedly confirms his or her submission to arbitration. Thus, upon challenges, the starting point for the court is to determine whether the person challenging the enforcement of the award was a party to the arbitration agreement or he or she can prove to be a non-party as regards participation in the proceedings.

On the other hand, the party can harness the arbitral proceedings, and if lost, can bring a claim at the court to get a favourable outcome which would also lean upon the gained time and added shreds of evidence. A question arises: Would such a "tactical opportunity" be fair and in line with the objectives of the law of arbitration and, particularly of the Arbitration Act? Certainly not.

The Arbitration Act is founded on the principles set out in Section 1; among others, it aims to achieve the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense.¹³ Section 1(1) of the Arbitration Act has two limbs: (a) the disputes must be resolved by an impartial tribunal, and (b) the resolution must avoid unnecessary delays or expenses. Indeed, the provisions related to challenging an award contradict the goal of the Act. Where a decision is final and binding over parties, proceedings are rapid, time-friendly, and effective, particularly involving fewer expenditures. A *de novo* rehearing of the claim that has already

¹¹ See *Azov Shipping Co v Baltic Shipping Co (No 1)* [1999] 1 Lloyd's Rep 68; *Peterson Farms Inc v C&M Farming Ltd* [2004] 1 Lloyd's Rep 603.

¹² Arbitration Act 1996, Section 69.

¹³ Arbitration Act 1996, Section 1(1).

been heard and decided upon by the tribunal would hardly facilitate the fair resolution of disputes without any delay or expenses. A prolonged process would further go against efficiency and predictability.

The provision refers to an “impartial tribunal” that encapsulates arbitrators and arbitral tribunals; the word “tribunal” in this Section is not concerned with courts or litigation. Apparently, the Act is about the jurisdiction of the tribunal upon which parties agree. It is not intended to determine the court’s jurisdiction except for some supporting power of the judiciary in relation to arbitral proceedings¹⁴ and awards, be it either recognition and enforcement, challenge, or appeal.¹⁵ To this end, Section 1(3) states that the court should not intervene in arbitration or arbitral proceedings except as provided by the Act.

Arbitration is “a self-contained juridical system, by its very nature separate from national systems of law”.¹⁶ Indeed, by agreeing to arbitrate, parties exclude court litigation. Nothing and nobody can force a party to appear in a courtroom if he has not had any will to litigate. In this relevance, the Explanatory Note by the UNCITRAL Secretariat reasserts that “the parties to an arbitration agreement make a conscious decision to exclude court jurisdiction and prefer the finality and expediency of the arbitral process”.¹⁷

According to Section 1(b) of the Arbitration Act, the parties should be free to agree on the means of the dispute resolution, subject only to such safeguards as are necessary for the public interest.¹⁸ Academic debates have already pinpointed the peculiarity of arbitration as a system “outside the law” bringing its manifest success.¹⁹ As indicated, the most desirable elements of arbitration are not its speed or cost-saving, rather those are the unwillingness of the corporations and governmental entities to litigate in the other party’s home court and enforcement of the awards across national boundaries.²⁰ Accordingly, it was claimed that

¹⁴ Arbitration Act 1996, Section 42-45.

¹⁵ Arbitration Act 1996, Sections 66-71. See also the supplementary provisions in Sections 76-84 and Part III.

¹⁶ *SA Coppée Lavalin NV v Ken-Res Chemicals and Fertilizers Ltd* [1995] 1 AC 38, 52 (per Lord Mustill).

¹⁷ Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006, 2008, § 15, available at: <http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/MLARB-explanatoryNote20-9-07.pdf>.

¹⁸ Arbitration Act 1996, Section 1(b).

¹⁹ Kronstein Heinrich, “Business Arbitration-Instrument of Private Government”, 54 *Yale Journal* (1944), 36, 39; Available at: <http://digitalcommons.law.yale.edu/ylj/vol54/iss1/11>. See also: Bastida Ana E., Okoye Adaye Ifesi, Mahmud Salim, Ross James, Wälde Thomas, “Cross-Border Unitization and Joint Development Agreements: An International Law Perspective”, *Houston Journal of International Law*, (2007), Volume 29, Number 2, 355, 391.

²⁰ Hunter Martin, “International Commercial Dispute Resolution: The Challenge of the Twenty-first Century”, *Arbitration International*, 2000, Volume 16, Issue 4, 379, 382; Knoll William H. III and Rubins Noah D., “Betting the Farm on International Arbitration: Is it time to an appeal option?”, *The American Review of International Arbitration*, 4, 531,535, available at: <https://www.mayerbrown.com/Files/Publication/b336c5b0-0d49-4b80-94c3-edf5e1cadf90/Presentation/PublicationAttachment/008a397d-7ac9-4eb4-8303->

parties arbitrate because they distrust a foreign country's legal system.²¹ Empirical evidences also show that based on their autonomy parties refer their disputes to the forum, which is the most favourable for them, particularly where their principal places of business are located.²² In a survey respondents' preferences for certain seats were predominantly based on the neutrality and impartiality of the legal system.²³ Another study revealed that one of the most pivotal advantages and important reasons for choosing arbitration as a means of international commercial dispute resolution is the neutrality of the forum, which avoids becoming subjected to the jurisdiction of the home court of one of the parties.²⁴ A local court favourable for one party might not always be convenient for the counterparty, which stimulates parties to arbitrate, but not because arbitration is the most favourable possible forum, rather it is the least unfavourable forum.²⁵ Especially, where parties resolve a dispute in a state other than their hometown, the interests of both the claimant and defendant are best served by a neutral manner and objectivity of the arbitral tribunal.²⁶

While Section 30(2) defines the *kompetenz* of the tribunal over the parties who have agreed to arbitrate and only in regard to those matters which have been submitted to arbitration, it also leaves doors open for any appeal or review in accordance with the Act. Challenges brought under Section 67 not only double the waste of time and expenses by the repetitive proceedings and potential parallel or inconsistent judgments but also go against the whole idea of arbitration. Particularly because parties' right to challenge is not negotiated, instead, Section 67 includes mandatory provisions, the possibility of challenging an award in the form of relitigating is against the autonomy of the parties who have chosen not to litigate but arbitrate their disputes. In this context, Aikens J held that where the award concluded that the parties never agreed on an arbitration agreement and there was no ad hoc arbitration agreement either, parties could re-open the issue at the court.²⁷ The language of the decision reasserts that against

f7e074fe4246/ART_INTARB_00_BETTHERFARM.pdf; See also: Paulsson Jan, "International Arbitration is not Arbitration", *Stockholm International Arbitration Review*, (2008), Issue 2, 1.

²¹ Drahozal Christopher R. "Privatizing Civil Justice: Commercial Arbitration and the Civil Justice System", *Kansas Journal of Law & Public Policy*, 1999-2000, Volume 9, Issue 3, 578, 579, 582-588.

²² Gary Born, *International Arbitration: Law and Practice*, Kluwer Law International, 2016, 2nd ed, 10.

²³ Survey: "Improvements and Innovations in International Arbitration", School of International Arbitration of Queen Mary University of London and White & Case LLP, 2015, available at: <http://www.arbitration.qmul.ac.uk/research/2015/>.

²⁴ Christian Buhring-Uhle, "A Survey on Arbitration and Settlement in International Business Disputes", *Towards a Science of International Arbitration: Collected Empirical Research*, edited by Christopher R. Drahozal, Richard W. Naimark, Kluwer Law International, 2005, 25, 31.

²⁵ *Ibid.*

²⁶ Daniel S. Meyers, "In Defense of the International Treaty Arbitration System", *Houston Journal of International Law*, (2008), Volume 31, Number 1, 47, 57 and 78; Gary Born, *supra* no 54, 8.

²⁷ *LG Caltex Gas Co Ltd and Another v China National Petroleum Corporation and Another* [2001] BLR 235.

an arbitration agreement, court litigation might become necessary only if the parties did not intend on arbitration and they had a rational will to commence court proceedings on the relevant issue.

Based on the discussions above, the suggestion is a revision of the Act to determine not mandatory but optional nature of such challenges and application to the court at the post-award stage. One might voice the necessity of court intervention with regard to arbitration. Admittedly, court intervention or supervision might become crucial for a smooth resolution and for certainty. The latter is ensured by the provisions determining the supportive power of the court of the seat.

The proposed reform for review of an award instead of relitigation or reconsideration would also make a reasonable combination with Section 69 applications in the cases of questions of law arising out of an award.²⁸ As claimed, finality can be a “universally positive quality in dispute resolution” only if arbitrators never made an error.²⁹ Likewise, further observations have not characterised speed and finality as virtues if any fundamental mistake has been made by arbitrators.³⁰ If there is any point of law, parties are entitled to appeal to the court on a question of law arising out of an award made in the proceedings.

²⁸ Arbitration Act 1996, Section 69.

²⁹ William H. Knull III and Noah D. Rubins, 2.

³⁰ Thomas J. Klitgaard, “The Transnational Arbitration of High-Tech Disputes,” presentation given to the Seventh Annual Transnational Commercial Arbitration Workshop, Dallas, Texas, June 20, 1996, as referred by William H. Knull III and Noah D. Rubins, 45.

B. Chapter 12, Consultation Question 38

Chapter 7 of the Consultation Paper is dedicated to Section 44 of the Arbitration Act 1996 on court powers to make orders in support of arbitral proceedings. The matters relevant to the types of orders are listed in sections 44(2)(a) to 44(2)(e). Among others, the section gives discretion to the court of the seat to grant an interim injunction (44(2)(e)).

In England and Wales, courts' powers to grant such injunctions derive from the two fundamental legal frameworks:

- 1) Arbitration Act 1996, Section 44
- 2) Senior Courts Act 1981, Section 37

The Supreme Court's judgment in *Enka v Chubb* provided guidelines for granting injunctions in support of arbitral proceedings and application of English law as the law of the seat (*lex fori*) regardless of the law applicable to an arbitration agreement (*lex arbitri*).³¹ A potential question might arise about the applicable framework to such injunctions provided the arbitral seat is in England and Wales. Notably, the Supreme Court judgment in *Ust-Kamenogorsk* might be helpful in this context. In para 46 of the judgment, Lord Mance stated: "The matters listed in section 44 are all matters which could require the court's intervention during actual or proposed arbitral proceedings. The power to grant an interim injunction is expressed in general terms, but is limited, save in cases of urgency, to circumstances in which either the tribunal permits an application to the court or all the other parties agree to this in writing. There is no power to grant a final injunction, even after an award."³²

As confirmed by Lord Mance in the same paragraph of the judgment, "... orders restraining the actual or threatened breach of the negative aspect of an arbitration agreement may be required both where no arbitration proceedings are on foot or proposed, and where the case is not one of urgency..."

The latter point brings another question about the interrelationship between the court's inherent jurisdiction to grant an injunction and those measures issued during the ongoing arbitral proceedings. In addition to the Supreme Court's guidance and decision above, the matter was also examined by the Commercial Court in *Alexandros T*.³³ Indeed, Cooke J addressed the link between the Arbitration Act 1996 section 44 and the Senior Courts Act 1981 section 37. Upon

³¹ *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38.

³² *Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35.

³³ *Starlight Shipping Co v Tai Ping Insurance Co Ltd (The "Alexandros T")* [2007] EWHC 1893 (Comm); [2008] 1 All ER (Comm) 593.

Chinese proceedings brought by the party in breach of the London arbitration clause and ongoing arbitral proceedings, Cooke J considered both legal frameworks applicable. Nevertheless, he also mentioned that “The difference between an order of this court and that of the arbitrators is that remedies for contempt are available if an order of this court should be breached.”³⁴

Having regard to Cooke J, Lord Mance reiterated that section 44(2)(e) did not exclude the court’s power to issue orders under the Senior Courts Act, Section 37. He further emphasised that “Where an injunction is sought to restrain foreign proceedings in breach of an arbitration agreement – whether on an interim or a final basis and whether at a time when arbitral proceedings are or are not on foot or proposed – the source of the power to grant such an injunction is to be found not in section 44 of the 1996 Act, but in section 37 of the 1981 Act. Such an injunction is not “for the purposes of and in relation to arbitral proceedings”, but for the purposes of and in relation to the negative promise contained in the arbitration agreement not to bring foreign proceedings, which applies and is enforceable regardless of whether or not arbitral proceedings are on foot or proposed.”³⁵

Based on the legal frameworks, their exclusive nature, and relevant authorities, the suggestion is to revise Section 44 of the Arbitration Act 1996 in a way to reflect the interrelationship between the Arbitration Act and the Senior Courts Act. The revision might contain a provision indicating that section 44 does not exclude the court’s powers to issue orders based on its inherent jurisdiction. Such an amendment would be in line with the objectives and general principles of the Arbitration Act 1996 to improve the law relating to arbitration, in general. Indeed, the revision would bring clarity about the application scope of the Act (see the Introductory Act to the Arbitration Act 1996). Moreover, as stated in Section 1(a), the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense. A clarification about the application scope of the Act would save time and prevent delays and expenses. Section 1(c) of the Act identifies another object of arbitration to avoid any court intervention except provided by the act itself. Confinement of the borders of the Acts would serve this object and provide justifications for the court’s involvement in the process whenever necessary and derives from the legal bases.

³⁴ Ibid, at [31].

³⁵ *Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35, at [48], per Lord Mance.

Response ID ANON-PT57-RUKN-G

Submitted to Law Commission Consultation: Review of the Arbitration Act 1996
Submitted on 2022-12-14 14:25:00

About you

What is your name?

Name:

Joseph Michael Matthews

What is the name of your organisation?

Enter the name of your organisation:

Joseph M. Matthews, P.A.

Are you responding to this consultation in a personal capacity or on behalf of your organisation?

Other (please state)

If other, please state::

I am the sole owner and professional in the organization so this consultation is on behalf of both.

What is your email address?

Email:

[REDACTED]

What is your telephone number?

Telephone number:

[REDACTED]

If you want the information that you provide in response to this consultation to be treated as confidential, please explain to us why you regard the information as confidential. As explained in our privacy notice, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

Please explain to us why you regard the information as confidential:

N/A

Consultation questions

Consultation Question 1: 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?

Agree

Please share your views below.:

Consultation Question 2: We provisionally conclude that the Arbitration Act 1996 should not impose a duty of independence on arbitrators. Do you agree?

Disagree

Please share your views below.:

I am a U.S. based lawyer and now a full-time arbitrator. I have experienced arbitrations as advocate and arbitrator conducted under the UK Arbitration Act 1996. I have served as an arbitrator for more than 30 years in more than 300 cases, including more than 50 international cases. London is a truly excellent and unique venue for international arbitrations for a number of reasons. One is, of course the quality of the judiciary and the predictability of the law. Another is the quality of advocacy and the uniqueness of the Chambers/Independent Referral Bar.

That said, I have come to believe the refusal to accept that independence is an essential requirement of an arbitrator from the time of appointment through the end of the proceedings, in the absence of knowing waiver by parties, is unwise as a principle of law for the law of England to retain. Virtually every other jurisdiction, including those with laws based on the UNCITRAL Model Law, and including former colonies with bifurcated bars and even bar library systems, like Ireland, require independence in the absence of knowing waiver by the parties. I also think it is hard to reconcile the position that independence is not required at the time of appointment with the well-established rule that independence of the party-nominated arbitrator is mandated once the appointment is accepted and confirmed.

I greatly admire the English bar and count a number of barristers and King's Counsel as friends and colleagues. I believe in the long run that the continued refusal to include independence as a requirement for service as arbitrator from the time of appointment through the end of the proceedings will harm the reputation of the UK as one of the great venues for international arbitration.

Consultation Question 3: 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. Do you agree?

Agree

Please share your views below.:

I agree that disclosure is essential. But disclosure will only be as meaningful as the facts disclosed. I understand the desire not to require disclosure of insignificant relationships because it might result in a party being denied its choice of an arbitrator. But Independence means the absence of those relationships that may affect the impartiality of the arbitrator. Only knowing waiver of relationships that might impact the independence by the parties should relieve the requirement of independence.

I have personally made decisions regarding what to disclose as a candidate for service as arbitrator hundreds of times under the rules and laws of numerous jurisdictions. The vast majority of the disclosures, as well as the now-standardized questions asked by arbitral forums that guide our disclosures, are based on identifying the existence of any relationships between the arbitrator and the parties and parties' agents, including most often, as a practical matter, the parties' counsel.

Consultation Question 4: Should the Arbitration Act 1996 specify the state of knowledge required of an arbitrator's duty of disclosure, and why?

Other

Please share your views below.:

This is a difficult issue for me to address in the context of English law. I am generally aware how Chambers function and that a typical law firm "conflict search" is not likely to be possible or of any value, but I am not sufficiently knowledgeable to comment on this meaningfully.

However, if the obligation to be independent at the time of appointment is included in the law, then the duty of disclosure would include membership in chambers, in a law firm, in a law library or Inn of Court, and broader professional activities if the relationships arising from those activities could give rise to the justifiable doubt as to impartiality pursuant to the applicable standard.

I would not think that under such circumstances it would be necessary to go beyond the personal knowledge of the potential arbitrator that s/he belongs to such an organization and that a party or party counsel in the specific case also belongs to the same organization.

Consultation Question 5: 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?

Other

Please share your views below.:

Again, I am not competent to address this in the context of the Chambers system. The IBA and others have addressed it far better than I could with respect to the law firm setting. As noted above, if the obligation of independence were imposed at the time of appointment, I would think that the obligation of "reasonable inquiry" would be minimal in the context of chambers. Rather, it would seem to be a question of the specific knowledge of the potential arbitrator about his/her relationship with a specific barrister from those chambers as counsel in the case. An inquiry as to whether other relationships with parties beyond the specific case might give rise to joint financial interests or risk of disclosure of confidential information would depend on the nature and functioning of the Chambers and the potential arbitrator presumably knows those without further inquiry.

Consultation Question 6:

Other

Please share your views below.:

I am not competent to comment.

Consultation Question 7:

Other

Please share your views below.:

I am not competent to comment.

Consultation Question 8: Should arbitrators incur liability for resignation at all, and why?

Other

Please share your views below.:

I am sympathetic to the potential negative impact of resignations on parties but I think this is probably better addressed at the level of rules development and enforcement by arbitral forums. I realize that does not cover ad hoc arbitrations, but crafting a statutory exception to the general principle of arbitrator immunity seems difficult.

Consultation Question 9: Should arbitrators incur liability for resignation only if the resignation is proved to be unreasonable?

Other

Please share your views below.:

See above

Consultation Question 10: 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. Do you agree?

Other

Please share your views below.:

While I am also sympathetic to this dilemma, it too may be more appropriately addressed through rules and arbitral institutions. With respect to ad hoc proceedings, arbitrators likely need to address this risk through insurance coverage.

Consultation Question 11: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 12: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 13: We provisionally propose that the Arbitration Act 1996 should stipulate the threshold for success in any summary procedure. Do you agree?

Agree

Please share your views below.:

Consultation Question 14: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 15: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 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?

Other

Please share your views below.:

I don't have sufficient experience as an advocate under the UK law to know how often essential evidence from a third party is unavailable due to uncooperative witnesses. Whether the need is sufficient to vest that authority in arbitrators rather than in supervising courts is a policy decision I am not competent to address. Besides, no U.S. lawyer, much less one who was a trial lawyer for 40+ years, should be so arrogant as to comment on how another country addresses this subject.

Consultation Question 17: 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. Do you agree?

Agree

Please share your views below.:

Subject to the above comment, this seems like an appropriate distinction.

Consultation Question 18: We provisionally conclude that the provisions of the Arbitration Act 1996 should not apply generally to emergency arbitrators. Do you agree?

Other

Please share your views below.:

Insufficient basis to comment

Consultation Question 19: 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?

Other

Please share your views below.:

Insufficient basis to comment

Consultation Question 20: Do you think that section 44(5) of the Arbitration Act 1996 should be repealed, and why?

Other

Please share your views below.:

Insufficient basis to comment

Consultation Question 21:

Not Answered

Please share your views below.:

Insufficient basis to comment

Consultation Question 22:

Other

Please share your views below.:

Insufficient basis to comment

Consultation Question 23: 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?

Other

Please share your views below.:

Insufficient basis to comment

Consultation Question 24: We provisionally conclude that our proposed change to section 67 of the Arbitration Act 1996 would not require any similar change to section 103. Do you agree?

Other

Please share your views below.:

Insufficient basis to comment

Consultation Question 25: 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. Do you agree?

Other

Please share your views below.:

Insufficient basis to comment

Consultation Question 26: 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?

Other

Please share your views below.:

Insufficient basis to comment

Consultation Question 27: 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?

Other

Please share your views below.:

Insufficient basis to comment

Consultation Question 28: Do you think that section 7 of the Arbitration Act 1996 (separability of arbitration agreement) should be mandatory, and why?

Other

Please share your views below.:

Insufficient basis to comment

Consultation Question 29: 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?

Other

Please share your views below.:

Insufficient basis to comment

Consultation Question 30: 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?

Other

Please share your views below.:

Insufficient basis to comment

Consultation Question 31: 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?

Yes

Please share your views below.:

Consultation Question 32: Do you think that section 39 of the Arbitration Act 1996 should be amended to refer to "orders" (rather than "awards"), and why?

Other

Please share your views below.:

Insufficient basis to comment

Consultation Question 33: Do you think that section 39(1) of the Arbitration Act 1996 should be amended to refer to "remedies" (rather than "relief"), and why?

Other

Please share your views below.:

Insufficient basis to comment

Consultation Question 34: 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?

Other

Please share your views below.:

Insufficient basis to comment

Consultation Question 35: 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?

Other

Please share your views below.:

Insufficient basis to comment

Consultation Question 36: We provisionally propose that sections 85 to 87 of the Arbitration Act 1996 (on domestic arbitration agreements) should be repealed. Do you agree?

Other

Please share your views below.:

Insufficient basis to comment

Consultation Question 37: Do you think that any of the suggestions discussed in Chapter 11 needs revisiting in full, and if so, why?

Please share your views below.:

Insufficient basis to comment

Consultation Question 38: 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?

Please share your views below.:

From an outsider's perspective, the Consultation Process is very impressive and appears to be very thorough. It was a privilege to be permitted to participate

From: Chris Ward [REDACTED]
Sent: 10 January 2023 12:09
To: arbitration
Cc: Alex McIntosh
Subject: Review of the Arbitration Act 1996

Dear Sirs

We note with interest the Law Commission's ongoing consultation with a view to reforming the Arbitration Act 1996 and must apologise for exceeding the 15 December 2022 deadline mentioned on the Law Commission's website. We wish to draw to your attention an anomaly we have encountered in the course of considering the Court of Appeal's recent decision in the case of *The Newcastle Express* [2022] EWCA Civ 1555, which is concerned with the separability of the arbitration agreement. The Court of Appeal is clear in that decision that the doctrine of separability applies only to matters of contract validity and not to matters of contract formation. Separability will accordingly ensure that the arbitration agreement may stand if the dispute concerns an alleged accepted repudiatory breach, or if the underlying contract is allegedly voidable for misrepresentation or void for illegality or fraud, i.e. matters of contract validity, which do not impeach the arbitration agreement. In these instances, the arbitrators will have jurisdiction to decide the dispute. However, if it is alleged that the underlying contract containing the arbitration agreement was never made because there was no meeting of the minds or there was a mistaken identity, then the arbitrators have no jurisdiction in that regard, and the matter must be decided by the court.

In view of this decision, section 7 of the Arbitration Act 1996, which was intended to codify the law following the earlier Court of Appeal decision in *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd* [1993] 1 Lloyd's Rep 455, now apparently expresses the principle of separability too broadly. Section 7 states:

"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." [Our emphasis]

Should it be of interest, Penningtons Manches Cooper recently published a short media article flagging this discrepancy in the course of discussing *The Newcastle Express* decision: [Arbitration and the limits of separability - the Newcastle Express \(penningtonslaw.com\)](#)

It seems to us that a review of section 7 is merited following this Court of Appeal decision. As section 7 was intended to codify an earlier decision of the same court, it may now be appropriate to revise the section 7 wording to accord with the subsequent clarification in *The Newcastle Express*.

We do hope these observations are of use and please let us know if we may offer further assistance.

Kind regards,

Alex McIntosh / Chris Ward

Chris Ward
Knowledge Lawyer

[REDACTED]



Penningtons Manches Cooper LLP: 125 Wood Street, London EC2V 7AW
www.penningtonslaw.com | T: +44 (0)20 7457 3000 | F: +44 (0)20 7457 3240 |

We do not routinely accept service by email. Acceptance of service of proceedings or any other formal documents by email must still be sought and confirmed separately in writing in relation to each individual matter.

Please note we no longer accept service or delivery of documents or correspondence by Document Exchange (DX). All future hard copy documentation should be directed to the postal address of the appropriate Penningtons Manches Cooper LLP office.

Penningtons Manches Cooper LLP is a limited liability partnership registered in England and Wales (Registered No. OC311575) and authorised and regulated by the Solicitors Regulation Authority. References to 'partner' include members and employees/consultants of equivalent standing within the LLP and its associated undertakings or businesses operating overseas. A list of the members is open to inspection at its registered office, 125 Wood Street, London, EC2V 7AW.

It is your responsibility to check this email and any attachments are virus free when received. This e-mail and any attachments are confidential and may contain privileged information. If you are not the named recipient, or responsible for delivering the message to the named recipient, you are not permitted to use this e-mail / attachments in any manner. If you have received this communication in error, please inform the sender and immediately delete this message. You can read the full text about your rights as a data subject and our data privacy statement on our website at www.penningtonslaw.com/privacy-policy/



Penningtons Manches Cooper LLP is a member of Multilaw and the European Law Group, two international networks of independent law firms.

Submission to the Law Commission of England and Wales
Consultation Paper 257: Review of the Arbitration Act 1996

The Role of the Courts in Reviewing
Arbitral Tribunal Determinations on Substantive Jurisdiction

Alex Mills
Professor of Public and Private International Law
Faculty of Laws, UCL

1. I am writing to provide a submission on certain issues raised by **Law Commission Consultation Paper 257: Review of the Arbitration Act 1996** ('the Consultation Paper'), dated September 2022.
2. This submission addresses **Consultation Questions 22, 23 and 24**, each relating to the role of the courts in reviewing the determination by an arbitral tribunal of its own jurisdiction. This submission is broadly supportive of the position adopted by the Law Commission on these issues, and provides some additional context which may assist in their consideration.

Consultation Question 22

3. Consultation Question 22 relates to Section 67 of the Arbitration Act 1996, which is concerned with proceedings brought in court to challenge a tribunal award on the basis that the tribunal lacked substantive jurisdiction.¹ It applies only to arbitral proceedings with their seat in England and Wales. The issue raised for consultation concerns the nature of the judicial proceedings. It is proposed by the Law Commission that, in defined circumstances (discussed further below), such proceedings should be by way of an appeal rather than a full rehearing, as is currently the case.
4. This issue arises because of a tension between four guiding principles in this area of law.
5. The first is the need for efficiency in the resolution of disputes, including the avoidance of wasted or duplicated costs. This is reflected, for example, in the overriding objective of 'proportionate cost' under the Civil Procedure Rules (Rule 1.1).
6. The second is that an arbitral tribunal possesses 'positive competence-competence', which is to say, the necessary authority to determine its own jurisdiction. This is a well-established principle of arbitration law, reflected in section 30 of the Arbitration Act 1996.
7. The third is that the authority of an arbitral tribunal depends on the consent of the parties. If there is no valid arbitration agreement, the tribunal can have no authority, including as to the question of its own jurisdiction. This is the well-known 'bootstrapping' problem, referred to in the Consultation Paper.² It has the consequence that a determination by the tribunal that it

¹ As defined in the Consultation Paper, para 8.6.

² Paragraph 8.37.

has jurisdiction cannot be definitive – it must be subject to some possibility of review by a court of law.

8. The fourth is that an agreement by the parties that their disputes should be resolved through arbitration should, in the absence of exceptional circumstances, be respected.
9. This fourth principle evidently means that courts should stay proceedings on the *merits* brought contrary to an arbitration agreement, as provided for under section 9 of the Arbitration Act 1996. The principle is, however, often also considered to have an impact on the determination of the *jurisdiction* of the tribunal. This impact is sometimes referred to as a doctrine of ‘negative competence-competence’.³
10. The negative aspect of competence-competence does not provide that *only* the arbitral tribunal has the power to rule on its own jurisdiction – if the tribunal does not in fact have jurisdiction, then no decision made by the tribunal as to its own jurisdiction can be effective to determine that it does, because of the third principle set out above. This doctrine is normally understood to have, at least principally, a temporal focus. It means that courts are minded, in certain circumstances, to give the tribunal the *first* opportunity to determine its own jurisdiction. The Court of Appeal of England and Wales has, for example, held on this basis that ‘it will, in general, be right for the arbitrators to be the first tribunal to consider whether they have jurisdiction to determine the dispute’.⁴
11. The doctrine of negative competence-competence in English law does not have clearly defined contours – it is unclear, for example, precisely when the courts will decide that they ought to reach their own conclusions on the jurisdiction of an arbitral tribunal prior to the tribunal itself, and what standard they should apply in making that determination. It is, however, generally accepted that at least in some circumstances it is desirable for the tribunal to be given the first opportunity to determine its own jurisdiction. This policy is reflected in section 32 of the Arbitration Act 1996, which provides that a preliminary question concerning the jurisdiction of a tribunal may only be brought before the courts (i) with the agreement of the other parties to the proceedings, or (ii) with the permission of the tribunal (but only if the court is satisfied that certain conditions are met).
12. The issue addressed in Consultation Question 22 concerns a related but distinct question – whether the courts should give a degree of deference to a determination by a tribunal as to its own jurisdiction, particularly where both parties have participated in the tribunal proceedings. The present position under English law, generally considered to follow from the 2010 Supreme Court decision in *Dallah v Pakistan*, is that very limited deference is given – that ‘[t]he tribunal’s own view of its jurisdiction has no legal or evidential value’.⁵ Thus, where the courts are asked to review a decision by a tribunal as to its own jurisdiction, the proceedings are by way of a full rehearing.
13. It is important to note that, although the present position is generally considered to be supported by the Supreme Court decision in *Dallah v Pakistan*,⁶ that case actually concerned the application of section 103 of the Arbitration Act 1996 in respect of a foreign arbitral award, rather than section 67 in respect of an English or Welsh arbitral award. As argued

³ For further discussion of this doctrine, see Alex Mills, ‘Arbitral Jurisdiction’, in Thomas Schultz and Federico Ortino (eds.), *Oxford Handbook on International Arbitration* (Oxford University Press, 2020); Alex Mills, *Party Autonomy in Private International Law* (Cambridge University Press, 2018), Chapter 6; *Dallah v Pakistan* [2010] UKSC 46, [79ff] (per Lord Collins).

⁴ *Fiona Trust v Privalov* [2007] EWCA Civ 20, [34].

⁵ *Dallah v Pakistan* [2010] UKSC 46, [30] (per Lord Mance), see also [96] (per Lord Collins).

⁶ Consultation Paper, para 8.15.

below and in the Consultation Paper (in relation to Consultation Question 24), a different approach may well be appropriate in relation to section 103. The decision in *Dallah v Pakistan* is therefore of uncertain value in relation to either the interpretation or policy of section 67.⁷

14. The present position raises concerns in relation to the first principle set out above. If the courts are only giving *temporal* deference to a tribunal – allowing it to make the initial decision on its jurisdiction, but then fully rehearing that decision – this raises a clear danger of wasteful and duplicative proceedings, as discussed in the Consultation Paper.
15. An additional concern arises that where the parties have agreed on arbitration, a full rehearing on the validity of the arbitration agreement is inconsistent with the second and fourth principles set out above – the doctrines of positive and negative competence-competence. A full rehearing means that a decision by the tribunal as to its own jurisdiction (pursuant to positive competence-competence) is not given any effect, other than by the tribunal itself.
16. In addition, in providing only a temporal deference to the arbitral tribunal's determination of its own jurisdiction, the courts are not in substance giving effect to an agreement that such issues should be resolved through arbitration, as they provide for the issues to be fully litigated in court. Where parties have in fact entered into an arbitration agreement, the approach presently adopted means that this agreement has no (or almost no) impact on the question of whether or to what extent disputes concerning the validity of the arbitration agreement can be litigated in court. This is notwithstanding the fact that the law of England and Wales otherwise adopts a presumption that parties intend their arbitration agreements to have broad effect, encompassing disputes about the validity of the arbitration agreement itself, unless clearly agreed otherwise.⁸
17. A purely temporal approach to negative competence-competence also increases the likelihood that arbitral proceedings will ultimately involve wasted costs, not only in duplicated hearings, but because of the possibility that a court will finally determine – through an independent rehearing based potentially on different evidence – that the tribunal had no jurisdiction and its award is of no legal effect. It may indeed be questioned why a tribunal should be given temporal priority in determining its own jurisdiction, if this does nothing more than delay a full judicial hearing on that question.
18. The proposal adopted in Consultation Question 22, it is submitted, would better balance these policy considerations and the underlying principles. Providing that a review of the tribunal's jurisdictional determination under section 67 is by way of appeal would give 'negative competence-competence' not only a temporal element, but also a *deferential* element. In the circumstances in which both parties have participated in the arbitral proceedings, this appears both appropriate and desirable.
19. Consistently with the first principle, it is likely to lead to reduced duplication of work between the tribunal and the court, and also decrease the likelihood that the court will reject a finding by the tribunal in favour of its (the tribunal's) substantive jurisdiction, rendering the arbitral proceedings as wasted costs. It is also more consistent with the second and fourth principles, as it gives greater effect to the arbitration agreement in conferring competence on

⁷ There is, however, first instance authority which directly supports the traditional interpretation of section 67 as requiring a full rehearing: see eg *Republic of Serbia v Imagesat International NV* [2009] EWHC 2853 (Comm); *Habas Sinai VE Tibbi Gazlar Isthisal Endustri A.S. v Sometal S.A.L.* [2010] EWHC 29 (Comm); *Golden Ocean Group Ltd v Humpuss Intermoda Transportasi Tbk Ltd* [2013] EWHC 1240 (Comm).

⁸ See *Fiona Trust v Privalov* [2007] UKHL 40, [13].

the tribunal. It remains, however, consistent with the third principle, because it leaves the ultimate determination of the jurisdiction of the arbitral tribunal to the court.

20. It is true that deferring to the tribunal might be thought to raise potential bootstrapping concerns – if in fact there is no valid and applicable arbitration agreement, it might be queried whether deference to a decision by the arbitral tribunal is appropriate. The answer to this issue, it is submitted, is that given in the Consultation Paper – that where both parties have participated in the arbitral proceedings, they are accepting the competence of the tribunal at least for the limited purpose of accepting the tribunal’s positive competence-competence – its power to determine its own jurisdiction. In these circumstances, giving deference to the determination of the tribunal while allowing for the possibility of a review by way of appeal does appear to strike an appropriate balance between the competing policy considerations.
21. A significant concern that might be raised with the proposed rule relates to the proposition that the test for whether judicial proceedings are by way of rehearing or appeal depends on whether a party has ‘participated in arbitral proceedings’. Whether a party has ‘participated in’ proceedings may be straightforward in some cases, but not in others. It should not, for example, be sufficient to satisfy this test that a party nominated an arbitrator, if this is the limit of their participation in proceedings and they are disputing the jurisdiction of the tribunal. Where a party has made some limited submission on the tribunal’s jurisdiction, for example by way of a letter to the arbitrators explaining that party’s non-appearance, it may be difficult to decide whether this should constitute ‘participation’. In practice, this is a complex fact-dependent question, and it is probably best left to the courts to determine on a case by case basis, but it is important to note that judicial clarification of the threshold for ‘participation’ is likely to be necessary.
22. One effect of this uncertainty is that parties are likely to be advised that they should either fully participate in arbitral proceedings, or not participate at all (so as to preserve a full hearing before the courts – as provided by the combination of section 67 and section 72). The former would ensure that all arguments are aired before the tribunal, which is the intended effect of the proposed reforms (and consistent with the policy considerations discussed below). The latter is a potentially unintended effect of the proposed reforms, but it is submitted would be no worse than the present situation (parties may have little incentive to incur costs arguing on jurisdiction before the tribunal, if there is to be a later full rehearing before the court), and in fact would reduce the costs that might be wasted in participation before an arbitral tribunal whose jurisdiction is ultimately denied by the court. A risk does arise that a tribunal, without the benefit of argument on its jurisdiction, goes ahead with hearing the merits of a dispute, only to have its jurisdiction ultimately rejected in judicial proceedings. This risk, however, also arises under the present law, and is best addressed through tribunals themselves making preliminary jurisdictional awards (which may be subject to section 67 challenge) or through the use of the section 32 procedure discussed below.
23. The Consultation Paper expresses the additional concern that, under the present position:

*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. In those circumstances, it is not an impossible consequence that the court might come to a decision on the evidence as to jurisdiction which is diametrically opposed to the original decision of the arbitral tribunal.*⁹

⁹ Paragraph 8.31.

24. This point adds to the concerns noted above with regard to costs, as it increases the likelihood that a decision by the courts (rejecting the tribunal’s jurisdiction) will render the costs incurred before the tribunal wasted, a particular concern if the tribunal has only determined its jurisdiction in a single award in conjunction with the merits. It also, however, raises the question as to whether there are measures which might be adopted by the courts to prevent this practice. The Consultation Paper notes, as a possible argument against the proposal, that the courts have the ability to exercise control over the evidence adduced in proceedings brought under section 67,¹⁰ and have exercised that control in some cases to exclude the presentation of new evidence.
25. There is an additional argument here worth considering, but not addressed in the Consultation Paper, which is the possible application of another legal doctrine known as *Henderson v Henderson* estoppel. This doctrine typically applies in the context of cases in which the English courts are deciding on whether a foreign judgment should be recognised and enforced.¹¹ It provides that a party who fails to raise an argument in proceedings before a foreign court which lead to a judgment against that party, where they had the opportunity to do so, may in some cases be estopped from raising that same argument before the English courts. To quote from *Henderson v Henderson* itself:

*where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of [a] matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.*¹²

26. This principle and the reasons for it given above have been affirmed and endorsed by the Supreme Court in *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* (2013).¹³ The doctrine is justified as it assists ‘to bring finality to litigation and avoid the oppression of subjecting a defendant unnecessarily to successive actions’,¹⁴ or as ‘limiting abusive and duplicative litigation’.¹⁵
27. Although this principle is generally applied in the context of foreign judicial proceedings, it is submitted that there are good reasons why it could be extended to cases in which the initial proceedings are in the form of an arbitration, particularly an arbitration conducted in England. The principle has indeed recently been recognised as applicable within the context of sequential arbitral proceedings in England and Wales (preventing litigation in later arbitral proceedings of issues which ought to have been addressed in earlier arbitral proceedings).¹⁶

¹⁰ Paragraphs 8.35-8.36.

¹¹ See generally eg *Dicey, Morris and Collins on the Conflict of Laws* (Sweet & Maxwell, 16th edition, 2022), para 14-047.

¹² *Henderson v Henderson* (1843) 67 ER 313, 319.

¹³ [2013] UKSC 46.

¹⁴ *Johnson v Gore Wood & Co* [2000] UKHL 65.

¹⁵ *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46, [25].

¹⁶ *Union of India v Reliance Industries Ltd and another* [2022] EWHC 1407 (Comm). See further eg David Williams and Mark Tushingham, ‘The Application of the Henderson v Henderson Rule in International Arbitration’ (2014) 26 Singapore Academy of Law Journal 1036.

The same objective of ensuring finality and avoiding duplicative successive actions applies in this context – where a party may seek to litigate issues concerning the substantive jurisdiction of a tribunal which ought to have been previously raised in arbitral proceedings.

28. On one approach, this doctrine could be seen as reducing the need for reform in this area, as it provides an additional technique through which the courts could address the risk that the hearing before the arbitral tribunal becomes a ‘dress rehearsal’, by effectively requiring all issues to be raised before the tribunal. On the other hand, it also supports the general policy of avoiding duplicative litigation, and in particular the argument that it may be appropriate for the courts to defer to decisions reached by an arbitral tribunal where the issues have been argued before that tribunal by the parties – that if issues must be raised before the tribunal, the tribunal’s determination of those issues ought to be given some weight. On balance, the existence of this form of estoppel arguably supports the Law Commission’s proposal that hearings under section 67 of the Arbitration Act 1996 should be by way of appeal rather than rehearing.
29. If this proposal were adopted, it is important to note that it ought not to preclude entirely the possibility for the parties to raise additional arguments or produce additional evidence before the court, where for some reason it was not possible to do so before the tribunal. Indeed, it is well established that it is possible in some circumstances to raise additional evidence in appellate proceedings before the English courts. The applicable principles were traditionally set out in *Ladd v Marshall* (1954),¹⁷ in which the court held that:

*In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive: thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.*¹⁸

30. Although this decision was in the context of fresh evidence before the Court of Appeal of England and Wales, the same principles ought to apply if proceedings were taking place in a court of first instance, by way of appeal from the decision of an arbitral tribunal. It may be beneficial for the Law Commission to ensure that this issue is clarified as part of its recommendations – that a hearing under section 67, although (as proposed) conducted by way of appeal rather than rehearing, may nevertheless receive fresh evidence if the court exercising appellate jurisdiction considers that to be appropriate in the circumstances.

Consultation Question 23

31. This question asks whether, if the proposed change to section 67 of the Arbitration Act 1996 is adopted, a similar change should be made in relation to section 32 of the Act. Section 32 relates to the possibility that an application may be brought before the courts for a preliminary determination of the jurisdiction of the arbitral tribunal. As noted above, it requires either the consent of all the parties to the proceedings or the permission of the arbitral tribunal.

¹⁷ [1954] EWCA Civ 1; [1954] 1 WLR 1489. See also *Muscat v Health Professions Council* [2009] EWCA Civ 1090 (holding that although the Civil Procedure Rules give the Court of Appeal a more flexible discretion to allow evidence which was not before the lower court (CPR 52.21(2)(b)), the *Ladd v Marshall* principles remain at the heart of the discretion).

¹⁸ Per Lord Denning.

32. The Consultation Paper notes that it is possible that a party may pursue proceedings under section 32 after the tribunal has ruled on its jurisdiction, although there is some uncertainty as to whether this was the legislative intention.¹⁹ If this is indeed a possibility, it creates a potential overlap between the procedures under section 32 and sections 67 – either section might be relied on to invoke the jurisdiction of the court after a tribunal has determined its own jurisdiction. One possible reform which would eliminate the issue under consideration would be to amend section 32 to clarify that it should not apply after the tribunal has made a determination as to its own jurisdiction. But if this is not adopted (and it does not seem to be proposed), it is important to note that section 32 would only permit proceedings to be brought with the agreement of the parties or the tribunal.
33. If section 32 were to allow for a full hearing of the question of the tribunal’s jurisdiction, and were to allow this after a determination by the tribunal of its own jurisdiction, the effect of this would be to make the proposed reforms in section 67 of the Act (as discussed above) optional rather than mandatory. They could, in effect, be departed from (i) by agreement of the parties, or (ii) by order of the tribunal, if the court is also satisfied that certain conditions are met. This is because the parties would (by agreement, or by order of the tribunal) have the option of using section 32 in order to achieve a full rehearing, as an alternative to the (proposed) section 67 ‘appellate’ procedure.
34. Section 67 of the Act is understood to be non-derogable, in the sense that it is not possible for parties to waive by contract the right to challenge the jurisdiction of an arbitral tribunal.²⁰ However, if section 67 were reformed as proposed, the current understanding of section 32 would open up the possibility that section 67 would be derogable in the sense that the parties could (by agreement) *expand* the scope of review to encompass a full rehearing, by making use of the alternative procedure in section 32 of the Act. Although there is a risk that allowing the parties this possibility would increase the expense of litigation, it is in practice unlikely that parties will be willing to reach such an agreement, and in the rare circumstances in which they might consider it appropriate, it is likely to be desirable that the court should give their agreement effect.
35. On balance, it is submitted that it is not necessary or desirable to reform section 32 to bring it in line with the proposed reforms to section 67 of the Act, but it may be worth considering whether section 32 should be amended to clarify whether or not it applies after the tribunal has ruled on its own jurisdiction.

Consultation Question 24

36. This question asks whether the proposed changes to section 67 should be mirrored in section 103, which concerns the recognition and enforcement of foreign arbitral awards (those which do not have their seat in England and Wales). At present, the application of section 103, like section 67, involves a full rehearing of questions concerning the jurisdiction of the arbitral tribunal. If the change under consideration were adopted, the effect would be that the deference given to an arbitral tribunal’s determination of its own jurisdiction under section 67 (through providing that judicial proceedings are by way of appeal rather than rehearing) would also be extended to decisions of foreign arbitral tribunals.
37. At first glance, it might indeed be questioned why different arbitral tribunals should be given different levels of deference (in relation to decisions on their own jurisdiction), depending on

¹⁹ Consultation Paper, para 8.49.

²⁰ Consultation Paper, para 8.41, n.47.

their seat. Those who argue in favour of a delocalised or transnational model of arbitration, which de-emphasises the significance of the seat of the arbitration,²¹ might particularly question whether this is appropriate.

38. This is not a straightforward question, but on balance it is submitted that the better approach is that proposed in the Consultation Paper, which is that the proposed changes to section 67 need not be extended to section 103. This is arguably also supported by the fact that, as noted above, the 2010 Supreme Court decision in *Dallah v Pakistan* is direct authority on the interpretation of section 103 (but not on section 67).
39. Where arbitral proceedings are conducted in a foreign seat, they will be subject to the arbitral law of that seat, which will regulate a range of matters regarding the conduct of the arbitration and the role of the courts in supervising the proceedings. It may be that in some circumstances foreign arbitral proceedings will be conducted on the same basis as those in England, and where the parties have participated in the arbitral proceedings it would indeed be principled to give the determination of the tribunal the same deference as that given under section 67.
40. However, if a rule were adopted allowing full review in some circumstances, and appellate review in others, it would create a boundary which would itself require regulating. There would be a risk of decreasing the efficient resolution of the dispute, because the parties would have to litigate a prior question as to whether the determination of the tribunal as to its own jurisdiction should be given deference (by analogy with cases under the proposed approach to section 67) or whether a full rehearing would be more appropriate (to ensure the rights of the parties are protected).
41. This is arguably a context in which a rule which is simple to apply – leaving section 103 unchanged – is more desirable than a rule which could more flexibly adapt to the circumstances under which specific foreign arbitral proceedings were conducted, which would add complexity and expense to judicial proceedings under section 103.

Professor Alex Mills

13 December 2022

²¹ For discussion of different ‘models’ of arbitration, see further Alex Mills, ‘Arbitral Jurisdiction’, in T. Schultz and F. Ortino (eds.), *Oxford Handbook on International Arbitration* (Oxford University Press, 2020); Alex Mills, *Party Autonomy in Private International Law* (Cambridge University Press, 2018), Chapter 6.

Response ID ANON-PT57-RUKG-9

Submitted to Law Commission Consultation: Review of the Arbitration Act 1996
Submitted on 2022-12-14 10:01:05

About you

What is your name?

Name:
Ethan Naish

What is the name of your organisation?

Enter the name of your organisation:

Student at University of Essex, Volunteer on the Law Reform Project for Essex Law Clinic

Are you responding to this consultation in a personal capacity or on behalf of your organisation?

Personal response

If other, please state::

What is your email address?

Email:
[REDACTED]

What is your telephone number?

Telephone number:
[REDACTED]

If you want the information that you provide in response to this consultation to be treated as confidential, please explain to us why you regard the information as confidential. As explained in our privacy notice, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

Please explain to us why you regard the information as confidential:

N/A

Consultation questions

Consultation Question 1: 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?

Not Answered

Please share your views below.:

Consultation Question 2: We provisionally conclude that the Arbitration Act 1996 should not impose a duty of independence on arbitrators. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 3: 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. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 4: Should the Arbitration Act 1996 specify the state of knowledge required of an arbitrator's duty of disclosure, and why?

Not Answered

Please share your views below.:

Consultation Question 5: 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?

Actual knowledge

Please share your views below.:

The duty should be based upon an arbitrator's actual knowledge due to the private nature of arbitration where there are multiple references concerning the same or overlapping subject matter it may be difficult to determine whether the Arbitrator was aware of certain facts, this could also promote vexatious activity (*Halliburton v Chubb* [2020] UKSC 48, [2021] AC 1083 at 107). An Arbitrator can only disclose what she or he knows, usually they are not required to search for facts or circumstances to disclose.

If the duty was based upon what they ought to know after making reasonable enquires we now have the question of what is reasonable. For example if a potential arbitrator had a business dealing with person A, which because of a financial interest would have prevented him from arbitrating, if he is then offered an appointment with person B he might be under an obligation to make enquiries to A, following this if person C and D have some interest in a totally unrelated matter however the Arbitrator knows that they share an interest with A and B they may have to make reasonable enquiries with those parties.

Due to the nature of arbitration many businesses will be closely connected to the subject matter, basing this duty on reasonable enquiries allows parties to undermine the arbitration through interpretation of what is reasonable and may cause unnecessary delays in the process. As the decision to arbitrate usually comes from a contractual clause it may be more practical to leave the level of disclosure up to the parties. Instead of being based on actual knowledge why not let the parties decide.

A more appropriate change could be to phrase the reform as "the duty should be based upon an arbitrator's actual knowledge; the duty may also be based upon what they ought to know after making reasonable inquiries that both parties mutually agree". The extent of the enquires would be left to the wording of the contract, for example. "Arbitrators have a duty to disclose any information that may possibly give rise to a justiciable bias". This would enable parties to decide their own level of disclosure if there is doubt as to the level of disclosure but would also avoid complicating arbitration. This would enable parties in cases such as *H v L* [2017] EWHC to instruct those people with relevant expertise but whom will naturally have to disclose irrelevant information due to their extensive dealings, whilst obvious concerns such as those raised in *Guidant LLC v Swiss Re International SE* [2016] would be covered by the initial passage of legislation.

Further to the previous point, as the Law Commission have stated "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". This is supported by *Helow v Advocate General for Scotland* [2008] UKHL 62 at 58, disclosure could be seen as a "badge of impartiality" however this can only be a marginal factor.. disclosure could not avoid objection to a judge who clearly ought not to hear the case, and non-disclosure could not be relevant, if a fair-minded and informed observer would not have thought there was anything to even consider disclosing. Contrasting this against the level of disclosure required of arbitrators, arbitrators who may have a clear biased would disclose any obvious relationships that may give rise to impartiality through their actual knowledge, but requiring a higher level of disclosure based upon what they ought to know would create circumstances in which arbitrators are undermined by relationships which could give rise to perceived biased in situations where they have acted as a fair-minded and informed observer would have. This conflicts with the aims of the Arbitration Act 1996 as it would create circumstances in which decisions are made legitimately but allow for additional scrutiny of those decisions which may not be necessary.

Concerns such as those recognised in *Almazeera v Penner* [2018] UKPC 3 where reasonable enquires would disclose a justiciable bias should not be affected by this change, as if the duty was based on actual knowledge there would still be a duty of disclosure. The reason for disclosure is not to rule out bias but to let the parties decide if the apparent bias is likely to relate to a real one. Parties have choice of Arbitrators therefore they are already instilling a level of trust, which is consistent of with a duty of care generally expected of professionals, therefore legislation should take the least intrusive form possible to allow parties autonomy in choosing Arbitrators.

For example, Arbitrators should not have to make reasonable enquires if they are acting in other matters involving the same party even if those matters are unrelated there could be an apparent bias, failure to disclose would cause a serious breach of natural justice. (*Beumer Group UK Ltd v Vinci Construction UK Ltd* [2016] EWHC 2283)

However a higher level of disclosure where the bias would not be apparent but would be on reasonable enquires, could give rise to situations where there is no bias, although one party retroactively views an apparent bias undermining the confidence in arbitration. Due to the continued duty of disclosure reasonable enquires would also be ongoing so in complicated cases arbitrators would be required to disclose information that would create no material change but could give rise to a doubt of impartiality. (*Soletanche Bachy France SAS v Aqaba Container Terminal (Pvt) Co* [2019] EWHC 362 (Comm))

It may be preferable to accept a higher level of disclosure in particularly sensitive arbitrations when both parties agree to this. Basing the reform on the actual knowledge of Arbitrators remains consistent with the aims of the legislation whilst improving accessibility, as Arbitrators are likely to disclose any obvious and apparent bias. As parties have a choice in Arbitrators, having a high level of disclosure is not necessary as if there are any concerns between the parties, they should be able to decide an alternative or implement a higher level of disclosure, as any justiciable bias should be apparent on the actual knowledge rather than reasonable enquires which could undermine the process entirely.

In conclusion, basing the duty upon what an arbitrator ought to know after making reasonable enquires takes the law too far, this change would enable parties to act vexatiously and goes against the aims of the legislation. This would cause complications and delays in the arbitration process as it would

require arbitrators to disclose information that may seem trivial and could not reasonably support a conclusion of a real possibility of bias, and enable a greater level of scrutiny of perceived bias which is likely to exhaust lines of enquiry with irrelevant information that could give rise to an apparent bias due to the interconnected nature of Arbitrators.

Further research could be made into how the level of disclosure works in the Scottish system, as if there are any prevalent issues a higher level of disclosure may be necessary, but prima facie the Scottish system works well and a higher level of disclosure may complicate the legislation, conflicting with the aims.

This could be achieved by consulting arbitrators in Scotland and parties that have a high number of issues resolved by arbitration as they would be able to give an insight as to the actual and legal effects these changes would make.

Consultation Question 6:

Not Answered

Please share your views below.:

Consultation Question 7:

Not Answered

Please share your views below.:

Consultation Question 8: Should arbitrators incur liability for resignation at all, and why?

Not Answered

Please share your views below.:

Consultation Question 9: Should arbitrators incur liability for resignation only if the resignation is proved to be unreasonable?

Not Answered

Please share your views below.:

Consultation Question 10: 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. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 11: 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. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 12: 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. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 13: We provisionally propose that the Arbitration Act 1996 should stipulate the threshold for success in any summary procedure. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 14: 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. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 15: 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. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 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?

Not Answered

Please share your views below.:

Consultation Question 17: 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. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 18: We provisionally conclude that the provisions of the Arbitration Act 1996 should not apply generally to emergency arbitrators. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 19: 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?

Not Answered

Please share your views below.:

Consultation Question 20: Do you think that section 44(5) of the Arbitration Act 1996 should be repealed, and why?

Not Answered

Please share your views below.:

Consultation Question 21:

Not Answered

Please share your views below.:

Consultation Question 22:

Not Answered

Please share your views below.:

Consultation Question 23: 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?

Not Answered

Please share your views below.:

Consultation Question 24: We provisionally conclude that our proposed change to section 67 of the Arbitration Act 1996 would not require any similar change to section 103. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 25: 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. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 26: 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?

Not Answered

Please share your views below.:

Consultation Question 27: 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?

Not Answered

Please share your views below.:

Consultation Question 28: Do you think that section 7 of the Arbitration Act 1996 (separability of arbitration agreement) should be mandatory, and why?

Not Answered

Please share your views below.:

Consultation Question 29: 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?

Not Answered

Please share your views below.:

Consultation Question 30: 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?

Not Answered

Please share your views below.:

Consultation Question 31: 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?

Not Answered

Please share your views below.:

Consultation Question 32: Do you think that section 39 of the Arbitration Act 1996 should be amended to refer to "orders" (rather than "awards"), and why?

Not Answered

Please share your views below.:

Consultation Question 33: Do you think that section 39(1) of the Arbitration Act 1996 should be amended to refer to "remedies" (rather than "relief"), and why?

Not Answered

Please share your views below.:

Consultation Question 34: 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 appellants was notified of the result of that request. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 35: 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?

Not Answered

Please share your views below.:

Consultation Question 36: We provisionally propose that sections 85 to 87 of the Arbitration Act 1996 (on domestic arbitration agreements) should be repealed. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 37: Do you think that any of the suggestions discussed in Chapter 11 needs revisiting in full, and if so, why?

Please share your views below.:

Consultation Question 38: 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?

Please share your views below.:

Response ID ANON-PT57-RU1H-G

Submitted to Law Commission Consultation: Review of the Arbitration Act 1996
Submitted on 2022-11-22 12:49:53

About you

What is your name?

Name:
Charles Oliver

What is the name of your organisation?

Enter the name of your organisation:
Charles Oliver Consultancy Limited

Are you responding to this consultation in a personal capacity or on behalf of your organisation?

Personal response

If other, please state::

What is your email address?

Email:
[REDACTED]

What is your telephone number?

Telephone number:
[REDACTED]

If you want the information that you provide in response to this consultation to be treated as confidential, please explain to us why you regard the information as confidential. As explained in our privacy notice, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

Please explain to us why you regard the information as confidential:

Consultation questions

Consultation Question 1: 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?

Agree

Please share your views below.:

Consultation Question 2: We provisionally conclude that the Arbitration Act 1996 should not impose a duty of independence on arbitrators. Do you agree?

Agree

Please share your views below.:

As long as they can act impartially and separate acquaintances from friends before accepting an appointment.

Consultation Question 3: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 4: Should the Arbitration Act 1996 specify the state of knowledge required of an arbitrator's duty of disclosure, and why?

Yes

Please share your views below.:

Consultation Question 5: 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?

What they ought to know

Please share your views below.:

All cases are different and some will need research to understand the problem fully .

Consultation Question 6:

More broadly justified

Please share your views below.:

Consultation Question 7:

Disagree

Please share your views below.:

It should be left to the parties to decide who they want to arbitrate and what characteristics that arbitrator should have.

Consultation Question 8: Should arbitrators incur liability for resignation at all, and why?

No liability for resignation

Please share your views below.:

It depends on why they resign, for example the arbitrator should be immune if the resignation is due to illness, finding they have a conflict, or following an objection from one of the parties. The arbitrator should not be immune if they just want to stop, or go on holiday.

Consultation Question 9: Should arbitrators incur liability for resignation only if the resignation is proved to be unreasonable?

Yes

Please share your views below.:

Consultation Question 10: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 11: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 12: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 13: We provisionally propose that the Arbitration Act 1996 should stipulate the threshold for success in any summary procedure. Do you agree?

Agree

Please share your views below.:

Consultation Question 14: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 15: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 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?

Yes

Please share your views below.:

For the avoidance of doubt

Consultation Question 17: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 18: We provisionally conclude that the provisions of the Arbitration Act 1996 should not apply generally to emergency arbitrators. Do you agree?

Agree

Please share your views below.:

Consultation Question 19: 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?

Agree

Please share your views below.:

Consultation Question 20: Do you think that section 44(5) of the Arbitration Act 1996 should be repealed, and why?

Yes

Please share your views below.:

Consultation Question 21:

Peremptory order

Please share your views below.:

Consultation Question 22:

Agree

Please share your views below.:

Consultation Question 23: 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?

Yes

Please share your views below.:

Consultation Question 24: We provisionally conclude that our proposed change to section 67 of the Arbitration Act 1996 would not require any similar change to section 103. Do you agree?

Agree

Please share your views below.:

Consultation Question 25: 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. Do you agree?

Other

Please share your views below.:

Section 67 (3) (c) already says that.

Consultation Question 26: 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?

Agree

Please share your views below.:

Consultation Question 27: 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?

Agree

Please share your views below.:

Consultation Question 28: Do you think that section 7 of the Arbitration Act 1996 (separability of arbitration agreement) should be mandatory, and why?

Yes

Please share your views below.:

So should section 4 be mandatory - what happens if the parties decide Section 4 has no effect?

Consultation Question 29: 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?

Disagree

Please share your views below.:

That would allow the court to interfere in more arbitrations.

Consultation Question 30: 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?

Yes

Please share your views below.:

Consultation Question 31: 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?

No

Please share your views below.:

Not necessary, it can be done already.

Consultation Question 32: Do you think that section 39 of the Arbitration Act 1996 should be amended to refer to "orders" (rather than "awards"), and why?

Yes

Please share your views below.:

Consultation Question 33: Do you think that section 39(1) of the Arbitration Act 1996 should be amended to refer to "remedies" (rather than "relief"), and why?

Yes

Please share your views below.:

Better English.

Consultation Question 34: 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?

Agree

Please share your views below.:

Consultation Question 35: 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?

Agree

Please share your views below.:

Consultation Question 36: We provisionally propose that sections 85 to 87 of the Arbitration Act 1996 (on domestic arbitration agreements) should be repealed. Do you agree?

Other

Please share your views below.:

They should be replaced as follows:

Section 85 – delete the current wording and change to:

“Unless the parties agree otherwise, all contracts except those set out in section 86 are deemed to include a provision that refers all disputes to arbitration under this Act.”

Section 86 – delete the current wording and change to:

“Section 85 shall not apply to:

- (a) contracts that specify a seat outside England and Wales;
- (b) matrimonial or civil partnership disputes;
- (c) disputes that come within the provisions of section 89;
- (d) disputes deemed unfair by Section 91.”

Section 87 – delete the current wording and change to:

“The court may rule that a matter should be referred to arbitration under this Act because of the specialised or technical nature of the dispute, or for any other reason.”

Consultation Question 37: Do you think that any of the suggestions discussed in Chapter 11 needs revisiting in full, and if so, why?

Please share your views below.:

Consultation Question 38: 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?

Please share your views below.:

Section 4 -

In Schedule 1, add sections 1 to 6, otherwise it is possible for the parties to avoid the mandatory sections by agreeing that section 4 will have no effect.

Section 18-

In subsections 18(2) and 18 (4) delete the word “court” and substitute “President of the Chartered Institute of Arbitrators.”

Change subsection 18(5) to read “The leave of the court is required for any appeal from a decision of the President of the Chartered Institute of Arbitrators under this section.”

Section 33(1)(b) – delete the word “falling”.

Section 39 – Change the title to “Power to make provisional orders”, not awards.

Change 39(1) to read “Unless the parties agree otherwise, the tribunal shall have the power to order on a provisional basis any relief that it would have power to grant in a final award.”

Delete 39(4).

Section 48(5)(b) – delete the words “(other than a contract relating to land)”.

Submitted to Law Commission Consultation: Review of the Arbitration Act 1996
Submitted on 2022-12-15 17:12:49

About you

What is your name?

Name:

[REDACTED]

What is the name of your organisation?

Enter the name of your organisation:

Orrick, Herrington & Sutcliffe (UK) LLP

Are you responding to this consultation in a personal capacity or on behalf of your organisation?

Response on behalf of organisation

If other, please state::

Please Select

What is your email address?

Email:

[REDACTED]

What is your telephone number?

Telephone number:

[REDACTED]

If you want the information that you provide in response to this consultation to be treated as confidential, please explain to us why you regard the information as confidential. As explained in our privacy notice, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

Please explain to us why you regard the information as confidential:

Consultation questions

Consultation Question 1: 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?

Disagree

Please share your views below.:

No. It is an anomaly that the Act addresses many areas which are complex and could be left to case law, but not this important point, even at the level of a point of principle. The confidential nature of English arbitration is a selling point, and it should be clearly endorsed as a matter of policy, to avoid arguments that the policy is not of general starting application (indeed, the possibility of London seated treaty arbitrations is exactly the reason why having a clear statement of policy is important to avoid disputes about whether there are additional policy considerations which should change the understood position). The fact that one of the best commentaries on confidentiality is found in a text providing a gloss on the Act (Merkin & Flannery) is telling as to this need. The statement of principle at 2.32 of the Consultation is a perfectly decent starting point.

Consultation Question 2: We provisionally conclude that the Arbitration Act 1996 should not impose a duty of independence on arbitrators. Do you agree?

Agree

Please share your views below.:

Agreed, on the basis that independence is a relevant factor in considering whether an arbitrator is (or appears to be) impartial.

Consultation Question 3: 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. Do you agree?

Agree

Please share your views below.:

Conceptually, yes. The use of both “reasonably” and “justifiable” appears duplicative however, and we suggest only one of these terms is employed.

Consultation Question 4: Should the Arbitration Act 1996 specify the state of knowledge required of an arbitrator’s duty of disclosure, and why?

Yes

Please share your views below.:

Yes – given the explosion in the number of challenges (particularly those within the context of institutional rules) and the fear that they are being used tactically, it makes sense to make clear what the basic framework is, to at least avoid disputes about what the test is and shift the focus solely to whether the test is met.

Consultation Question 5: 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?

Other

Please share your views below.:

In terms of initial disclosures, there should be a duty to make reasonable enquiries.

However, once an arbitrator has been appointed, it would be too cumbersome and unworkable to require an arbitrator to actively have to keep making constant enquiries (e.g., in the context of a solicitor arbitrator, how often would they have to keep re-running a conflict check?). However, limiting the duty to actual knowledge at that stage also presents the problems of arbitrators allowing themselves to be perceived to be less than partial through inaction (e.g., a solicitor arbitrator checks conflicts pre-appointment and is clear, but the day after her appointment her law firm accepts a major instruction from one of the parties which she is unaware of).

The compromise would be to require: (1) an arbitrator, pre-appointment to be under a duty to make (and disclose the results of) reasonable enquiries, and (2) post appointment to have the duty to (i) disclose any matters they have actual knowledge of and (ii) put in place reasonable systems (in the relevant context) to ensure that they would obtain actual knowledge of any likely matter, and to positively confirm at relevant points in the reference that enquiries have been refreshed (e.g. at the time of any hearing and as part of making any award).

Consultation Question 6:

More broadly justified

Please share your views below.:

See Q7.

Consultation Question 7:

Agree

Please share your views below.:

In general, yes, but we are concerned that the phrase “unless in the context of that arbitration” may be problematic where positive discrimination is being employed to broaden the pool of arbitrators etc. It is undoubtedly good for arbitration as a whole to have active diversity in mind in appointments, but could it be said that a clause or institutional policy which actively required positive discrimination could be justified in the context of any one arbitration? Alternative language could be “unless such agreement is a proportionate means of achieving a legitimate aim”.

Consultation Question 8: Should arbitrators incur liability for resignation at all, and why?

Liability for resignation

Please share your views below.:

Yes, in limited circumstances an arbitrator who unreasonably resigns can throw away significant costs for the parties which cannot be reasonably insured against. There needs to be some consequence to act as a deterrent to wrongful behaviour, particularly as the pool of arbitrators sitting is ever wider and the fear of damage to reputation is diminished.

Consultation Question 9: Should arbitrators incur liability for resignation only if the resignation is proved to be unreasonable?

Yes

Please share your views below.:

Consultation Question 10: 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. Do you agree?

Disagree

Please share your views below.:

No. This would be too absolute a protection. While it should be very rare that an arbitrator's behaviour should expose them to cost liability, there needs to be consequences in egregious cases where behaviour is in bad faith or otherwise beyond the pale.

Consultation Question 11: 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. Do you agree?

Agree

Please share your views below.:

Yes, very strongly agree. This may be the most important revision being proposed. We would suggest it made clear that the provision is worded as an 'opt out', rather than 'opt in'.

Consultation Question 12: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 13: We provisionally propose that the Arbitration Act 1996 should stipulate the threshold for success in any summary procedure. Do you agree?

Agree

Please share your views below.:

Consultation Question 14: 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. Do you agree?

Agree

Please share your views below.:

Yes. Given the body of case law around this standard, it makes good sense for it to be adopted.

Consultation Question 15: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 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?

Yes

Please share your views below.:

Yes. The reasoning stated at paras 7.23 to 7.34 of the Consultation is compelling and reflective of what the position sensibly should be. It is not however by any means clear from the Act that this is the position or at least that the position is not in doubt. It would make significant sense and avoid future disputes for the Act to clearly reflect the analysis rather than requiring careful parsing as has been done.

Consultation Question 17: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 18: We provisionally conclude that the provisions of the Arbitration Act 1996 should not apply generally to emergency arbitrators. Do you agree?

Disagree

Please share your views below.:

No. Or at least the word "generally" requires further understanding. While it is agreed that the Act cannot be simply applied as it stands to emergency arbitrators given their different and limited functions, it would seem important that certain minimum safeguards and powers should be retained, or risk emergency arbitrators acting in an improper manner, or not having the teeth to act at all. It is suggested that – at least – the following sections should apply: ss 1, 29, 33, 34, 38, 39, 41, 42, 46 and 48.

Consultation Question 19: 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?

Not Answered

Please share your views below.:

Yes. These should be features of specific institutional rules, allowing parties to opt into what is an exceptional procedure – subject to the need to have basic safeguards and enabling provisions (see answer to Q18).

Consultation Question 20: Do you think that section 44(5) of the Arbitration Act 1996 should be repealed, and why?

Not Answered

Please share your views below.:

Yes, for the reasons given at paragraph 7.86 of the Consultation.

Consultation Question 21:

Permission under section 44

Please share your views below.:

Option 2, on the basis that by definition an emergency arbitrator is dealing with an urgent matter and is unlikely to have time to go through the peremptory order hoops.

Consultation Question 22:

Agree

Please share your views below.:

Consultation Question 23: 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?

Yes

Please share your views below.:

Yes, for the reasons given in the Consultation.

Consultation Question 24: We provisionally conclude that our proposed change to section 67 of the Arbitration Act 1996 would not require any similar change to section 103. Do you agree?

Agree

Please share your views below.:

Consultation Question 25: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 26: 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?

Agree

Please share your views below.:

Consultation Question 27: 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?

Agree

Please share your views below.:

Consultation Question 28: Do you think that section 7 of the Arbitration Act 1996 (separability of arbitration agreement) should be mandatory, and why?

No

Please share your views below.:

No. A party may well be advised not to disapply s.7, but it is consistent with the concept of allowing party autonomy (a selling point of English arbitration) to allow them to do so.

Consultation Question 29: 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?

Agree

Please share your views below.:

Consultation Question 30: 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?

Yes

Please share your views below.:

Yes. It makes sense to streamline these procedures for the reasons given in the Consultation.

Consultation Question 31: 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?

No

Please share your views below.:

This seems unnecessary – currently there is no particular doubt that remote hearings or electronic documentation are valid manners of proceedings. The Act gives the Tribunal very wide discretion and the parties still further ability to agree such matters. The danger in making specific provision for one innovation is that the absence of express language dealing with another form will give rise to doubts as to whether the list is intended to be exhaustive or inclusive. For that reason, we would leave this alone.

If remote hearings are to be specifically dealt with, we would suggest it be made clear that such hearings ‘can be permitted’ rather than being simply ‘permitted’, to make clear the Tribunal still must be satisfied it is an appropriate way of proceeding in the circumstances.

Consultation Question 32: Do you think that section 39 of the Arbitration Act 1996 should be amended to refer to “orders” (rather than “awards”), and why?

Yes

Please share your views below.:

Yes, for the reasons given in the Consultation.

Consultation Question 33: Do you think that section 39(1) of the Arbitration Act 1996 should be amended to refer to “remedies” (rather than “relief”), and why?

Yes

Please share your views below.:

Yes – on the basis that there is no clear difference, but the use of different words will suggest that there is.

Consultation Question 34: 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?

Agree

Please share your views below.:

Yes, strongly. This is probably the second most important change recommended by this consultation.

Consultation Question 35: 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?

Disagree

Please share your views below.:

We would tend towards deleting the provision. As the Consultation sets out, there is significant confusion and doubt as to what it is doing. While the Consultation admirably finds a justification for it, it is not clear how that is additive to the Court of Appeal's general powers to condition permission for appeal on the provision of payment in etc. The provision should either be removed or its use more clearly explained in its text.

Consultation Question 36: We provisionally propose that sections 85 to 87 of the Arbitration Act 1996 (on domestic arbitration agreements) should be repealed. Do you agree?

Agree

Please share your views below.:

Consultation Question 37: Do you think that any of the suggestions discussed in Chapter 11 needs revisiting in full, and if so, why?

Please share your views below.:

If any issue were to be included, the most obvious would be codifying the proper approach to the law which governs the arbitration agreement (whether reflecting the decision in *Enka v Chubb* or otherwise) – i.e. the matters dealt with at paragraphs 11.8 to 11.12 of the Consultation. Given the wealth of case law on this issue and the frequency of it being litigated, codifying the answer may prevent further litigation.

Consultation Question 38: 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?

Please share your views below.:

No

Response ID ANON-PT57-RUBW-G

Submitted to Law Commission Consultation: Review of the Arbitration Act 1996
Submitted on 2022-12-15 23:59:37

About you

What is your name?

Name:

Dr Manuel Penades

What is the name of your organisation?

Enter the name of your organisation:

King's College London - Independent Arbitrator

Are you responding to this consultation in a personal capacity or on behalf of your organisation?

Personal response

If other, please state::

What is your email address?

[REDACTED]

What is your telephone number?

[REDACTED]

If you want the information that you provide in response to this consultation to be treated as confidential, please explain to us why you regard the information as confidential. As explained in our privacy notice, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

Please explain to us why you regard the information as confidential:

Consultation questions

[...]

Consultation Question 27: 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?

Agree

Consultation Question 38: 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?

Please share your views below:

One point that has not been mentioned in the Consultation is the possibility to challenge an award on the basis of an alleged breach of substantive public policy. Section 68(1) of the English Arbitration Act ('EAA') permits the challenge of an award on the 'ground of serious irregularity affecting the tribunal, the proceedings or the award'. Case law has confirmed that section 68 is not available when a party challenges the award on the basis of an error in the application of the law chosen to govern the arbitration (e.g., *Vee Networks Ltd v Econet Wireless International Ltd* [2005] 1 Lloyd's Rep 192 at [90]). Section 69 EAA, unless excluded, is the only ground available under English arbitration law to challenge errors on a question of substantive law, as defined in section 82 EAA.

Section 68(2)(g) provides that serious irregularity includes 'the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy'. The reference to public policy in that

provision is not absolute. Not every breach of public policy is caught by the wording of section 68(2)(g), which must be interpreted restrictively. The reference to public policy in section 68(2)(g) is limited to 'the way in which [the award] was procured'. Commentators agree that 'What does seem to be of importance is the fact that if the provision is to be read literally, an award whose result is contrary to public policy (e.g. an award enforcing a drug-trafficking deal) will not fall foul of the section under this heading unless the manner in which the award was procured was contrary to public policy.' (*Merkin & Flannery on the Arbitration Act 1996*, Sixth Edition, Routledge, 2020, 719-720). This is in line with the title of section 68 EAA, which refers to 'procedural' irregularities. Some case law has adopted a similar view, although in non-conclusive terms. For instance, in *R v V* [2009] 1 Lloyd's Rep 97 David Steel J noted that annulment under section 68(2)(g) EAA was not justified because there had been no complaint with the arbitral process, nor of V's conduct during the arbitration. Still, the decision also discussed the alleged illegality on the merits of the case. Similarly, in *PT Transportasi Gas Indonesia v ConocoPhillips (Grissik) Ltd* [2017] 2 Lloyd's Rep 600, Sir Jeremy Cooke refused a challenge under section 68(2)(g) EAA noting that what the challenging party intended was nothing more than an attempt to re-argue what had been lost before the tribunal. The challenge was not based on procedural reasons, but on the grounds that the payment of damages pursuant to the award against the losing party in Indonesia would be contrary to public policy there, since the award was the result of an attempt to circumvent Indonesian legislation that outlawed such payments.

Some authors suggest that the omission of substantive public policy from section 68 'was an inadvertent drafting lacuna' (*Merkin & Flannery on the Arbitration Act 1996*, Sixth Edition, Routledge, 2020, 720).

The limitation to procedural public policy in section 68 EAA would be of little practical relevance if a party could challenge the award based on wider public policy grounds under common law (via section 81(1)(c) EAA). This would be similar to the availability of the ground of lack of arbitrability under section 81(1)(a) EAA in the context of jurisdictional challenges, where it is unclear whether section 67 EAA covers lack of arbitrability (*Serbia v Imagesat International NV*, [2009] EWHC 2853 (Comm) and *Azov Shipping Co v Baltic Shipping Co (No. 3)* [1999] 2 All ER (Comm) 453). However, the operation of sections 81(1)(a) and 81(1)(c) EAA in the context of sections 67 and 68 respectively cannot be equated. This is because, unlike the wide reference to lack of arbitrability in section 81(1)(a) EAA, the availability to public policy in section 81(1)(c) EAA is limited to 'the refusal of recognition or enforcement of an arbitral award'. Notwithstanding this clear wording, some voices suggest that, despite the limitation to procedural public policy in section 68 EAA, 'anyone seeking to challenge a domestic award on the basis that it offends against public policy would almost certainly be able to rely upon section 81 of the Act' (*Merkin & Flannery on the Arbitration Act 1996*, Sixth Edition, Routledge, 2020, 720). It is unclear why these authors adopt such reading 'praeter legem' when simultaneously advocating that section 68(2)(g) EAA should be 'read literally' (*idem*). As they acknowledge, 'the proposition has yet to be tested' (*idem*).

The Law Commission should use the ongoing review of the English Arbitration Act to clarify whether it is possible to challenge an award in England on public policy grounds other than 'the way in which it was procured' (section 68(2)(g) EAA). This would include a violation of substantive public policy.

The lack of clarity around this issue is a source of uncertainty for courts, arbitrators and, most importantly, foreign parties that select England and Wales to arbitrate their disputes under the (perhaps false) assumption that their rights protected by public policy are safeguarded by post-award challenges.

The availability of a wider ground of public policy could be reflected by amending section 81(1)(c) EAA. A proposed wording could be: '(c) the challenge or the refusal of recognition or enforcement of an arbitral award on grounds of public policy' [the current provision reads '(c) the refusal of recognition or enforcement of an arbitral award on grounds of public policy.']

Should such wider ground of public policy not be available, perhaps the legislative process could be used to clarify the rationale behind this limitation, which is quite exceptional at a comparative level. In the vast majority of jurisdictions, if not all, awards can be challenged on public policy grounds (procedural and substantive). A possible reason for a limitation of the public policy ground to the procedural dimension captured in section 68(2)(g) EAA might be the logic behind article IX(2) of the European Convention on International Commercial Arbitration 1961, to which the UK is not a party. According to this article, 'In relations between Contracting States that are also parties to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10th June 1958, paragraph 1 of this Article limits the application of Article V(1)(e) of the New York Convention solely to the cases of setting aside set out under paragraph 1 above.' That is, article IX(2) of the European Convention excludes setting aside decisions based on public policy (and arbitrability) from the scope of article V(1)(e) of the New York Convention. To be clear, this provision does not prevent the challenge of awards on grounds of breach of public policy or lack of arbitrability. It simply excludes those cases of setting aside for the purposes of article V(1)(e) of the New York Convention.

If, according to the prevailing interpretation of article V(1)(e) of the New York Convention, the setting aside of an award should bar its enforceability at an international level, the exclusion of public policy as relevant annulment ground for the purposes of article V(1)(e) of the New York Convention eliminates the risk that a country exports its internal notions of public policy and restricts the effectiveness of an award that may never be intended to be enforced in the territory of the seat (see Grusic & Penades 'Illegality in English Arbitration after *Patel v Mirza*', in Davies & Raczynska (eds.), *Contents of Commercial Contracts. Terms Affecting Freedoms*, Hart Publishing, 2020, 382-402, 398). This solution is favourable to international arbitration, while preserving the autonomy of each jurisdiction to examine the recognition and enforcement of awards in their territory under their own notions of public policy.

Should the English Arbitration Act restrict the challenge of awards to the ground of procedural public policy, it would reach a result similar to article IX(2) of the European Convention as regards substantive public policy. That is, it would prevent the exportation to English notions of substantive public policy through the annulment of an award while maintaining the possibility to invoke this ground in enforcement actions under sections 81(1)(c) and 103(3) EAA.

Should this rationale be the reason behind the current wording of sections 68(2)(g) and 81(1)(c) EAA, the EAA would not require any amendment. Still, the policy should be spelt out during the current review of the Act to assist courts and parties in the application of sections 68(2)(g) EAA and 81(1)(c) EAA, and avoid unintended wide interpretations of those provisions.



Pinsent Masons

Response to the Law Commission's Consultation Paper 257

Review of the Arbitration Act 1996
December 2022

A PURPOSE-LED PROFESSIONAL SERVICES
BUSINESS WITH LAW AT THE CORE

CONTENTS

		PAGE
1.	INTRODUCTION	3
2.	CONFIDENTIALITY	4
3.	INDEPENDENCE OF ARBITRATORS AND DISCLOSURE	8
	A. A SEPARATE DUTY OF INDEPENDENCE?	8
	B. A LEGISLATIVE DUTY OF DISCLOSURE	10
4.	DISCRIMINATION	10
	A. A NARROW OR BROAD JUSTIFICATION FOR REQUIRING A PROTECTED CHARACTERISTIC	11
5.	IMMUNITY OF ARBITRATORS	14
	A. SHOULD ARBITRATORS INCUR LIABILITY FOR RESIGNATION AT ALL, AND WHY?	14
	B. SHOULD ARBITRATORS INCUR LIABILITY FOR RESIGNATION ONLY IF THE RESIGNATION CAN BE PROVED UNREASONABLE	16
	C. ARBITRATORS' LIABILITY FOR COSTS	22
6.	SUMMARY DISPOSAL OF ISSUES WHICH LACK MERIT	23
	A. THE PRINCIPLE OF SUMMARY DISPOSAL	23
	B. THE SUMMARY DISPOSAL PROCEDURE TO BE ADOPTED	25
	C. THE SUMMARY DECISION THRESHOLD	25
7.	INTERIM MEASURES ORDERED BY THE COURT IN SUPPORT OF ARBITRAL PROCEEDINGS (SECTION 44 OF THE ACT)	26
	A. SECTION 44 AND THIRD PARTIES	29
	B. ORDERS RELATING TO WITNESS EVIDENCE, AND THIRD PARTIES	30
	C. THIRD PARTY APPEALS	30
	D. EMERGENCY ARBITRATORS	31
8.	JURISDICTIONAL CHALLENGES AGAINST ARBITRAL AWARDS (SECTION 67)	36
	A. APPEAL OR REHEARING?	36
	B. CONSISTENCY WITH SECTION 32	38

C.	CONSISTENCY WITH SECTION 103	38
D.	REMEDIES UNDER SECTION 67	39
E.	COSTS	40
9.	APPEALS ON A POINT OF LAW	41
A.	THE NATURE AND TIMING OF THE AGREEMENT TO EXCLUDE THE COURT'S POWERS	42
B.	CODIFICATION OF THE REQUIREMENT THAT CONSENSUAL APPEALS MUST RELATE TO QUESTIONS OF LAW WHICH "SUBSTANTIALLY AFFECT" THE RIGHTS OF ONE OR MORE PARTIES	46
10.	MINOR AMENDMENTS	49
A.	SECTION 7 (SEPARABILITY OF THE ARBITRATION AGREEMENT)	49
B.	APPEALS FROM SECTION 9 (STAY OF LEGAL PROCEEDINGS)	51
C.	SECTIONS 32 AND 45 (COURT DETERMINATION OF PRELIMINARY MATTERS)	51
D.	MODERN TECHNOLOGY	53
E.	SECTION 39 (POWER TO MAKE PROVISIONAL AWARDS)	56
F.	SECTION 70 (CHALLENGE OR APPEAL: SUPPLEMENTARY PROVISIONS)	59
G.	SECTIONS 85 TO 88 (DOMESTIC ARBITRATION AGREEMENTS)	63
11.	OTHER SUGGESTIONS NOT SHORTLISTED FOR REVIEW	63
SCHEDULE 1 – RESPONSES TO CONSULTATION QUESTIONS		

RESPONSE TO THE LAW COMMISSION'S CONSULTATION PAPER 257

REVIEW OF THE ARBITRATION ACT 1996

1. INTRODUCTION

- 1.1 Pinsent Masons is pleased to submit its Response to the Law Commission's Consultation Paper concerning its review of the Arbitration Act 1996 (the "Act"). On the 25th anniversary of the entry into force of the Act, the Consultation Paper raises important questions concerning not only the theoretical underpinnings of the Act, but also how it is used in practice. Taking the opportunity to explore these issues helps to test the robustness of the Act which, along with the reliability of the common law and the maturity of the legal profession in this jurisdiction, is one of the key attributes that has helped maintain the position of England & Wales as a leading seat of arbitration.
- 1.2 We have set out our analysis of the issues raised in the Consultation Paper in the main body of this Response, which follows the structure of the Consultation Paper. Whilst we address the matters covered by each of the Consultation Questions in the main body of the Response, for ease of reference we have reproduced the Consultation Questions at Schedule 1 and summarised our responses to each of them.
- 1.3 We are in broad agreement with much of the analysis set out in the Consultation Paper, and many of the conclusions it reaches as to the need (or otherwise) for reform. Where we consider that it assists, we have provided further analysis in support of the conclusions in the Consultation Paper, and have made proposals as to the substance of amendments which could be made to the Act so as to satisfy the need for reform.
- 1.4 As noted above, the topics addressed in the Consultation Paper address issues of significance in arbitration. We are particularly encouraged by the proposals aimed at tackling discrimination in arbitrator appointments by expressly prohibiting challenges based on protected characteristics. We are also pleased to see that the environmental impact of arbitration has been given consideration in the context of the discussion as to whether the use of modern technology should be provided for in the Act. In response to this, we have proposed that environmental considerations could be incorporated into the general principles in section 1 of the Act, so that the provisions of the Act can be interpreted and construed with the environmental impact of arbitration in mind.
- 1.5 Where we have taken a contrary view to the positions set out in the Consultation Paper, we have set out our reasons for doing so. The main points of disagreement relate to the topics of confidentiality, the availability of interim measures under section 44, challenging jurisdiction under section 67, and appeals on points of law under section 69.
- 1.6 Insofar as confidentiality is concerned, we broadly favour a codification of the law on confidentiality as a means of ensuring that England & Wales remains a competitive seat for arbitration by providing additional certainty for putative parties that the default position in this jurisdiction is confidentiality.
- 1.7 Our positions on sections 44, 67 and 69 are more concerned with the principles which govern arbitration, in particular party autonomy and consent. In the context of sections 44 and 69, we have proposed modest amendments which seek to clarify the circumstances in which parties are deemed to have waived their rights to invoke the supervisory jurisdiction of the courts to either grant interim measures or hear appeals on points of law. We consider that the current position which deems that rights under these provisions have been waived due to either the inclusion of a *Scott v Avery* clause (preventing the bringing of any action until the dispute has

been arbitrated) or the adoption of institutional rules (which contain a waiver of a right of recourse) is not based on the informed consent of the parties, and does not properly reflect the reality in which commercial contracts are negotiated. We have therefore suggested that the Act stipulates the circumstances in which an agreement to exclude the court's jurisdiction under these provisions can be made.

- 1.8 As regards section 67, we are not convinced of the need for reform in view of the fact that challenges to the substantive jurisdiction of the tribunal concern issues that go to the heart of arbitration as a consensual dispute resolution process. Unlike other grounds for challenge which require a showing of substantial injustice or that determination of the issue will substantially affect the rights of the parties, there is no statutory threshold which must be met in order to challenge a tribunal's ruling on its jurisdiction, which reflects the fact that jurisdiction is binary: a tribunal either has it or it does not, and if it does not, then it cannot determine the parties' dispute. It is therefore important that a court faced with a challenge to a tribunal's jurisdiction should be able to review all of the available evidence as part of a full rehearing, rather than be restricted to the tribunal's factual findings on an appeal.
- 1.9 In conclusion, the Law Commission's Consultation Paper is a welcome assessment of the status of the law of arbitration in England and Wales which contains a number of proposals which – if implemented – should in our view contribute to the continued success of this jurisdiction as a global centre for arbitration for the next 25 years. We would be happy to further develop any aspects of our Response with the Commission in due course.

2. CONFIDENTIALITY

- 2.1 The possibility of including provisions on confidentiality in the Arbitration Act was explored pre-1996 and it was decided to leave the rules to be developed by the courts on a case-by-case basis. More than 25 years later, there is still some level of uncertainty about the scope of confidentiality, yet the same approach is being proposed: let the rules be developed by the courts.
- 2.2 A key reason why the Act is being reviewed is to keep it fit for purpose and to ensure that the law of England and Wales continues to be the most frequent choice of applicable law in commercial contracts and that London retains its place as arguably the most popular arbitral seat in the world.¹
- 2.3 It is therefore appropriate to look at what changes have taken place between 1996 and now, and why such changes might lead to the conclusion that a codification of rules on confidentiality should be reconsidered.
- 2.3.1 Firstly, competitor jurisdictions are developing their services and vigorously promoting themselves, to the potential detriment of London. They are enacting cutting-edge legislation to meet the demands of today's users of the arbitral process. This has become even more apparent as a result of Brexit, the Covid-19 pandemic, and environmental considerations. Although the majority view appears to be that Brexit is not negatively impacting the attractiveness of London as a seat,² with some even saying that London's popularity will increase as a result of Brexit, this has not prevented some jurisdictions from claiming that Brexit undermines London's appeal as an arbitral seat: there is no shortage of articles and conferences in which this type of debate takes place. The halt on travel and the development of

¹ According to the *2021 International Arbitration Survey: Adapting arbitration to a changing world*, conducted by Queen Mary University London and White & Case, London and Singapore are on a par as the top arbitral seats, although there are nuances in the report that we do not address here.

² 2018 International Arbitration Survey, *'The Evolution of International Arbitration'* conducted by Queen Mary University of London and White & Case, pp. 2, 9, 11 and 12.

virtual hearings as a result of the Covid-19 pandemic provided an opportunity for arbitral seats other than London to grow. Environmental considerations in the conduct of international arbitrations, which existed pre-Covid, are now more urgent than ever³ and have also resulted in seats other than London growing in popularity. In addition, the cost of arbitrating in London is sometimes given as a reason to diminish London's reputation as an arbitral seat.

2.3.2 Second, users of the arbitral process have become more demanding about their wish for clarity and accessible laws and process. Government policy appears to support making the law more accessible to users.

2.3.3 Third, there is a clear move towards more cost-effective case management, as evidenced, for example, in many institutional arbitration rules.⁴ Cases can be run more cost-effectively when the law is clear on issues such as confidentiality, as it avoids the need to make specific provision for these issues when the procedural rules are being agreed, and the attendant discussion and argument this can involve.

2.3.4 Fourth, cybersecurity and data protection issues have added a new dimension to confidentiality which did not exist in the same way in 1996. This may make it even more important to have a clear statutory provision.

2.4 We are not suggesting that the issue of confidentiality on its own will necessarily impact the popularity of London as a seat. However, like any jurisdiction, England and Wales will wish to ensure that, overall, the law provides what users of the arbitration process expect and want, in an accessible and affordable way. Rules on confidentiality are part of that 'package' and, as the figures referred to at paragraph 2.6 of the Consultation Paper demonstrate, confidentiality is important to a significant majority of arbitration users.

2.5 We have considered whether users actually want their arbitrations to be confidential. If so, how do they wish confidentiality to be dealt with? Would they prefer a clear, accessible statutory provision or are they content to research the case law?

2.6 We take the view that some level of confidentiality is generally expected in international commercial arbitrations (investor-State arbitrations are a different matter and are mentioned below). Confidentiality has been described as one of the "*true central pillars of the entire arbitral system*".⁵ The Hong Kong legislation of 2011 introduced confidentiality provisions because it was felt that "*one of the main reasons that parties choose to settle disputes by arbitration is confidentiality*".⁶

2.7 The consultation process for the Arbitration (Scotland) Act 2010, which includes provisions on confidentiality (see 2.12 below), revealed that the Scottish business community was overwhelmingly in favour of having a statutory confidentiality obligation.

³ See, in particular, the Campaign for Greener Arbitrations and its Green Protocols (www.greenerarbitrations.com).

⁴ For example, LCIA Arbitration Rules (2020) Article 14; ICC Arbitration Rules (2021) Article 21; Singapore International Arbitration Centre Rules (2016) Article 19.

⁵ 2018 International Arbitration Survey, '*The Evolution of International Arbitration*' conducted by Queen Mary University of London and White & Case, p. 7.

⁶ Hong Kong Government LC Paper No CB(2)2546/08-09(04), para 9.

- 2.8 This has been similarly endorsed by the international arbitration community. Not only do users appear to prefer a statutory provision, but according to the 2018 Queen Mary University International Arbitration Survey, a sizeable majority would prefer an opt-out provision, i.e., a default rule that would apply unless the parties decide otherwise. 74% of respondents to the survey thought that *“confidentiality should be an opt-out, rather than an opt-in, feature.”*⁷
- 2.9 We suggest that leaving confidentiality to be developed by the courts is not an attractive prospect for users of international arbitration choosing to seat their process in London. Codified rules would be more user-friendly than spending valuable time and money carrying out case law research (frequently only accessible to the legal profession) to ascertain whether or not an arbitration, or aspects of an arbitration, are confidential.
- 2.10 As the Honourable Mr Justice Scarman wrote as a member of the Law Commission for England in 1965 on the issue of codification generally:⁸
- “In truth, it will be a great convenience to provide the judges with one and the same starting point instead of asking them to choose their own from the 300,000 reported cases, or whatever is the sizeable fraction of that grand total which represents the case law on the subject under consideration. It must be a clear advantage that they all start at the same point – the code – wherever they may end up and whatever legal route (motorway or maze) they choose to take from that point onwards”.*
- 2.11 It is not only the judges who wish to know how to decide their cases. Users too wish to understand what protections are available to them, preferably before they start proceedings.
- 2.12 Codified rules on confidentiality in arbitration are in force in other jurisdictions, including Scotland, Australia, New Zealand and Hong Kong, and have been shown to work well.⁹
- 2.12.1 Under the Arbitration (Scotland) Act 2010, there is a statutory duty, under Rule 26, prohibiting the arbitrators and the parties from disclosing confidential information relating to the arbitration (see the extract at Figure 1 below). However, Rule 26 is not mandatory: this is an opt-out model in the shape of a default rule which applies unless the parties decide otherwise. They may opt out partially or entirely, thus allowing for transparency if the parties so wish.
- 2.12.2 Under the Scots Act, confidential information is defined as information relating to the dispute, the arbitral proceedings, the award or in some circumstances civil proceedings relating to the arbitration, so long as the information is not and has never been in the public domain.
- 2.12.3 There are some exceptions, which include:
- (a) where the disclosure is authorised by the parties or required by the tribunal;
 - (b) if it is required to comply with the law;

⁷ 2018 International Arbitration Survey, *‘The Evolution of International Arbitration’* conducted by Queen Mary University of London and White & Case, p.28.

⁸ Scarman, L., (1967) *Codification and Judge-Made Law: A Problem of Coexistence* Indiana Law Journal 42(3), Article 3.

⁹ Arbitration (Scotland) Act 2010; Australia: amendments to the International Arbitration Act effected by the Civil Law and Justice Legislation Amendment Act 2015; New Zealand: Arbitration Amendment Act 2019; Hong Kong: Arbitration Ordinance 2011.

- (c) where it is in the public interest;
- (d) or where it is necessary in the interest of justice or is needed to protect a party's lawful interests.

2.12.4 The requirement to treat proceedings as confidential has been strongly supported by the Scottish courts. If an application is made to a Scottish court in respect of an arbitration, the court will keep the parties' names and details of the case anonymous. It is also possible to obtain an order from the court that the case should not be reported at all.

2.12.5 A clear, statutory confidentiality obligation is probably more likely to result in compliance: the Scottish provisions make breach of the obligation actionable.

2.12.6 The Scots Act respects the integrity of the arbitral system whilst providing a clear and pragmatic solution to what users actually want and need.

2.12.7 While confidentiality is a complex issue, a careful drafting process involving in-depth study of comparative law could be carried out and result in a clear and accessible codified approach. Other jurisdictions have done it, demonstrating that it is not only possible to codify the rules on confidentiality for the purposes of arbitration, but that a codified position works in practice.

2.13 We recognise the increasing tension between confidentiality and transparency, especially in investor-State cases and in other cases affecting the general public such as where public money is at stake in public procurement contracts. There is no 'one size fits all', since in commercial arbitrations particularly, confidentiality may be why parties choose arbitration over litigation, whereas in investor-State or other arbitrations in which public interest is a consideration, transparency may be desirable or necessary. An opt-out provision can cater to both scenarios.

2.14 While there is a trend towards transparency for certain aspects of some commercial arbitrations (e.g., publication of awards), we think this may be overstated. Although there may be an increasing need for transparency in some commercial arbitrations, in our experience this would tend to be the exception rather than the rule. There are no hard and fast rules about which cases require confidentiality and which do not, but it is likely that most users of commercial arbitration expect some level of confidentiality and that such expectation could be met through codification. Provisions along the lines of the Scots legislation would clarify and preserve that expectation, whilst allowing parties to agree to disclose confidential information relating to the arbitration if they wish (parties can of course agree to do this in most arbitrations anyway through a specific confidentiality agreement, but a statutory provision would have the merit of providing greater clarity than the current English law implied duty of confidentiality). This in turn could benefit London as a seat.

<i>Rule 26 Confidentiality D</i>	
26	<p>(1) Disclosure by the tribunal, any arbitrator or a party of confidential information relating to the arbitration is to be actionable as a breach of an obligation of confidence unless the disclosure—</p> <ul style="list-style-type: none"> (a) is authorised, expressly or impliedly, by the parties (or can reasonably be considered as having been so authorised), (b) is required by the tribunal or is otherwise made to assist or enable the tribunal to conduct the arbitration, (c) is required— <ul style="list-style-type: none"> (i) in order to comply with any enactment or rule of law, (ii) for the proper performance of the discloser's public functions, or (iii) in order to enable any public body or office-holder to perform public functions properly, (d) can reasonably be considered as being needed to protect a party's lawful interests, (e) is in the public interest, (f) is necessary in the interests of justice, or (g) is made in circumstances in which the discloser would have absolute privilege had the disclosed information been defamatory. <p>(2) The tribunal and the parties must take reasonable steps to prevent unauthorised disclosure of confidential information by any third party involved in the conduct of the arbitration.</p> <p>(3) The tribunal must, at the outset of the arbitration, inform the parties of the obligations which this rule imposes on them.</p> <p>(4) "Confidential information", in relation to an arbitration, means any information relating to—</p> <ul style="list-style-type: none"> (a) the dispute, (b) the arbitral proceedings, (c) the award, or (d) any civil proceedings relating to the arbitration in respect of which an order has been granted under section 15 of this Act, <p>which is not, and has never been, in the public domain.</p>

Figure 1 - Extract of Rule 26 of the Arbitration (Scotland) Act 2010 relating to Confidentiality

3. INDEPENDENCE OF ARBITRATORS AND DISCLOSURE

A. A separate duty of independence?

- 3.1 We agree that the Act should not impose a duty of arbitrator independence separate from the pre-existing duty of impartiality in terms of the Act.
- 3.2 The dividing line between impartiality and independence is not clear cut and there is significant overlap between the two concepts; an arbitrator who lacks sufficient independence cannot be regarded as impartial. In our experience, the existing regime of section 24(1)(a), section 33 and section 68 works well to capture these 'overlap' cases – particularly when combined with the disclosure practices adopted by the majority of arbitrators (as described below).
- 3.3 However, we disagree with the Commission's position at paragraph 3.39 of its Consultation Paper, if it is suggested there that, in the arbitral context, independence is necessarily subsumed into impartiality so that there is only a lack of independence when it impacts impartiality (as a matter of fact or by apparent bias). This

is best demonstrated by the example where both an arbitrator and party counsel are from the same chambers. English law does not view this as impacting on partiality however we have experience of clients from other jurisdictions expressing concerns at such circumstances. In the premises, the ICSID Tribunal in *Hrvatska Elektroprivreda d.d. v. Republic of Slovenia* noted that the practice of counsel and arbitrators being from the same chambers is “not universally understood let alone universally agreed” and held that the question of whether such an arrangement was permissible was a question to be regarded in all of the relevant circumstances.¹⁰

- 3.4 We give the example of barristers from the same chambers given its prominence in discussions on this subject; in using it we do not suggest that such circumstances should be caught by a hypothetical duty of independence. However, it is illustrative of the different approach that international parties can take with regards to certain connections an arbitrator might have, and the impact of those connections on impartiality. A separate duty of independence could serve to address the concerns of some international parties where the current focus on impartiality does not. Such a duty could increase the confidence of some international parties in the English system.
- 3.5 However, the potential benefits of a separate duty of independence are likely to be marginal. In our experience, there is a significant degree of commonality between England and other jurisdictions as to what is an appropriate degree of independence and, therefore, a separate duty of independence would only provide desired protection in a small number of instances. Further, international parties' expectations as to what is an unacceptable degree of independence are influenced by their legal advisors who, in arbitrations under the Act, are often English practitioners.
- 3.6 These marginal benefits must be weighed up against what, in our view, are the two most important countervailing factors:
- 3.6.1 Firstly, the most important issue is that the arbitrators are impartial, not that they are independent in every respect, and in this regard, we agree with the Commission. The significant overlap between a lack of independence and impartiality means that in the vast majority of cases where there is a significant concern regarding independence then a party already has a route of challenge.
- 3.6.2 The second is the potentially significant prospect of a standalone duty of independence being used by unwilling parties to attempt to frustrate the arbitral process. In this regard, in our 2019 survey with Queen Mary University, 53% of respondents noted that party tactics contributed to the inefficiency of the arbitral process.¹¹ This concern is particularly acute in sectors where the efficiency of the arbitral process depends in large part on a number of repeat and experienced arbitrators.
- 3.7 When that balancing exercise is conducted, in our view it clearly weighs against the inclusion of a separate duty of independence in the Act.

¹⁰ ICSID Case No. ARB/05/24, Tribunal's Ruling regarding the participation of David Milton QC in further stages of proceedings, paragraph 18.

¹¹ Pinsent Masons LLP & Queen Mary University, *2019 International Arbitration Survey: International Construction Disputes*, page 24 (accessible: <https://www.pinsentmasons.com/thinking/special-reports/international-arbitration-survey>).

B. A legislative duty of disclosure

- 3.8 We agree that the Act should provide that arbitrators have a continuing duty to disclose any circumstances which may give rise to justifiable doubts as to their impartiality. However, this duty should be expressed as a general principle to allow further development of the duty by the courts. We presume that the duty is to be a mandatory provision of the Act and, if so, we agree with that approach.
- 3.9 In the majority of arbitrations with which we are involved under the Act, arbitrators do provide disclosure of the kind envisaged by the Commission. In this regard they are aided by the IBA Guidelines on Conflicts of Interest in International Arbitration, various institutional rules requiring disclosure,¹² and the tendency towards good practice in the arbitral community. This practice of disclosure was the case prior to the Supreme Court's decision in *Halliburton v Chubb*.¹³ In this regard, *Halliburton* is not a revolution in arbitral practice but a welcome recognition of the pre-existing norms of disclosure and confirmation that a failure to abide by that practice may constitute grounds for challenging an arbitrator's appointment.
- 3.10 We anticipate that the law with regard to the arbitrator's duty to disclose has some way to develop following the decision in *Halliburton* and it is important to allow the courts sufficient flexibility to do so. Therefore, in our view an amendment to the Act providing that arbitrators have a continuing duty of disclosure should be expressed as a principle only – the detail of such a duty is best left to be developed by the courts on a case-by-case basis.
- 3.11 We agree that the language of 'justifiable doubt' should be used rather than 'apparent bias' or another such term, to ensure uniformity with the remainder of the Act.
- 3.12 We agree that if a duty of disclosure is being introduced then it should specify the state of knowledge required. This increases legal certainty and reduces the risk of unnecessary challenges.
- 3.13 We are of the view that the duty should be expressed both in terms of the arbitrator's actual knowledge and what they ought to have known having made reasonable inquiries. It is reasonable to expect arbitrators to have taken sufficient care in providing their disclosure as to have made reasonable inquiries, given the importance of insuring arbitrator impartiality. Further, the 'ought to have known' test introduces a degree of objectivity into what would otherwise be a subjective, and therefore potentially difficult to prove, test. In any event, this broadly reflects what already happens in practice; prospective arbitrators will usually perform conflict checks to confirm whether they or others in their firm, chambers or company have a pre-existing professional relationship with any of the putative parties to the arbitration prior to accepting an appointment.

4. DISCRIMINATION

- 4.1 The proposed reforms to the Act seek to address the issue of discrimination in the context of arbitral appointments as well as to correct the use of gendered language as it currently drafted.
- 4.2 We wholeheartedly agree with the reforms suggested, which will align the appointment of arbitrators not just with the Equality Act 2010, but also with the principles of diversity and inclusivity which are fundamental principles that must be observed by all individuals as a matter of public policy.

¹² See, for example: LCIA Rule 5.4 & 5.5; ICC Rules (2021), Arts. 11(2) & (3); SIAC Rules (2017), Arts. 13.4 – 13.5.
¹³ [2020] UKSC 48, [2021] AC 1083.

A. A narrow or broad justification for requiring a protected characteristic

- 4.3 Reference is made in the Consultation Paper to the case of *Hashwani v Jivraj*,¹⁴ and the agreement which had been entered into between the parties regarding the appointment of an arbitral panel, all of whom had to be members of the Ismaili community.
- 4.4 The case raised the question whether the requirement of a protected characteristic in an arbitrator should be enforceable only if it is necessary (as suggested by the Court of Appeal), or where it can be broadly justified as suggested by the Supreme Court in the judgement.
- 4.5 Our view is that an agreement as to the requirement of a protected characteristic in an arbitrator should be enforceable where it can be broadly justified, and that the grounds should be reasonable and objective, not subjective.
- 4.6 Allowing the enforcement of such a requirement where applicable and objectively justifiable is likely to enhance the robustness of – and confidence in – arbitral decisions where there are special circumstances that apply. In this regard, we agree with what is noted in the Consultation Paper that, “[i]t would be hasty to conclude, for example, that nationality or religion ought never to be relevant. An example might be where the dispute concerns details of a particular religious practice.”¹⁵ Evidently, a person who is a member of a particular religion will have a greater understanding of relevant matters where a dispute relates to issues which are specific to that religion, than a person who does not have such a background.
- 4.7 It may be argued by analogy that arbitrators are often appointed to hear disputes on subject matters in which they are not experts, but on which they will determine the outcome based on the evidence of those who are presented as independent experts by the parties. Therefore, the requirement that an arbitrator must have a protected characteristic (i.e., that they are of a particular religion) is not relevant in circumstances where they would be able to obtain relevant expert advice. However, in our view this argument overlooks the fact that, in certain circumstances, what is of particular importance to the parties when agreeing a stipulation as to arbitrator characteristics is experience, rather than knowledge, the former of which cannot necessarily be imparted through expert evidence.
- 4.8 In support of our view that the test for justifying such *prima facie* discrimination cannot be subjective, we note the Supreme Court’s position in *Hashwani* that whether or not holding a particular religion or belief is a legitimate and justified requirement of an occupation is an objective question for the court. The test is simply whether, in all the circumstances, the requirement that the arbitrators should be respected members of (in this case, the Ismaili community) was not only genuine, but also legitimate and justified. This test should apply where any protected characteristic is in question.
- 4.9 The Supreme Court ultimately disagreed with the Court of Appeal regarding the approach to be taken when dealing with considerations of religion and belief. The Supreme Court’s approach that an appointment based on religious requirements could be a “*genuine occupational requirement*”¹⁶ is to be favoured as it demonstrates an understanding of the flexibility and consensual nature of arbitration. This in turn allows parties to have their

¹⁴ [2011] UKSC 40.

¹⁵ Paragraph 4.15.

¹⁶ [2011] UKSC 40, at [57].

disputes resolved in a way that takes into account and caters for specific requirements, which it might not be possible to accommodate in national court litigation.

- 4.10 A failure to consider specific requirements in the appointment of arbitrators is likely to result in a narrow approach being taken to matters where robustness is required. When regard is had to the function of arbitration proceedings, which by their nature are intended to be flexible in allowing the parties to agree on the conduct of the arbitration, including the appointment of an arbitrator (provided there is no contravention of public interest considerations as set out in section 1 of the 1996 Act) it would appear that a more inclusive approach should be adopted.
- 4.11 It is based on this that the approach of the Supreme Court is to be favoured insofar as it promotes flexibility and party autonomy in arbitrations. In this regard, the Supreme Court found that conducting an arbitration before three Ismaili arbitrators was likely to involve a procedure in which the parties could have confidence in the conclusions reached. The approach further recognises that there are instances where the requirements relating to protected characteristics must be given effect, in light of public interest considerations.
- 4.12 When regard is had to the principles endorsed by the Supreme Court and the various arbitral rules, it is also clear that the judgement in *Hashwani* will have the effect of enhancing the application of the rules.
- 4.13 An example of this is the UNCITRAL Model Law which states that no person shall be precluded by reason of their nationality from acting as an arbitrator, unless otherwise agreed to by the parties.¹⁷ In applying the principles set out in *Hashwani*, the agreement to preclude any arbitrator on the basis of nationality will be subject to objective criteria, where applicable and where public interest considerations so permit.
- 4.14 The LCIA Rules deal with the nationality of arbitrators more generally. Those rules provide that where the parties are of different nationalities, a sole arbitrator or the presiding arbitrator shall not have the same nationality as any party unless the parties who are not of the same nationality as the arbitrator candidate all agree in writing otherwise.¹⁸ Again, it is clear that the principles set out in *Hashwani* will ensure that any agreement on the appointment of an arbitrator or otherwise based on nationality, is not used to discriminate against any person in contravention of the Equality Act.
- 4.15 The ICC Rules, state that *"In confirming or appointing arbitrators, the Court shall consider the prospective arbitrator's nationality, residence and other relationships with the countries of which the parties or the other arbitrators are nationals and the prospective arbitrator's availability and ability to conduct the arbitration in accordance with the Rules."*¹⁹ This could be construed, albeit not intentionally, as providing a mechanism for the exclusion of certain individuals based on nationality, amongst others.
- 4.16 However, when construed against the backdrop of the decision in *Hashwani*, may be read as being inclusive as opposed to exclusionary. The ICC Rules contain a similar provision to that contained in the LCIA Rules, on the nationality of a presiding or sole arbitrator.
- 4.17 From a South African perspective, the Arbitration Foundation of Southern Africa ("AFSA") International Arbitration Rules emphasise neutrality and impartiality as the main consideration for the appointment of arbitrators. The AFSA Rules also expressly refer to the considerations, which are to be taken into account when

¹⁷ Article 10 of the UNCITRAL Model Law on International Commercial Arbitration.

¹⁸ Article 6.1 of the LCIA Rules.

¹⁹ Article 13(1) of the ICC Rules.

appointing arbitrators, such as the nature and circumstances of the dispute, the applicable law, the seat and language of the arbitration and any other relevant circumstances.²⁰ This is in line with the judgement in *Hashwani* and again seeks to emphasise the importance of ensuring that where the circumstances so require, and the grounds relied on are objectively justified, then the requirement of a protected characteristic in an arbitrator should be enforceable.

- 4.18 A further question that arises is whether the wording, insofar as challenges to an appointment based on protected characteristics where the characteristic is a proportionate means of achieving a legitimate aim are concerned, goes far enough in striking a balance which ensures that the provisions are not used to legitimise appointments which are exclusionary without a legitimate basis.
- 4.19 The remedy to this lies in the courts, where the objectivity and reasonableness of the requirements based on protected characteristics will be tested and the principles laid out in the Supreme Court's decision in *Hashwani* will be applied.
- 4.20 Lastly, we note the issue identified in the Consultation Paper concerning the effect of adopting the proposed amendment, and the potential grounds for resisting the enforcement of arbitral awards this could create. Pursuant to Article V.1(d) of the New York Convention, enforcement may be resisted on the basis that "*the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties*". Such a situation would arise in instances where the arbitral appointment was made contrary to the arbitration agreement.
- 4.21 We agree that this is an issue which is unlikely to occur and in addition to what is set out in the Consultation Paper, we note that complaints regarding the appointment of an arbitrator ought to be invoked initially during the arbitration proceedings. There are mechanisms in the various arbitration rules to do so. A party will find it difficult to resist enforcement on the grounds of irregular composition of the arbitral tribunal, in cases where it participated in the arbitral proceedings without objection or failed to exhaust all legal remedies at the seat of arbitration within the time limits prescribed by the applicable national law.
- 4.22 The proposed express wording which deals with discrimination should be adopted subject to what is set out above.
- 4.23 Insofar as the use of gendered language is concerned, it is noted that whilst there have been notable initiatives which have promoted an increase in the appointment of women as arbitrators, this is not nearly enough, and female appointments remain in the minority.
- 4.24 The drafting of the Act using gender neutral language, insofar as this this aligns with the Equality Act and the principles of inclusivity and fairness, is therefore supported.

²⁰ Article 6 of the AFSA International Arbitration Rules.

5. IMMUNITY OF ARBITRATORS

A. Should arbitrators incur liability for resignation at all, and why?

- 5.1 When considering the liability of an arbitrator, it is useful to reflect upon the nature, contractual role, legal and societal function they assume. At its core, the question surrounding the scope of an arbitrator's liability against the granting of immunity is ultimately a matter of public policy of the jurisdiction concerned.
- 5.2 Although arbitrators and judges share certain functional similarities, there are also key distinctions between the two roles. As such, it may be that full judicial immunity in respect of resignation is not suitable, due to the quasi-judicial role played by an arbitrator. Equally, whilst it could be suggested that exposure to liability could result in a chilling effect in respect of the ability of arbitrators to resign even in cases where it would be appropriate to do so, this possibility is considered limited, particularly if the threshold for incurring liability was very high. This could be achieved by, for example, ensuring measurable, codified, and objective bad faith criteria are expressly provided for in future reform of the Act.
- 5.3 For the reasons outlined below, we support a qualified extension of arbitrator immunity to include potential liability that would otherwise be incurred when an arbitrator resigns. We would propose that arbitrators should only incur liability where they have resigned in bad faith. Specifically, where such a resignation is found to constitute an act of fraud, corruption, or intentional and deliberate misconduct. We recognise the importance of protecting and extending arbitrator immunity, and only in the most severe of circumstances should an arbitrator be held liable for resignation.

Application of full judicial immunity for arbitrators in respect of resignation

- 5.4 In consideration of Consultation Question 8, it is useful to assess the overall application of an arbitrator's liability through the lens of the doctrine of judicial immunity.²¹ There are certainly many shared similarities that exist between the nature, function, and responsibility of both a judge and an arbitrator. Parallels are often drawn between the two roles. Reflecting on the shared qualities and differences between judges and arbitrators could highlight the extent to which a form of judicial immunity, if any, could be applicable to arbitrators. In turn, greater clarity may be provided when determining the nature and scope of liability that could be incurred by arbitrators following a resignation.
- 5.5 Broadly, there are two schools of thought that govern whether a form of judicial immunity might be applicable to arbitrators. Generally, under the common law, there is recognition that arbitrators have a quasi-judicial nature, status, and function to judges.²² Particularly, in England and Wales, case law has referred to the characteristics that could point to the judicial function and capacity of arbitrators, often citing criteria including:²³
- 5.5.1 the existence of a dispute;
 - 5.5.2 agreement of the parties to submit the dispute for a binding decision;
 - 5.5.3 forum to hear evidence and arguments put forward by the parties; and

²¹ *Coopers & Lybrand v. Superior Court*, 260 Cal. Rptr. at 713.

²² Lew, D. M. J., *The Immunity of Arbitrators* (Lloyd's of London in conjunction with the School of International Arbitration) 1990.

²³ *Sutcliffe v Thackrah & Ors* [1974] AC 727 and *Arenson v Casson Beckman Rutley & Co* [1977] AC 405.

5.5.4 a fair, impartial, and unbiased decision made fairly between the parties.

- 5.6 Notwithstanding the characteristics shared by both arbitrators and judges,²⁴ commentators have noted that this functional analogy, upon further interrogation, falls short for several reasons.
- 5.7 A key distinction lies in the origin and delineation of their powers. For judges, their judicial powers and duties are derived from the state, whereas for arbitrators, their powers are conferred by the consent of parties to an arbitration agreement. Furthermore, judges are paid directly by the state,²⁵ whereas arbitrators are paid by each of the parties to the arbitration. Judges are therefore an emanation of the state who owe duties and obligations to the courts of the jurisdiction and have been recognised as “*essential to the preservation of democracy*”.²⁶ This functionally democratic role is further reinforced in England and Wales by virtue of the contribution judges make to the development of the common law by issuing binding judicial decisions.
- 5.8 Conversely, arbitrators exist to perform a private, commercial service. Their duties are owed to the parties to the arbitration (irrespective of which party appointed the arbitrator) and the relevant arbitral institutions under whose rules they operate.²⁷ To this extent, an arbitrator can only influence the outcome of a single, private, voluntary arbitration to which they are contracted. A judge, on the other hand, has far-reaching judicial power and influence that is not limited to the confines of the dispute itself, but extends to third parties by virtue of the binding nature of their decisions.
- 5.9 In addition, there are strict procedural rules and formalities such as timescales and witness evidence that a judge must administer that cannot be easily, nor inconsequentially, altered by the parties. Arbitration, by its very nature, is much more flexible and its procedural functioning is subject to the mutual agreement and consent of the parties by virtue of any applicable arbitral institutional rules.²⁸
- 5.10 Finally, where judges in England and Wales have rendered a decision, it can be subject to appeal. Operationally, this provides a procedural framework whereby parties can challenge determinations on various grounds such as incorrect application of the law, abuse of judicial powers or errors in procedure.²⁹ Arbitration does not, by and large, afford parties the same ability to challenge awards. Most arbitral institutional rules and curial laws only provide for very narrow, exceptional grounds for review of an award, in order to conserve the efficacy and finality of the arbitration.³⁰
- 5.11 It could be suggested that in creating liability for arbitrators upon their resignation, the final, binding nature of arbitral awards may be compromised. However, were an arbitrator to resign in bad faith as a result of fraud, corruption, or deliberate and intentional misconduct, only then should an arbitrator to be held liable for resignation. As such, there is limited potential for the finality of arbitral awards to be compromised.
- 5.12 Extending full immunity to arbitrators for resignation akin to that which is granted to judges should be considered with caution. There are nuanced distinctions between the nature and role of a judge and an arbitrator. As noted

²⁴ Butler D. & Finsen E., *Arbitration in South Africa: Law and Practice* (1993) 95-97].

²⁵ *Baar v. Tigerman*, 140 Cal. App. 3d 979, 985, 189 Cal. Rptr. 834, 839 (1983); *Arenson v Casson Beckman Rutley & Co* [1975] 3 All. E.R. at 918-19.

²⁶ *Baar*, 140 Cal. App. 3d at 984.

²⁷ *Baar*, 140 Cal. App. 3d at 984.

²⁸ Sponseller, M. A., *Redefining Arbitral Immunity: A Proposed Qualified Immunity Statute for Arbitrators* [1993], *Hastings Law Journal* 44 (2): 421-447, page 421.

²⁹ Article 36 Correction and Interpretation of the Award; Additional Award; Remission of Awards, ICC Rules (2021) and Article 27 Correction of Award(s) and Additional Award(s) LCIA Rules (2020).

³⁰ Redfern, A., Hunter, M., *Law and Practice of International Commercial Arbitration* (Sweet & Maxwell, 2nd ed., 1991), pages 266-67, 270.

above, although there are certainly shared characteristics between both, judges operate on a judicial plane that is of increased legal and democratic consequence to third parties than that of arbitrators, which necessarily calls for full immunity from liability. In addition, determinations and actions of judges are subject to more stringent judicial and administrative scrutiny that is not available to the same extent for arbitral awards. This provides additional comfort and security for parties to litigation against judicial errors or misconduct, meaning that judicial immunity does not obstruct justice. For arbitrators, complete immunity would not be counterbalanced by procedural or legal checks and balances in the same way, for the reasons outlined above.

- 5.13 Consequently, it is appropriate for arbitrators to be subject to qualified immunity that extends beyond the current statutory parameters of section 29 of the Act. In our view, arbitrators should only be exposed to liability when they resign where the resignation is shown to be manifestly and grossly unreasonable. Liability should be restricted to resignations made in bad faith and considered objectively to be the direct result of fraud, corruption, or intentional and deliberate misconduct.

B. Should arbitrators incur liability for resignation only if the resignation can be proved unreasonable?

- 5.14 It is accepted that the resignation of an arbitrator is a breach of their agreement to arbitrate.³¹ The current position in England and Wales is that liability can be incurred where an arbitrator has resigned under section 25 of the Act, and the parties do not agree that the arbitrator incurs no liability. In the absence of an agreement on this matter, arbitrators can seek relief from the court for any liability they have incurred as a consequence of their resignation under section 25(3) of the Act. When an application for relief is made to the court, section 25(4) provides that:

“If the court is satisfied that in all the circumstances it was reasonable for the arbitrator to resign, it may grant such relief... on such terms as it thinks fit.”

- 5.15 Due to an absence of statutory codification, the question of what constitutes a 'reasonable' resignation is left to the courts to determine. As explained below, this creates uncertainty for arbitrators when assessing their potential exposure to liability. Equally, as discussed by the Law Commission,³² there is limited caselaw on which a court can rely when assessing reasonableness in this context. We make the following points in this regard:

- 5.15.1 First, the standard of reasonableness is uncodified, meaning there are no statutory parameters against which reasonableness can be objectively measured. Similarly, the case law concerning the circumstances in which an arbitrator's resignation will attract liability is acutely underdeveloped.³³ This lack of a legal framework to which an objective standard of reasonableness could be determined offers little comfort to arbitrators considering resignation. This may have a chilling effect for arbitrators faced with a decision as to whether or not to resign, even where such resignation would be reasonable, for fear of incurring liability.³⁴ This position is also undesirable for parties to arbitration as the integrity of the arbitral process could be compromised.³⁵ For example, an arbitrator may have a

³¹ DAC Report (1996), paragraph 111.

³² Law Commission *Consultation Paper* (2022), paragraph 41.

³³ *ibid.*

³⁴ Franck, S., *The Liability of International Arbitrators: A Comparative Analysis and Proposal for Qualified Immunity* [2000] New York Law School Journal of International and Comparative Law 20 (1) 1-60, page 54.

³⁵ *Cort v. American Arbitration Ass'n*, 795 F. Supp. 970, 972 (N.D. Ca. 1992).

compelling reason as to why resignation is necessary such as sickness, bereavement or alleviating conflicts that may arise during an arbitration. However, as legislation currently provides, it may be that due to the threat of liability, an arbitrator may not wish to resign even where circumstances are reasonable. In turn, this could potentially compromise an arbitrator's professional performance and their undertaking of arbitral duties and obligations.

- 5.15.2 Second, in our view the threshold in respect of what would be considered unreasonable grounds for resignation should be set at a high level in order to avoid capturing what are, in consideration of all of the circumstances, reasonable grounds. The burden of proof should also be passed to the arbitral party alleging that a resignation is unreasonable, as opposed to the current position which requires the arbitrator to prove their resignation was reasonable.
- 5.15.3 Third, greater protection against liability incurred by arbitrators upon resignation can be afforded by improving codification and augmenting the requisite threshold for unreasonable resignation. In doing so, the scope of judicial discretion in this area will be restricted, as arbitrator immunity would be the default position in respect of resignation, only to be withdrawn in the most unreasonable of circumstances. We consider the codification of an unreasonable resignation below.

Threshold for unreasonable resignation

- 5.16 As a general principle, we would favour a statutory, qualified immunity to be afforded to arbitrators in respect of their resignation. An express, codified, bad faith resignation liability carve out should be introduced into the Act. This would ensure that only the most objectively, unreasonable resignations could incur liability. We would recommend expressly providing liability where a resignation has been made in bad faith as a result of fraud, corruption, or intentional and deliberate misconduct. This position seeks to balance the certainty of immunity afforded to arbitrators whilst acting in their quasi-judicial capacity with protections for arbitral parties against gross misconduct and other bad faith conduct.
- 5.17 For parties to an arbitration, there is an implied consent that arbitrators are to conduct the arbitration in good faith.³⁶ Codification could serve to incentivise and strengthen overarching principles of good faith and integrity within arbitration more broadly. In addition, the efficacy of arbitral procedure would be further supported by limiting the circumstances in which an arbitrator's resignation could be challenged, reducing additional procedural cost, delay, and uncertainty for parties. Ultimately, a high threshold for incurring liability in respect of arbitrator resignation seeks to balance arbitrator liability against arbitrator immunity. An analysis of various international jurisdictions has been conducted below to assess how future reform of the Act could best facilitate the functioning and integrity of the arbitral process and the individual rights of parties to arbitration.

Liability for resignation: lower legal threshold

- 5.18 Arbitrators perhaps face an increased exposure to liability and are afforded less immunity in civil law jurisdictions which observe Islamic legal tradition. The civil law tradition dictates that when establishing the scope and basis for an arbitrator's liability, principles concerning an arbitrator's contractual and professional responsibilities to the parties are given greater emphasis than the quasi-judicial function of the arbitrator role.

³⁶ Franck, S., *The Liability of International Arbitrators: A Comparative Analysis and Proposal for Qualified Immunity* [2000] New York Law School Journal of International and Comparative Law 20(1) 1-60, page 30.

Combined statutory and contractual arbitrator liability

- 5.19 France is a typical example of the civil law tradition in which arbitrator liability is equated with contractual liability. Arbitrators are held liable for “*withdrawal without a legitimate reason*” under the French Code of Civil Procedure.³⁷ It is ultimately the contractual and professional basis upon which an arbitrator is appointed that holds arbitrators liable for acts in breach of their arbitral obligations to the parties. A legal manifestation of this contractual obligation is seen arguably with greater clarity in Germany. Arbitrators are subject to a general liability due to the categorisation of an arbitrator’s contractual mandate to perform a professional service under the arbitration agreement.³⁸ As such, arbitrators in Germany are held responsible for both intentional and negligent acts.³⁹
- 5.20 Furthermore, Saudi Arabia is another example of where arbitrators may incur increased levels of implied liability on the basis that the legal threshold for triggering such liability is lower. Pursuant to a basic principle under the Qur’an,⁴⁰ an arbitrator may be found liable for almost any fault, including resignation from the arbitration, irrespective of reasonableness, that causes damage to any party.⁴¹
- 5.21 This strong influence of the contractual relationship between the arbitrator and the parties explains why arbitrators enjoy limited or no immunity in those jurisdictions compared to others. Consequently, this combination of statutory and contractual liability arguably lowers the liability threshold for arbitrators when resigning to a purely contractual standard that would be expected of most professions.

Express liability for resignation

- 5.22 Several MENA countries impose express liability in respect of an arbitrator’s resignation where it is deemed improper or unjustified. For example, in Tunisia⁴², Libya⁴³ and Lebanon⁴⁴ an arbitrator can incur liability should they resign without good reason. In Romania, an arbitrator can also be held liable for an unjustifiable resignation.⁴⁵
- 5.23 This lower threshold for incurring liability for resignation leaves arbitrators in a somewhat similar position in England and Wales under the Act as it is presently drafted. Arbitrator immunity is qualified to the extent that judges must determine the reasonableness of the resignation using their judicial discretion.⁴⁶ Although there is potential scope for judges to rely on section 29(1) of the Act to consider whether a resignation has been made in bad faith, again, for the reasons expressed above, this standard remains largely uncodified and relies heavily upon the subjective discretion of the judge.

³⁷ French Code of Civil Procedure, Article 1457.

³⁸ The Federal Supreme Court of Germany held that the relationship between the parties and the arbitrator is governed by the arbitration contract; Bavarian Higher Regional Court, decision of 21 January 2021, 101 SchH 115/20.

³⁹ Sanders, P., *National Report on Germany in International Handbook on Commercial Arbitration* (1998) at page 14.

⁴⁰ The Qur’an, Surah Al-Nisa (4:85), which states: “*He who intercedes in a good cause shall share in its good result, and he who intercedes in an evil cause shall share in its burden. Allah watches over everything*” (Abul Ala Maududi Translation).

⁴¹ El-Ahdab, A., *Arbitration with the Arab Countries* (Kluwer Law International 2nd ed. 1999) at pages 348-349.

⁴² Tunisian Arbitration Code (1993), Article 11.

⁴³ Libyan Code of Civil and Commercial Procedure (1953), Article 748.

⁴⁴ Lebanese New Code of Civil Procedure (2002), Article 769.

⁴⁵ Romanian Code of Civil Procedure (2013), Article 565.

⁴⁶ Arbitration Act 1996, section 25(4).

Criminal liability for resignation

- 5.24 Previously, in 2016, the approach to arbitrator liability in the UAE was subject to heavy criticism by the international arbitration community for imposing criminal liability upon arbitrators who were found to act without complete neutrality and integrity.⁴⁷ The application of this law could have, in theory,⁴⁸ extended to circumstances where an arbitrator's resignation could have been considered to compromise their neutrality or integrity. The introduction of this law led to fears that arbitrators would refuse nominations throughout the Emirates, DIFC and ADGM. Following such criticism, 2018 saw the removal of this specific criminal liability for arbitrators.⁴⁹ Nevertheless, this episode demonstrated that attaching criminal liability (or even a punitive civil financial sanction) is likely to result in arbitrators refusing to accept nominations, and would therefore be undesirable.
- 5.25 Arguably, in providing a relatively low statutory threshold for civil liability, or criminal sanctions, this could affect the finality of the arbitral process due to the greater possibility for challenging an arbitrator's resignation. Equally, without the protection of a qualified immunity operating under a higher liability threshold, the integrity of the arbitral process may be compromised. To this extent, arbitrators could be more exposed to subtle threats that may leave them susceptible to adverse influence during their decision-making process. Affording arbitrators a higher degree of qualified immunity could ensure that arbitrators are well-positioned to make principled decisions and not fear financial, civil, or even criminal liability.

Absolute arbitrator immunity: no liability for resignation

- 5.26 An extreme example of absolute immunity for arbitrators, applicable to all arbitrator resignations irrespective of the circumstances, is the USA. For the 21 states that have adopted the Revised Uniform Arbitration Act 2000, section 14 affords arbitrators an absolute immunity from civil liability for all acts undertaken in their capacity as an arbitrator.⁵⁰ This immunity has extended to instances where arbitrators have been found to have committed acts of gross negligence, intentional fraud or carelessness.⁵¹ However, this civil immunity does not prevent arbitrators from being held criminally liable for acts of corruption or fraud.⁵²
- 5.27 It is possible that this absolute immunity is unfavourable to arbitral parties as it fails to incentivise the professional, competent conduct and accountability of arbitrators. It could be argued that granting absolute immunity to arbitrators could encourage a certain degree of carelessness, or even professional recklessness as incentives to act with caution and reasonableness are removed. Parties would be exposed to greater potential for arbitrators to abuse their powers and act in bad faith, creating a sharp imbalance in favour of arbitrator immunity at the detriment of the interests of arbitral parties.

Liability for resignation: higher legal threshold

- 5.28 It is appropriate to recognise the legal, quasi-judicial⁵³ function performed by arbitrators and seek to extend arbitrator immunity in respect of an arbitrator's resignation. In this way, it would be reasonable for the Law

⁴⁷ UAE Federal Decree Law No. 7 of 2016, Article 257.

⁴⁸ Between 2016 and 2018, no prosecution of an arbitrator on the basis of Article 257 took place, and the UAE authorities did not entertain any abusive complaint based on Article 257.

⁴⁹ UAE Federal Decree Law No. 7 of 2016, Article 257.

⁵⁰ Revised Uniform Arbitration Act 2000, section 14.

⁵¹ Sanders, P., "National Report on the United States" in *ICCA International Handbook on Commercial Arbitration* (2019) at p. 18.

⁵² *Ibid.*

⁵³ *Hoosac Tunnel Dock and Elevator v O'Brien*, 137 Mass. 424 (1884).

Commission to propose reform in respect of liability for resignation to better accord with, and reflect, the immunity of arbitrators more closely to that of a judge in the courts of England and Wales. A higher legal threshold for incurring liability for resignation would improve the impartiality, integrity, and procedural efficacy of arbitrators, as it does for judges.⁵⁴ In contrast, the civil law approach seeks to establish an arbitrator's liability on the basis that it is derived from the contractual terms of an arbitrator's appointment, rather than the quasi-judicial role and function performed by an arbitrator. The contractual nature of an arbitrator's liability under the civil law is oftentimes reflected in the typically lower legal threshold for triggering liability.

5.29 Arguably, a reasonable middle ground, in between a lower legal threshold for liability and absolute arbitrator immunity would be to ensure that, broadly, arbitrator immunity is qualified to preserve the integrity of the decision-making process within arbitration. However, such immunity should be expressly curtailed and codified so that liability is limited to acts of bad faith (as already provided for by section 29(1) of the Act). Second, bad faith liability must capture only the most unreasonable or unjustifiable acts. Such acts of bad faith must be expressly codified under the Act. For example, acts of fraud, corruption, or intentional and deliberate misconduct whereby an arbitrator that could undermine the integrity of the arbitral process and/or undermine the professional accountability of the arbitrator. It is worth emphasising that it is imperative that any amendments made to the Act must codify and expressly stipulate the measurable criteria by which a wholly unreasonable, bad faith resignation could be determined.

Express bad faith liability for acts of fraud, corruption, or deliberate misconduct

5.30 There are certain other jurisdictions where a higher legal threshold is applicable in respect of arbitrator resignation than that currently in existence in England and Wales, which could be instructive when considering the wording of any amendment to the Act in this regard.

5.31 For example, in Australia it is expressly provided that arbitrators can only be held 'liable for fraud' when acting in their capacity as arbitrator.⁵⁵ In Belgium, authoritative case law considers that an arbitrator can only be held liable for acts of fraud or false misrepresentation.⁵⁶ In Alberta, Canada it is expressly provided that arbitrators can only be held liable in respect of resignation that could be considered an act of fraud or corruption.⁵⁷ Under Chinese law, immunity is extended to arbitrators, save for expressly codified acts of bad faith. Only where an arbitrator has committed an act of corruption, fraud or has unjustifiably compromised their impartiality, could an arbitrator be held liable.⁵⁸ Such acts include embezzlement, accepting bribes and meeting privately with parties.⁵⁹ In Bermuda, arbitrator immunity is expressly excluded where an arbitrator has committed conscious or deliberate wrongdoing.⁶⁰

5.32 There is some degree of conceptual accord in the above examples of express, bad faith liability regarding acts of fraud, corruption, or intentional and deliberate misconduct. We would propose that reform to arbitrator liability for resignation must include express statutory wording in order to provide an objective, codified and measurable standard against which a resignation could be accurately determined to have been made in bad faith. In turn,

⁵⁴ Sharman, J. M., *Judicial Ethics: Independence, Impartiality and Integrity* A Discussion Paper prepared for the Judicial Reform Roundtable II (1996) page 12.

⁵⁵ Australia Commercial Arbitration Act 1984, section 51.

⁵⁶ Judgment of 21 January 1992, unpublished (Antwerp Cour d'Appel).

⁵⁷ Alberta Arbitration Act 2000, section 15(4).

⁵⁸ Arbitration Law of the People's Republic of China, Article 38.

⁵⁹ *Ibid*, Article 34(4), and Article 58(6).

⁶⁰ Bermuda International Arbitration and Conciliation Act 1993, section 34.

this would help to serve to protect arbitrators against unfair judicial treatment in respect of resignations in the future.

- 5.33 Whilst not exhaustive, such examples are illustrative of the ways in which future reform of the Act may be able to further strengthen arbitrator immunity in England and Wales.

Conclusion

- 5.34 Based on the above, we consider that a blanket immunity for arbitrators which excludes liability for all acts and omissions including resignation would be inappropriate. Although arbitrators perform a quasi-judicial role, their position and function does not require that they be afforded the same degree of immunity as judges. Resignation should therefore attract liability in circumstances due to the nature of the relationship between the parties and the tribunal, which is a creature of the parties' agreement. Whilst the effects of an arbitrator's resignation on the parties and the proceedings should be of limited relevance in determining liability (as the effects would be the same irrespective of whether the resignation was reasonable or otherwise), they are nevertheless often significant. It is therefore right that arbitrators should not be entitled to act with impunity when resigning and avoid accountability for the impact of their actions.
- 5.35 However, any reform of the Act will need to take account of the fact that arbitrators resign for various reasons, many of which are legitimate (i.e. ill health, bereavement, or the emergence of circumstances giving rise to a conflict of interest). It would be unfair to hold arbitrators liable where genuine circumstances arise which necessitate their resignation. Indeed, the threat of liability could result in arbitrators remaining in their role where it is inappropriate for them to do so, and indeed dissuade people from accepting appointments, which could in turn reduce not only the pool of available arbitrators, but also diversity within the pool.
- 5.36 Accordingly, immunity should extend to cover legitimate resignations so that liability only attaches to resignations which are unreasonable. The question of what constitutes an 'unreasonable' resignation should be set out in the Act so as to provide clarity and certainty in this regard, and in our view should set a high threshold so as to avoid inadvertently capturing resignations for reasons which may fall outside the norm for legitimate resignation, but are otherwise reasonable. To achieve this, we consider that the test for reasonableness should be articulated in terms of bad faith, defined (non-exhaustively) by reference to fraud, corruption, and deliberate or intentional misconduct.
- 5.37 We recognise that there may of course be cases which are on the boundary of what might be considered reasonable, but do not meet the high threshold set out above. Parties may feel particularly aggrieved if, for example, an arbitrator resigns because they have taken on too many appointments for them to adequately discharge their obligations on each arbitration, or an arbitrator wishes to resign as they want to wind down their practice. However, our approach recognises that accepting an appointment as arbitrator – although not a contract of employment – nevertheless involves the provision of services by the arbitrator to the parties, and that personal and professional circumstances can change after accepting an appointment which render provision of those services difficult or impossible. In such cases, the balance of convenience lies in allowing an arbitrator to resign, without attracting liability that would otherwise force them to remain in their role, which could have a deleterious effect on the quality of the quality of the service they provide.
- 5.38 Our proposal therefore involves a combined approach when considering reform of arbitrator liability in respect of resignation:

- 5.38.1 First, that arbitrators must be relieved from proving reasonableness of a resignation before the courts. To this extent, the burden of proof would shift from the arbitrator proving reasonableness to the challenging party proving the unreasonableness of resignation.
- 5.38.2 Second, that statutory liability must only capture unreasonable resignations.
- 5.38.3 Third, that the threshold for triggering unreasonable resignation should be very high, in recognition of the quasi-judicial function performed by arbitrators. This would ensure that the level of qualified immunity afforded to arbitrators would better align to (although not match) the immunity afforded to judges.
- 5.38.4 Finally, that the test for unreasonable resignation should be codified. This would provide greater legislative certainty for arbitrators when performing their duties, professional obligations and arbitral function. We would recommend further fortification of the bad faith principle in respect of arbitrator resignations. Therefore, creating an objective, measurable standard of unreasonable resignation that can only apply where a resignation has been made in bad faith. Future reform of the Act should expressly limit liability to acts of fraud, corruption, or deliberate and intentional misconduct to best protect resigning arbitrators by extending qualified immunity in this way.

C. Arbitrators' liability for costs

- 5.39 We agree that the Act should be amended in order to make clear that arbitrator immunity extends to the costs of court proceedings which arise out of the arbitration.
- 5.40 The line of case law outlined in the Consultation Paper in our view contradicts the premise of section 29 of the Act. While the Act grants immunity to arbitrators, this line of case law suggests that arbitrators can incur liability for the costs of applications to court. We agree with the Commission that this line of case law: (1) introduces a liability for which there is no insurance, (2) risks encouraging collateral challenges by parties disappointed with the arbitrator's ruling, and (3) undermines the neutrality of an arbitrator who is forced to comply with parties' demands for fear that a contrary stance might lead to court proceedings and personal liability for costs. It is therefore our position that the reversal of the line of case law discussed above is only a logical consequence of the extension of arbitrators' immunity. In response to Question 10, our view is that the Act should explicitly confirm that arbitrator immunity extends to the costs of court proceedings arising out of the arbitration.
- 5.41 However, the specific facts of these cases do call into question whether this immunity should apply to the (likely very small) minority of cases where the court application has been necessitated as a consequence of the arbitrator's misconduct. As Henshaw J explained in *C Ltd v D*,⁶¹ "Cofely was an exceptional case, where the court found the arbitrator to have been accepting repeat instructions from a party, amounting to a significant proportion of his business, and that his response to the claimant's attempts to establish the facts as to his relationship were aggressive and hostile" (emphasis added).⁶² *Wicketts* was another exceptional case according to Henshaw J, in which the judge "*removed the arbitrator pursuant to s 24(1)(d) of the 1996 Act on the basis that he had failed to properly conduct proceedings by (among other things) issuing two sets of*

⁶² See paragraph [58].

directions which he described as 'the most outrageous I have ever seen given in any arbitration proceedings'⁶³ and which demonstrated a pitifully inadequate comprehension of the nature of his function as an arbitrator".⁶⁴

5.42 We would therefore propose that the immunity for costs is made subject to a provision excluding costs incurred in applications occasioned by bad faith conduct including acts of fraud, corruption, intentional and deliberate misconduct or negligence. In such situations, it may be appropriate for arbitrators to be held liable for costs of an application to remove them, or any other court proceedings that arise out of this conduct. There is no reason why an arbitrator can misconduct themselves without being held accountable for doing so. This would also maintain the equilibrium between the parties and the arbitrator if such misconduct is seen to be the limit of the arbitrator's immunity.

6. SUMMARY DISPOSAL OF ISSUES WHICH LACK MERIT

A. The principle of summary disposal

6.1 We agree that the Act should expressly provide that a tribunal may adopt a summary procedure to decide a claim or issue. We also agree that it is appropriate that the tribunal should only be empowered to do so upon the application of a party.

6.2 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 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.⁶⁵

6.3 Our views on the benefits of summary judgment are also shared by the leading arbitral institutions. As the Commission notes at paragraph 6.10 of its Consultation Paper, several institutional rules – including the LCIA, HKIAC, and SIAC – expressly provide for summary determination of claims, and the ICC in its 2021 Note states that it considers its case management powers as contained in Article 22 of its Rules as enabling summary determination of claims. It can be inferred that such changes would not have been introduced if these institutions were not convinced of the benefits of such a procedure. These time and cost benefits are why summary judgment / disposal procedures are a feature of most leading litigation jurisdictions, including under the Civil Procedure Rules in England and Wales.

6.4 Yet the experience of arbitration practitioners at our firm is that summary judgment is rarely sought by parties or granted by arbitral tribunals. This may be due to the availability of other procedures which achieve the same outcome. One senior practitioner noted that the power to make more than one award at different times on different issues by means of bifurcation is sufficient to dispose of issues in an expedited manner. Where summary disposal procedures are available under institutional rules, the data indicates that these processes are rarely used; SIAC's Annual Reports for 2020 and 2021 disclose five and 10 applications for summary

⁶³ See paragraph [51], (8 June 2001) (HHJ Seymour) (unreported) (TCC).

⁶⁴ See paragraph [59], *C Ltd v D* [2020] EWHC 1283 (Comm).

⁶⁵ Pinsent Masons LLP & Queen Mary University, 2019 International Arbitration Survey: International Construction Disputes, page 27 (accessible: <https://www.pinsentmasons.com/thinking/special-reports/international-arbitration-survey>).

judgment respectively,⁶⁶ yet each year a majority were not allowed to proceed and none of those that did proceed were disclosed as successful.

- 6.5 The reason that summary judgment procedures are not more widely used is not clear. However, like the Commission's consultees, we anticipate that 'due process paranoia' – i.e., cautious procedural management by tribunals to protect their eventual award from challenge – may be a factor.
- 6.6 Due process paranoia may arise from the so-far limited statements by the English courts in support of summary procedure in arbitration. The primary statement in support is the judgment of Mr Justice Blair in *Travis Coal Restructured Holdings LLC v Essar Global Fund Limited (Formerly Known as Essar Global Limited)*⁶⁷. In *Travis Coal*, the Court rejected the argument that a summary procedure in and of itself is a denial of due process,⁶⁸ holding that the question was "*whether the procedure adopted by the Tribunal was within the scope of its powers, and was otherwise fair*", which was a question of substance rather than labelling.
- 6.7 Therefore, a more explicit recognition in English law that summary disposal is available in arbitration proceedings would increase confidence that deciding a case or issue summarily would be consistent with the arbitrator's duty of due process in terms of section 33, and that an award will not be challenged in terms of section 68. There may be some residual due process paranoia in seeking to protect an award from challenge under Article V.1(b) of the New York Convention, but such concern may be unavoidable until other jurisdictions follow the anticipated example of England & Wales in this regard.
- 6.8 We would be content for an express recognition of summary disposal to come from case law. However, for reasons of expediency, we think it preferable that the express recognition be introduced by amendment to the Act.
- 6.9 Like the Commission, we think that it is appropriate that summary disposal is only adopted in response to an application by a party to the arbitration, for the following reasons:
- 6.9.1 in practice, cases where a tribunal and not a party would propose summary procedure are likely to be rare;
 - 6.9.2 a tribunal proposing summary disposal of its own volition may engage due process concerns; and
 - 6.9.3 making summary disposal available only on the application of the parties will, as the Commission notes, guard against excessive procedural zeal and retain party autonomy over the process. Further, this approach reflects the majority view of the community; our 2019 arbitration survey found that the favoured approach to summary judgment was for parties to encourage arbitrators to dismiss unmeritorious claims (favoured by 59% of respondents).⁶⁹
- 6.10 We place a high value on the autonomy that arbitration gives parties and, therefore, agree that summary disposal should be a discretionary and not mandatory provision of the Act.

⁶⁶ Known as "early dismissal" under SIAC Rule 29.

⁶⁷ [2014] EWHC 2510 (Comm).

⁶⁸ [42] – [54].

⁶⁹ Pinsent Masons LLP & Queen Mary University, 2019 International Arbitration Survey: International Construction Disputes, page 28 (accessible: <https://www.pinsentmasons.com/thinking/special-reports/international-arbitration-survey>).

B. The summary disposal procedure to be adopted

- 6.11 We agree that the Act should not prescribe the summary disposal procedure to be adopted. We also agree that the procedure to be adopted should be a matter for the arbitral tribunal, having consulted with the parties, and subject to the parties having agreed otherwise.
- 6.12 This requirement of fairness will provide an important minimum threshold and remedy, should an unsuitable procedure be adopted by the tribunal. The greatest concern with summary disposal is generated by the potential for a procedure to be adopted which does not give both parties sufficient opportunity to put their case. This would be an injustice. However, like the Commission, we agree that section 33(1)(a) of the Act provides some comfort in ensuring cases are not decided without at least the minimally appropriate amount of procedure. Challenges to an improper summary award in terms of section 68 of the Act and to resist enforcement on the basis of Article V.1(b) of the New York Convention also provide some protection against insufficient procedures being adopted.
- 6.13 We note in this regard that all major institutional rules make provision for due process protections and there is therefore an additional layer of protection in such arbitrations.
- 6.14 We would also be concerned to ensure that the summary disposal procedure is not open to abuse by a party seeking to cause delay by cherry-picking issues and/or making applications for summary disposal in a way which causes delay to the arbitration, which would have the opposite effect to what is intended by introducing a summary disposal process. Ensuring that the arbitral tribunal has control over the procedure would help to guard against potential abuse.

C. The summary decision threshold

- 6.15 We agree that the Act should stipulate the threshold for success in summary disposal. A key goal of introducing summary disposal is to reduce due process concerns by increasing legal certainty. Leaving the test to be applied unclear would retain the current level of legal (un)certainty in a key part of the operation of summary procedure. Therefore, the goals of the innovation could be frustrated as tribunals may continue to be reluctant to use summary judgment because of the due process concerns explained above.
- 6.16 Instead, incorporating the “*no real prospect of success*” and “*no other compelling reason*” standard from the English Civil Procedure Rules incorporates a well-defined test that will increase legal certainty for both parties and tribunals. Moreover, it could be hoped that adopting a standard which has been tried and tested by the English courts (as opposed to that which is applied under institutional rules, and so may not have been given judicial consideration) would provide foreign enforcement courts with some further comfort that awards which involve issues that have been summarily disposed of have been dealt with on the basis of well-developed principles.
- 6.17 We understand the Commission's proposal to be that any summary disposal failing to meet the threshold test set out in the Act will be deemed a failure of due process and the resultant award will be open to challenge in terms of section 68. As the Commission notes at paragraph 6.19 of the Consultation Paper, certain institutional rules adopt the “*manifestly without merit*” standard for summary disposal. We agree with the Commission's view at paragraph 6.33 of the Consultation Paper that the two tests are substantially similar, however, we recognise there is legal uncertainty as to whether they are in fact the same. We will be interested as to whether

any institutions amend their rules so as to incorporate the proposed test in the Act, should it be introduced, so as to increase legal certainty as to the enforceability of summary awards under their rules.

- 6.18 In order to help prevent the potential abuse of a summary disposal process noted above and ensure that use of it results in tangible benefits in terms of time and cost savings, we would also suggest that the summary decision threshold should incorporate a materiality requirement so as to ensure that the determination of a summary disposal application has a meaningful effect in terms of reducing the timetable and/or cost of the proceedings. For example, a claimant may advance two claims, both of which involve investigation of substantially the same facts, but a different legal analysis. In circumstances where the claimant has a strong *prima facie* case on the first claim, yet a weak *prima facie* case on the second, it is arguable that an application for summary disposal of the second claim will not result in any significant time or cost saving and may even incur additional time and cost in dealing with the application.
- 6.19 We would therefore propose that, in addition to requiring that the applicant shows that the claim or defence has “*no real prospect of success*” and that there is “*no other compelling reason*” why it should be heard, it should also demonstrate that the disposal of the claim or defence substantially affects the rights of one or more of the parties. This is the same test as is applicable to an application for determination of a preliminary point of law under section 45 or an appeal on a point of law under section 69. We consider that this is appropriate in circumstances where an application for summary disposal should result in the shortening or the reduction in the scope of proceedings, which will only be the case where the determination of a party’s substantive (i.e. more than *de minimis* rights) do not need to be considered as part of the full proceedings. Alternatively, if it is thought that the use of the section 45 / 69 test by reference to the parties’ rights is too stringent, the applicant could be required to demonstrate that the summary disposal of the claim or defence will result in a substantial saving in costs.
- 6.20 For these reasons, and subject to the amendments suggested above, we endorse the Commission’s proposal.

7. INTERIM MEASURES ORDERED BY THE COURT IN SUPPORT OF ARBITRAL PROCEEDINGS (SECTION 44 OF THE ACT)

- 7.1 Before addressing the specific proposals set out in the Consultation Paper, we consider that a modest amendment is necessary to the circumstances in which the court’s jurisdiction is found to have been excluded by the agreement of the parties.
- 7.2 The effect of section 44 (and indeed, one of the purposes of the Act itself) was to introduce limits on the extent to which the courts may intervene in arbitration, consistent with the general principles articulated in section 1.⁷⁰ This was a significant departure from the previous position under the Arbitration Act 1950, in which the High Court was granted mandatory supervisory powers from which the parties could not derogate.⁷¹
- 7.3 This underlying intent has been confirmed through various court decisions, including *Daelim Corporation v Bonita Company Ltd and Others*,⁷² in which the Commercial Court overturned part of an injunction previously granted under section 44(3) of the Act on the grounds that the specific paragraph of the injunction amounted

⁷⁰ Section 1(c).

⁷¹ *B v S* [2011] EWHC 691 (Comm), per Flaux J (as he then was), who described at [9] the “*permissive and non-mandatory regime of section 44 of the 1996 Act, together with the whole philosophy underlying the Act of party autonomy, which is fundamentally different from the mandatory regime of the 1950 Act which it replaced*”.

⁷² [2020] EWHC 697 (Comm).

to an anti-arbitration injunction which the Court held was unnecessary for the statutory purpose of preserving assets. In its judgment, the Court emphasised that the court's powers under section 44(3) of the Act were of a limited nature and therefore, there must be as little interference with the arbitral process as possible.⁷³

- 7.4 We agree that party autonomy should prevail as a key tenet of arbitration, and that where parties have agreed to exclude the now non-mandatory jurisdiction of the courts under section 44 to supervise their arbitral process, that choice must be respected as an exercise of party autonomy.
- 7.5 However, in our view the courts have been too quick to find that the parties have excluded the operation of section 44. In the decision in *B v S*,⁷⁴ the court held that there is “no requirement for a special form of words” in order to exclude the court's powers under section 44,⁷⁵ and that an agreement to do so can be implied from an agreement not to bring any action or other legal proceedings until the dispute had first been determined in arbitration (a *Scott v Avery* clause).
- 7.6 In that case, Flaux J (as he then was) held that cases decided prior to the 1996 Act entering into force which had found that *Scott v Avery* clauses only prevented legal proceedings on the substantive dispute being commenced prior to arbitration, not ancillary matters, had done so because of the mandatory nature of the predecessor provision to section 44. However, the judge considered that the introduction of the 1996 Act and its “radically different concept of party autonomy and its specific provision in the opening words of section 44 that the parties could agree to exclude the supervisory powers of the court, the whole statutory landscape had changed” meant that “there is no obstacle, either as a matter of law or as a matter of construction, to giving the wide words of the *Scott v Avery* clause their full meaning and effect”.⁷⁶
- 7.7 In our view, whilst the 1996 Act represented a radical departure from the previous regime for court invention and prioritised party autonomy, implying an agreement to exclude the court's jurisdiction into a *Scott v Avery* clause mischaracterises the nature of the court's powers in section 44. In general *Scott v Avery* clauses are intended to prevent a party from commencing proceedings in respect of the substantive dispute which must first be referred to arbitration. Indeed, in the case of *Scott v Avery*,⁷⁷ the House of Lords articulated the principle in terms that no right of action (i.e., on the substantive dispute) accrued until an arbitration award had been made,⁷⁸ meaning that the court would not have jurisdiction to entertain any action on the substantive dispute. However, the powers listed in section 44 of the Act do not establish a right of action by which the substantive dispute can be referred to the courts; they are, as the section title states, court powers that are exercisable *in support of* the arbitral proceedings in which the substantive dispute will be determined. Properly characterised, the proceedings anticipated by section 44 are ancillary to the arbitration process and, properly exercised, do not usurp, or otherwise restrict the authority and jurisdiction of the tribunal to determine the substantive dispute, as agreed by the parties.
- 7.8 We therefore consider that it is incorrect to construe an agreement to exclude the court's jurisdiction over a substantive dispute as including an agreement to exclude the court's jurisdiction to exercise its powers in support of arbitral proceedings. In view of the qualitative differences between the court's jurisdiction to

⁷³ *Ibid*, per Baker J at [15], citing the Court of Appeal's decision in *Cetelem SA v Roust Holdings Ltd* [2005] EWCA Civ 618. [2011] EWHC 691 (Comm).

⁷⁵ *Ibid*, per Flaux J (as he then was) at [79].

⁷⁶ *Ibid*, at [72].

⁷⁷ (1856) 10 E.R. 1121.

⁷⁸ *Ibid*, per Lord Cranworth LC at 1137, and Lord Campbell at 1138.

determine substantive rights and liabilities and the powers which can be invoked under section 44, the exclusion of the latter should require an express agreement between the parties.

- 7.9 Moreover, implying an agreement to exclude the court's powers in the absence of an express agreement to this effect creates the risk that the parties will have unintentionally lost the ability to seek urgent relief. The powers in section 44 are exercisable in circumstances where the tribunal is yet to be appointed or is otherwise unable to act, and so provide a valuable right to invoke the court's powers to, for example, maintain the status quo and preserve evidence pending the constitution of the tribunal. Accordingly, this right to recourse to the courts under section 44 should only be found to have been excluded in circumstances where the parties have given consideration to it (and therefore the consequences of excluding it), which is demonstrated by an express agreement to this effect.
- 7.10 Furthermore, the possibility that the court's supervisory powers may be excluded by implication rather than express agreement creates uncertainty as to the extent to which the parties are able to seek the court's intervention, which would only be capable of being resolved once a party has sought to invoke the court's jurisdiction under section 44. This uncertainty is particularly problematic in the context of applications where relief is sought on an urgent basis, and so the delay that would be incurred in determining whether the court's jurisdiction has been excluded by implicit agreement could result in the harm eventuating which the relief was intended to prevent.
- 7.11 In our view, the issues identified above would be resolved by an amendment to section 44 which requires that an agreement to exclude the court's powers must be expressly made. Additional wording could be included at the end of section 44(1) in the following terms:
- “For the purposes of this section, any agreement to exclude the jurisdiction of the court to exercise the powers listed below is not effective unless it is expressly made in writing either before or after the commencement of the arbitral proceedings in which the award is made. Any provision that an award is a condition precedent to the bringing of legal proceedings in respect of a matter to which an arbitration agreement applies shall not satisfy the requirements of this subsection”.*
- 7.12 This modest adjustment would ensure that the right to invoke the power of the courts in section 44 will only be waived where the parties intend to do so, and will avoid the situation whereby the right is accidentally excluded by implication.
- 7.13 We do not consider that this approach is contrary to the principles underpinning arbitration which are set out in section 1. As noted above, the powers in section 44 are exercisable only in support of arbitral proceedings, and do not supplant the parties' agreement to arbitrate substantive disputes or subordinate the jurisdiction of the tribunal to that of the supervising court. Further, the ability to apply to the courts for conservatory and interim measures in support of arbitration is a widely acknowledged and accepted feature of international arbitration, and is expressly provided in many institutional rules.⁷⁹ Indeed, inserting the amendment above would avoid the risk of conflict between the agreement to allow parties to seek interim relief from the courts implied by the provisions of institutional rules, and an agreement to exclude those powers implied from the terms of the arbitration agreement or contract (i.e. a *Scott v Avery* clause).

⁷⁹ See, for example, ICC Rules (2021) Art. 28; LCIA Rules (2020) Art. 25.3; SCC Rules (2017) Art. 37(5).

7.14 Requiring an express agreement to exclude powers in section 44 would also result in the “*commercially desirable*” construction of *Scott v Avery* clauses that such clauses are limited to prohibiting substantive – rather than ancillary – proceedings.⁸⁰ As noted by the judge in *B v S*,⁸¹ in view of the existing precedent on this matter, it would only be open to the Supreme Court to construe the clause in this manner at present. Therefore, amending section 44(1) in the terms proposed above would resolve this point via legislation rather than having to wait for the issue to come before the Supreme Court.

A. Section 44 and Third Parties

7.15 It is only since 2014 and following the decisions of the courts in *A and B v C, D and E*⁸², *DTEK Trading SA v Morozov*⁸³ and *Cruz City 1 Mauritius Holdings v Unitech Limited*⁸⁴ that the current position in relation to third parties was established. The current position is undoubtedly confusing and somewhat contradictory; while the English courts can compel a person who is not a party to the arbitration to provide witness evidence in the arbitration,⁸⁵ they cannot compel a non-party to:

7.15.1 Maintain (or not destroy) evidence relevant to the arbitration⁸⁶;

7.15.2 Sell (or not) goods which are subject to the arbitral proceedings⁸⁷; and / or

7.15.3 Preserve assets or not put them beyond the reach of an arbitration party.⁸⁸

7.16 The discrepancy in case law pre- and post-2014 has created uncertainty in relation to the scope of section 44. This is further complicated by the fact that the court has not provided its fully considered reasoning for extending only one of the powers in section 44 to third parties (i.e., the power to take witness evidence in section 44(2)(a)).

7.17 In addition, the current position also means that a third party is able to take steps which could hinder the fair and efficient conduct of an arbitration (for instance, by destroying relevant documents) without the parties being able to take any steps to prevent it.

7.18 Our view is that each of the courts' powers in section 44 should be exercisable against third parties. We agree with the Law Commission that the current wording already allows for orders to be made against third parties, however it would be beneficial to make this explicitly clear in the wording of the provision. This would address the above discrepancies and would bring English law in line with other major arbitration centres around the world including Paris, Singapore, and Hong Kong. Moreover, this would reflect the evident intent of the Departmental Advisory Committee on Arbitration (“DAC”) which, when explaining in its February 1996 Report (the “DAC Report”) that the purpose of section 44 was to help the arbitral process operate effectively, noted that “*there may be instances where a party seeks an order that will have an effect on a third party, which only the court could grant*”.⁸⁹ We therefore agree, in response to Question 16 and for the reasons outlined above,

⁸⁰ *B v S* [2011] EWHC 691 (Comm), per Flaux J (as he then was) at [89], referring to the Court of Appeal's decision in *Alfred C Toepfer International GmbH v Societe Cargill France* [1998] 1 Lloyd's Rep. 379.

⁸¹ *Ibid.*

⁸² [2020] EWCA Civ 409.

⁸³ [2017] EWHC 1704.

⁸⁴ [2014] EWHC 3704 (Comm).

⁸⁵ Section 44(2)(a).

⁸⁶ Section 44(2)(b).

⁸⁷ Section 44(2)(d).

⁸⁸ Section 44(2)(e).

⁸⁹ DAC Report, para. 214.

that section 44 of the Act should be amended to confirm that orders made under these provisions can be made against third parties.

- 7.19 Bearing in mind the Law Commission's comment that section 44 imports the law on these various matters as it is applied in domestic legal settings, the amendment would need to be worded in such a way that does not inadvertently create the ability to obtain an order against third parties in respect of a matter listed in section 44(2) that is not available to litigants in court. Therefore, we would propose that the amendment could take the form of short clarification at the end of section 44(1) as follows:

"(including the power to make orders about such matters against non-parties to the arbitration)."

B. Orders relating to witness evidence, and third parties

- 7.20 We agree with the Law Commission's observation that, as it stands, the Act allows parties to obtain witness summonses by way of either section 44(2)(a) or section 43. There is no reason to maintain two procedural regimes which accomplish the same objective, and it plainly cannot have been the intention that section 44(2)(a) should have the effect of rendering section 43 redundant. As such, in direct response to the proposal made in Question 15, we agree that section 44(2)(a) of the Act should be amended to confirm that it relates to the taking of evidence of witnesses by deposition only.

- 7.21 However, this issue (and the proposed amendment) highlights a discrepancy between the nature of the ability to secure the attendance of a witness on the one hand, and obtain their deposition evidence on the other. In the case of the former, section 43 is a mandatory provision, whereas the latter is a non-mandatory provision which can be excluded by express (and, at present, implied) agreement. We can see no reason why the two methods for obtaining witness evidence should be treated differently in this regard. If, for example, the parties to an arbitration had impliedly agreed to exclude the court's powers under section 44, a party seeking to obtain evidence from a witness would have to proceed under section 43, which would only be available if the witness is located in the jurisdiction. Said party would not be able to compel a witness' evidence by way of deposition prior to them departing the jurisdiction.

- 7.22 In our view, the provisions for obtaining witness evidence – irrespective of the method used – should be mandatory. We therefore propose that, rather than amending section 44(2)(a), section 43 should be amended instead so as to cover the power to both compel the attendance of a witness and require that a witness provides a deposition. Consequential amendments would also need to be made so as to clarify that the restriction in section 43(3) only applies to witness summonses, as the ability to compel deposition evidence are not subject to the same restrictions.

C. Third party appeals

- 7.23 The DAC provided limited reasoning as to why it proposed restricting the right of appeal by making it subject to obtaining the leave of the court from which a decision originated, noting simply that *"[i]t seems to us that there should be this limitation, and that in the absence of some important question of principle, leave should not*

generally be granted', stating that it took "*the same view*" where the Bill provided elsewhere that appeals should be subject to this limitation.⁹⁰

- 7.24 Nevertheless, this restriction may have been prompted by the general principles set out in section 1 particularly party autonomy and the limitation on court intervention. Where parties have agreed to arbitrate their disputes, the normal rights of appeal through the court system should not be available as this would subvert the parties' agreement. In this way, the requirement that there be an important point of principle in order for leave to appeal to be granted echoes, for example, the requirement in section 69(3)(c)(ii) that the question of law is one of general public importance in order that leave to be appeal will be granted.
- 7.25 However, as third parties are not party to the arbitration agreement and have therefore not consented to any express or implied restriction on the involvement of the courts, the same rationale should not apply to the availability of the right of appeal in circumstances where they have been – often involuntarily – brought into the dispute.
- 7.26 Accordingly, as section 44 orders can be made against third parties, it follows (and is only appropriate) that third parties can avail themselves of the usual rights of appeal that would be open to them if the proceedings had been brought in relation to court proceedings. As such, in response to Question 17, we agree with the proposition that the requirement for the court's consent to an appeal of a decision made under section 44 should only apply to parties and proposed parties to an arbitration, and not to third parties, who should have the usual rights to appeal.

D. Emergency arbitrators

Extension of the Act to Emergency Arbitrators

- 7.27 We agree that the provisions of the Act should not apply to emergency arbitrators, although we disagree with the rationale set out in the Consultation Paper.
- 7.28 In the first instance, emergency arbitrator provisions are contained within institutional arbitration rules, which the parties to an arbitration agreement must have chosen in order for them to validly have recourse to an emergency arbitrator. These rules provide what is, in effect, a complete code as to the purpose and procedure of emergency arbitrator proceedings, which suffices – for the purposes of section 4(2) – as being an agreement to make arrangements in respect of the non-mandatory provisions of the Act.
- 7.29 Accordingly, much of the Act will not apply to emergency arbitrators. Indeed, the two provisions identified in the Consultation Paper which set out non-mandatory provisions for the appointment of arbitrators (section 16) and court powers exercisable where there has been a failure of the appointment procedure (section 18) are unlikely to ever apply in circumstances where the institutional rules governing emergency arbitrators invariably provide for the institution's governing body to appoint the emergency arbitrator.⁹¹
- 7.30 Secondly, we do not consider that the fact that the relief ordered by an emergency arbitrator is only provisional in nature constitutes grounds for refusing to apply the Act to emergency arbitrators. The Act already provides

⁹⁰ DAC Report, paragraph 74(iii). The DAC's comments were made in the context of appeals from decisions of the court under section 12, but then expressly applied to other instances where it had proposed this restriction.

⁹¹ See, for example, ICC Rules (2021) Appendix V, Art. 2; LCIA Rules (2020) Art. 9(6); SCC Rules (2017) Appendix II, Art. 4(1); SIAC Rules (2016) Schedule 1, Art. 1(3).

a mechanism by which the tribunal can make a provisional order under section 39, which can be enforced by the courts under section 42 (after it is made into a peremptory order under section 41), but which can be subsequently varied or set aside by the tribunal in its final award. Indeed, further on in this section of the Consultation Paper there are proposals for the enforcement of emergency arbitrator orders where a party fails to comply.

- 7.31 Instead, we consider that the Act should not apply to emergency arbitrators because, as noted above, the institutional rules which make emergency arbitration available provide comprehensive rules which govern the appointment, powers, and procedure for emergency arbitrators. For the necessarily limited role (both in terms of the time for which they are appointed and the scope of their role), the full suite of provisions of the Act is unnecessary.
- 7.32 Moreover, the role of the emergency arbitrator is essentially conservatory in nature; whilst an emergency arbitrator's order may temporarily affect a party's rights (i.e. its ability to dispose of an asset to which the proceedings relate) the fact that the order either expires, or can be fully reviewed by the tribunal once constituted means that any unwarranted interference will be limited, and is capable of being remedied by the full tribunal. Accordingly, the protections afforded by the Act which, for example, ensure procedural fairness and allow for parties to invoke the court's full supervisory jurisdiction, are unnecessary in circumstances where the effect of an emergency arbitrator's award is temporary and reversible.

Court-administered Emergency Arbitrator Regime

- 7.33 We also agree with the Commission's conclusion in Question 19 that the Act should not include provisions for the court to administer a scheme of emergency arbitrators.
- 7.34 We say this for much the same reasons as for why the Act should not apply to emergency arbitrators; 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.
- 7.35 Further, the purpose of appointing an emergency arbitrator is to obtain urgent interim relief prior to the constitution of the tribunal. The Act already provides a route by which a prospective party to arbitral proceedings can obtain various forms of urgent relief via section 44(3), which can be sought against both parties and non-parties to prospective proceedings (unlike emergency arbitrator relief, which can only be sought against prospective parties). It is therefore unclear why an additional route for seeking emergency interim relief via a court-appointed emergency arbitrator would be necessary.

Repeal of Section 45

- 7.36 For the reasons outlined in the Consultation Paper, we agree with the proposal in Question 20 that section 44(5) of the Act should be repealed.

- 7.37 Removing section 44(5) will resolve the uncertainty created by the interpretation of *Gerald Metals v Timis*,⁹² which has created confusion amongst arbitration practitioners as to the availability of relief under section 44 in circumstances where the rules adopted by the parties include emergency arbitrator provisions.
- 7.38 Since the *Gerald Metals* decision, the LCIA has sought to clarify the position, making it clear that it is not the intention of the LCIA that emergency arbitrator provisions should be treated as an alternative to or substitute for the right of a party to apply to the court for interim or conservatory measures before the formation of the tribunal. However, in doing so, the LCIA recognised it is unable to legislate for how the court will interpret section 44(5).⁹³
- 7.39 In our view, relief under section 44 should be available irrespective of whether the party seeking relief could seek the appointment of an emergency arbitrator. There are many instances where, notwithstanding the availability of an emergency arbitrator, relief from the court is preferable. As noted in the Consultation Paper, these include cases where the relief is required more urgently than the emergency arbitrator provisions would allow, the order is sought to be made against third parties, or the party to whom the order is to be made is recalcitrant, and is unlikely to comply without the threat of contempt proceedings.
- 7.40 We would add that, if the availability of section 44 relief was subject to whether the relief could be obtained from an emergency arbitrator, this could create significant uncertainty in instances where there is a lack of clarity as to whether certain relief is capable of being granted by tribunals. For example, as a matter of English law, there is still uncertainty about whether the parties can confer power on an arbitrator (emergency or otherwise) to grant a freezing injunction. A party seeking relief under section 44 which may or may not be available from an emergency arbitrator would not know whether its application will be considered on its merits or fail on the grounds that it could be granted by an emergency arbitrator. This sort of uncertainty, particularly in the context of urgent relief, is unwelcome. Repealing section 44(5) will alleviate this uncertainty, and allow parties to obtain relief by whichever means it considers will be the most effective.
- 7.41 We also agree with the view that sections 44(3) and 44(4) effectively render section 44(5) redundant. The restriction in section 44(5) limiting the court's power to act only where the tribunal (or the arbitral institution or person vested with power) either has no power or is unable to act effectively is inherent in:
- 7.41.1 Section 44(3), which envisages the court acting where the required relief is urgent and the tribunal (or emergency arbitrator) cannot act as expeditiously as required; and
- 7.41.2 Section 44(4), where, in circumstances where tribunal permission is required, it is likely to be given only where the tribunal cannot grant the relief sought, otherwise it would do so.
- 7.42 Whilst section 44(5) may, as noted in the consultation, hold important symbolic value as a bulwark against overzealous juridical intervention, it is evident from case law over the past quarter of a century that the judiciary has fully adjusted to the pro-arbitration approach embodied in the Act and set out in the general principles at section 1. Accordingly, the overt provisions such as section 44(5) concerned with emphasising party autonomy

⁹² [2016] EWHC 2327 (Ch).

⁹³ Since *Gerald Metals*, the LCIA has made amendments to Article 9.12 (now Article 9.13) and to Article 25.3 (relating to interim relief before an arbitral tribunal, rather than before an emergency arbitrator specifically) in the new 2020 rendition of its Rules, to simplify the language and to confirm the availability of court-ordered interim relief in certain circumstances.

and the court's limited role in arbitration are, we would suggest, unnecessary for present purposes, and so where they serve no other evident purpose, should be removed in order to further streamline the Act.

Non-compliance with the orders of emergency arbitrators

- 7.43 We welcome the proposal to include in the Act a mechanism by which orders of emergency arbitrators can be enforced by the courts in the case of non-compliance. Doing so would resolve the long-running uncertainty over the enforceability of such awards in the English courts.
- 7.44 Parties which agree to the adoption of emergency arbitrator provisions have a legitimate expectation that, if they apply for and obtain relief from an emergency arbitrator (which, by its nature, will be urgent and important), the order by which it is granted will either be complied with by the other party (as that is what it has agreed to do) or else the other party's compliance can be compelled. Otherwise, if there is no effective means of enforcing the terms of an emergency arbitrator's award, the process is effectively rendered redundant. Accordingly, an effective means of enforcing emergency arbitrator orders is vital in order for this valuable tool in the arbitral party's arsenal to be successful.
- 7.45 As to the method by which emergency arbitrator orders should best be enforced, we agree with the conclusion that section 41 is not suited to emergency arbitrators:
- 7.45.1 Section 41(3) concerns inexcusable delay in a claimant pursuing their claim, which should be irrelevant in circumstances where an arbitral institution recognises the urgent need for an emergency arbitrator
- 7.45.2 Section 41(5) empowers the tribunal to issue a peremptory order in case an order of the tribunal is not complied with. This is obviously intended for tribunals which have been fully constituted per the parties' wishes and appointments. In this case, if a peremptory order is not complied with, the tribunal has recourse powers so far as to dismiss the claim under section 41(6); a power that is also not suitable for an emergency arbitrator.
- 7.45.3 Sections 41(4) and (7) deal with the option of proceeding to an award, which, again, is only applicable to the fully constituted arbitral tribunal, rather than the ruling of an emergency arbitrator.
- 7.46 Of the two alternative methods proposed in Question 21 involve either:
- 7.46.1 A new 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; or
- 7.46.2 An amendment to section 44(4) which allows an emergency arbitrator to give permission for an application to be made by a party to the court for enforcement of the order.
- 7.47 In our view, the three-step process envisaged in the first option of emergency arbitrator order > emergency arbitrator peremptory order > court order involves unnecessary delay. The requirements to act fairly and impartially which are often expressly stipulated in the rules governing the emergency arbitrator process will invariably require that the emergency arbitrator provides both parties a reasonable opportunity to put their respective cases before taking a decision. If this has to occur at both the stage of issuing the original order and again when issuing the peremptory order, this will delay the process for obtaining urgent relief (particularly as

the applicant will still have to apply to the courts for enforcement of the emergency arbitrator's peremptory order).

7.48 We prefer the two-step process in the second option wherein a failure to comply would give the applicant party a direct line to the courts without the intermediate step of obtaining an emergency arbitrator peremptory order.

7.49 However, we are not convinced that an amendment to section 44(4) is the most appropriate means of achieving the objective of enforcing emergency arbitrator orders. Whilst we see much force in the logic at paragraph 7.92 of the Consultation Paper that emergency arbitrators are appointed on an interim basis to grant interim relief, and interim relief is dealt with in the Act at section 44, the matters which a court has power to make orders in respect of are limited to those set out in section 44(2). However, it may be that the relief granted by an emergency arbitrator extends beyond those matters, encompassing, for example, orders requiring a party to continue performing contractual obligations, or execute certain arrangements in order to ensure the effectiveness of the arbitration agreement. As noted in the Consultation Paper, sections 44(3) to 44(7) are likely mandatory,⁹⁴ thus the court would not be able order compliance with an emergency arbitrator's award which addresses matters other than those set out in section 44(2), even with the permission of the emergency arbitrator.

7.50 Moreover, if compliance with an emergency arbitrator's order is not urgent and therefore an application under section 44(4) must be made with the permission of the emergency arbitrator (as per the proposal) this may not be possible if, after issuing its order, the emergency arbitrator is rendered *functus officio* and is therefore unable or unwilling to provide permission.

7.51 By contrast, section 42 is not subject to any such restrictions as to the nature of the orders a court can require compliance with, which enables it to make an order requiring compliance with any orders of the tribunal which have been made into peremptory orders. Nor does section 42 require the permission of the tribunal (or, in this scenario, the emergency arbitrator) where the parties have agreed that the powers of the court under this section are available.

7.52 We would therefore propose that amendments are made to section 42 which would allow the court to enforce both peremptory orders of the tribunal, as well as orders issued by emergency arbitrators, making it clear that awards of the latter variety need not have been issued as peremptory orders in order to be enforced via this method.

7.53 We would propose that section 42(1) is amended as follows to achieve this (with the additional wording emphasised):

"Unless otherwise agreed by the parties, the court may make an order requiring a party to comply with a peremptory order made by the tribunal, or an order made by an emergency arbitrator. For the purposes of this section, an emergency arbitrator need not have made a peremptory order to the same effect as his order prior to an application under this section to be made" (emphasis added).

7.54 We see merit in an emergency arbitrator being empowered to enforce her/his order, and would therefore suggest that section 42(2)(a) is amended as follows:

⁹⁴ Paragraph 7.68(2).

“by the tribunal or the emergency arbitrator (upon notice to the parties)” (emphasis added).

7.55 We would also suggest that specific provision is made in relation to emergency arbitrator orders only so that an application for compliance with an emergency arbitrator's order can be made by a party without having to first obtain the agreement of the other parties or permission from the tribunal. This help strengthen the enforceability of such orders as it avoids the need to obtain permission from the emergency arbitrator (who may be *functus officio*) and allows the enforcing access to the court without having had to agree that the courts powers under section 42 are available.

7.56 Finally, we note that the Act would require a definition of 'emergency arbitrator' to be included in section 82. We would suggest the following:

““emergency arbitrator” means a person appointed as such in accordance with the provisions of any institutional rules which the parties have agreed shall apply, and which provide for the appointment of an emergency arbitrator (or a like role)”.

8. JURISDICTIONAL CHALLENGES AGAINST ARBITRAL AWARDS (SECTION 67)

A. Appeal or Rehearing?

8.1 We are not convinced that a sufficiently compelling case exists for reform of section 67 so as to limit a challenge to the tribunal's jurisdiction to an appeal rather than a *de novo* rehearing.

8.2 In the first instance, challenges brought under section 67 are concerned with an issue which goes to the heart of the arbitral process, namely the existence or otherwise of the power of a tribunal to determine the issues which have been referred to it. They are therefore qualitatively different from other forms of challenge, such as challenges to a tribunal's determination of points of law on the merits of the dispute. In those cases, what is at issue is the content of the award itself and whether the tribunal's deployment of the law is correct, not the ability of the tribunal to have made the award in the first place. Therefore, not only can the ability of the parties to challenge a point of law be excluded by agreement, the threshold for obtaining leave to do so is very high, due to the fact that the law recognises the parties' agreement to have their disputes resolved by arbitration, inherent in which is an acceptance of the risk that the arbitrators may render an award that is wrong on the law, but nevertheless enforceable.

8.3 However, the question of whether the tribunal was right or wrong when determining its jurisdiction is not a matter for which the parties are deemed to tolerate a margin of error in the tribunal's decision. Unlike a question of law (which, even if the tribunal gets wrong, the result is nevertheless within the range of acceptable outcomes which the tribunal is permitted to reach), if the tribunal wrongly concludes that it has jurisdiction when it does not, the result is that it will proceed to determine the substantive dispute in circumstances where it has no authority or power to do so. This, in our view would be intolerable, and it would offend against the principle of party autonomy, as the tribunal would be acting in the absence of the parties' consent.

8.4 Jurisdiction is therefore a binary question: a tribunal either has it or it does not, and the consequence if the latter is found to be true is that the basis of the entire process and any award rendered by the tribunal will be illusory. It is for this reason that a challenge under section 67 does not require a party to show that it has or will suffer substantial injustice or that determination of the challenge will substantially affect the rights of one or more of the parties, as challenges under sections 68 and 69 require.

- 8.5 It is therefore appropriate that, for such a fundamental issue, the court should have the ability to rehear the evidence unrestricted by the evidence that was placed before the Tribunal, the Tribunal's controls on the evidence that was presented, or its findings of fact.
- 8.6 The issue is also one of consent. In this regard, we share the sentiment of Lord Mance in *Dallah Real Estate and Tourism v Ministry of Religious Affairs of the Government of Pakistan*,⁹⁵ who stated that "...a party who has not submitted to the arbitrator's jurisdiction is entitled to a full judicial determination on evidence of an issue of jurisdiction before the English Court".⁹⁶ The premise of this entitlement being that if the party does not accept the jurisdiction of the Tribunal, it does not consent to the arbitrability of that question by the Tribunal. The absence of that consent is, in our view, sufficient to warrant a rehearing of the evidence.
- 8.7 We are not unsympathetic to the concerns highlighted in the Consultation Paper of the potential for delay and cost that the repetition of evidence in a *de novo* rehearing entails, or the issue of fairness in allowing a party which has challenged jurisdiction to use the tribunal's award as a 'dress rehearsal'. However, we do not consider that these matters override the more fundamental concern of ensuring that a tribunal which purports to determine the rights and obligations of a party has the power and authority to do so.
- 8.7.1 In the first instance, as set out in the Consultation Paper, the figures from the Commercial Court demonstrate that there is by no means a deluge of these challenges being brought. Therefore, reform is not required in order to fix a lacuna that is being routinely misused by recalcitrant parties.
- 8.7.2 Secondly, although not to the same extent as other instances where court intervention remains permissible under the Act, the threshold for bringing a section 67 challenge is high, with the requirement in practice that there be serious grounds to support an application, and speculative applications or those with no real prospect being discouraged through the use of adverse costs orders. In view of the large number of arbitrations which are seated in this jurisdiction and the vanishingly small number of section 67 challenges in comparison, it would appear that the threshold requirements are (at least in part) responsible for weeding out challengers who wish to have weak objections to jurisdiction re-heard as a means of obfuscating the arbitral process.
- 8.7.3 Thirdly, questions of fairness must be balanced against considerations of propriety and maintaining confidence in arbitration as a reliable means of dispute resolution. It is unavoidable that a party which has unsuccessfully challenged the tribunal's jurisdiction in the proceedings will take its cues from the award on jurisdiction to obtain new evidence and develop its arguments. However, if that results in new evidence being uncovered or arguments being presented in a different way when the section 67 challenge is made so that a tribunal's jurisdiction can be shown to be deficient or non-existent, any perceived unfairness in this process is acceptable in order to avoid a tribunal which has no jurisdiction from being able to render enforceable awards.
- 8.8 We also disagree with the response in the Consultation Paper to the DAC's objection (summarised at paragraph 8.37) to reform. The central plank of the Law Commission's position is that, irrespective of whether the challenge is by way of appeal or rehearing, the court will remain the final arbiter on the question of the tribunal's jurisdiction. Whilst that is undoubtedly true, the distinction lies in the extent of the court's ability to act in its role as final arbiter. Where the challenge is by way of a rehearing, the court is able to review the evidence afresh

⁹⁵ [2010] UKSC 46.
⁹⁶ *Ibid*, at [26].

and draw its own conclusions as to what it establishes. Whereas, on an appeal, the court is constrained to consider the findings of fact made by the tribunal on the evidence presented at the time it determined its own jurisdiction. In that sense, the court is not acting as the final arbiter on the tribunal's jurisdiction, rather it is acting as final arbiter on the tribunal's ruling on its own jurisdiction.

- 8.9 In the same way that parties have a legitimate expectation that the tribunal will apply the chosen law to the merits of the dispute (as explored in Section 9 further below), parties legitimately expect that the tribunal will only act in circumstances where it has the jurisdiction to do so. If a party challenges the tribunal's jurisdiction and the tribunal misinterprets or fails to take proper account of the evidence then, in view of the fundamental nature of substantive jurisdiction to the arbitral process (as noted above), it is appropriate that the court should be entitled to consider the evidence afresh and apply the law to the facts in the way that it would do as a court of first instance in litigation, rather than being bound by tribunal's (potentially incorrect) findings on the evidence.
- 8.10 For the reasons set out above, we do not agree that reform of section 67 is required. Whilst we recognise that the proposed amendment would only apply to parties which had participated in the proceedings and objected to the tribunal's jurisdiction (and therefore would not affect parties who had not participated in the proceedings), we consider that the risk of incorrect jurisdictional decisions being upheld due to the court's inability to consider all of the relevant evidence outweighs concerns of cost, delay and fairness, and so the current position which allows the court to rehear *de novo* jurisdictional challenges under section 67 should remain.

B. Consistency with Section 32

- 8.11 As set out above, we do not agree that section 67 should be limited to an appeal. However, if section 67 is amended in the manner proposed, for the sake of consistency in approach and clarity the same limitation should apply to Section 32 (but only where the tribunal has already issued an award on its jurisdiction which is final and binding).

C. Consistency with Section 103

- 8.12 We agree that, if section 67 was amended so that the consideration of jurisdictional challenges was limited to appeals rather than a full rehearing, no equivalent change under section 103 concerning the recognition and enforcement of foreign arbitral awards would be required.
- 8.13 Enforcement is an entirely separate issue governed by an internationally recognised and applied standard set forth in the New York Convention which adopts an international pro enforcement approach by national courts. At present, there is no fetter to the procedure adopted when determining challenges to recognition and enforcement, and any attempt to do so would place this jurisdiction at odds with other seats.
- 8.14 It is, we think, appropriate that a court being asked to recognise and enforce a foreign arbitral award should be entitled to consider evidence that the tribunal lacked jurisdiction before granting leave for it to be enforced as if it was a judgment of the court. As alluded to in the Consultation Paper, the curial jurisdiction may have afforded no – or a limited – right to challenge jurisdiction, meaning that the enforcement stage may be the first opportunity that a party has to raise issues of jurisdiction before a court. If a party has genuine grounds for challenging the jurisdiction of the tribunal, the English courts should not be in the business of enforcing such awards unless it is satisfied – having reviewed the evidence – that the tribunal did in fact have jurisdiction.

D. Remedies under Section 67

- 8.15 We agree with the proposed addition of the remedy of declaring an award to be of no effect, either in whole or in part.
- 8.16 However, we note that section 67(1) addresses challenges to two different types of awards. The first is a challenge to an award which deals specifically with the tribunal's jurisdiction; the second is a challenge to an award on the merits which a party considers the tribunal lacked the jurisdiction to make (either in its entirety, or in respect of specific matters).
- 8.17 Whilst we agree that the ability to declare an award of the first type to be of no effect – if the court considers that the tribunal had no jurisdiction – should be expressly provided for in section 67(3),⁹⁷ we also consider that the option to remit awards of the second type should be available.
- 8.18 The option to remit was dismissed in paragraph 8.58 of the Consultation Paper as its absence was not seen as problematic, but this was only considered in light of challenges to awards of the first type, i.e., awards on the tribunal's jurisdiction, not awards on the merits which are rendered ineffective (in whole or in part) as a consequence of the tribunal's lack of jurisdiction.
- 8.19 Presently, awards of the second type can only be declared of no effect, in whole or in part, as this is the only order which can be sought under section 67(1)(b). The remedies listed in section 67(3) are only available where the challenge is to an award which deals specifically with the tribunal's jurisdiction under section 67(1)(a).
- 8.20 Declaring the whole of a substantive award to be of no effect is an appropriate remedy where the entire award is undermined by the tribunal's lack of jurisdiction. However, declaring parts of an award to be of no effect (where, for example, the issues determined by the tribunal include issues which were both within and without the tribunal's jurisdiction) risks leaving the award unenforceable, as amendments would need to be made to take account for the part of the award which has been carved out by the court. This might include changes to the quantum of damages that has been awarded, interest, or even a reconsideration of matters of liability.
- 8.21 It is unlikely that the court could make consequential adjustments to the award as part of an order declaring part of it to be of no effect (and the option to vary the award under section 67(3)(b) is not available to the court on an application under section 67(1)(b)). Moreover, if the tribunal has issued its award yet part of it is subsequently declared to be of no effect, the tribunal nevertheless remains *functus officio* as the rump of the award continues to exist.
- 8.22 In these circumstances, it would therefore be appropriate for the court to have the power to remit the award to the tribunal so as to allow it to make any changes that are necessary in view of the court's decision on jurisdiction.
- 8.23 Section 67 could be amended to accommodate this change as follows:

⁹⁷ We note the comment at paragraph 8.60 that the ability to declare the award as being of no effect is envisaged in section 67(1)(b) yet omitted from section 67(3). However, we do not consider that this was an unintentional omission: section 67(3) is concerned only with the remedies available on the first type of challenge under section 67(1)(a), i.e. to an award of the tribunal as to its substantive jurisdiction, wording which it echoed in the section 67(3).

8.23.1 Section 67(1)(b) is deleted and replaced with:

“challenging any award made by the tribunal on the merits on the grounds that the tribunal did not have substantive jurisdiction.”

8.23.2 A new section 67(4) is inserted (with the existing section 67(4) becoming a new section 67(5)) which states that:

“On an application under this section challenging an award of the arbitral tribunal on the merits, the court may by order—

(a) confirm the award,

(b) declare the award to be of no effect, in whole or in part, and/or

(c) remit the award to the tribunal for reconsideration”.

E. Costs

8.24 We agree that a tribunal should, once it has determined that it does not have substantive jurisdiction, nevertheless retain residual jurisdiction in order to issue a binding award on costs.

8.25 In our view, neither of the alternatives proposed at paragraph 8.68 of the Consultation Paper are appealing. Seeking the involvement of the court under section 63(4) is, as noted, likely to involve more time and expense. In addition, the provisions of this section allow the court to either: (i) determine the recoverable costs of the arbitration on such basis as it thinks fit; or (ii) order that they be determined by such means and upon such terms as the court may specify. Section 63(5) goes on to say that, unless determined otherwise, the recoverable costs are to be determined in the basis that there shall be allowed a *“reasonable amount in respect of all costs reasonably incurred”*. If the court was to adopt an English CPR approach to the determination of costs, it is likely that a successful party would recover significantly less under section 63(4) than it would if costs were to be determined by the tribunal.

8.26 The inherent unfairness identified in paragraph 8.69 of the Consultation Paper that would arise if costs were simply irrecoverable makes this option unattractive. Jurisdictional challenges can require significant costs to be incurred, including not only lawyers' fees but also those of experts and witnesses. Indeed, we have experience of jurisdictional objections in one set of arbitration proceedings requiring evidence as to the nature of the relationship between the party to the proceedings and the non-party over which the claimant had asserted the tribunal had jurisdiction, and in another set expert evidence was required as to whether the claims fell within the ambit of the relevant investment treaty and were therefore matters which fell within the tribunal's jurisdiction. In both cases, there were several rounds of submissions as well as witness and expert evidence required. If the associated costs had been irrecoverable, this would have been a significant financial burden on the successful party.

8.27 Accordingly, the Act should be amended so as to make specific provision as to the ability of a tribunal which has determined that it has no jurisdiction to nevertheless make an award as to the costs of the arbitration up to the point it determines that it lacks jurisdiction.

8.28 We would suggest that, rather than section 61, provision in this regard should be made in section 31, which is a mandatory provision. A new section 31(6) could be introduced as follows:

“If, in a ruling made pursuant to subsection (4), the tribunal rules that it has no substantive jurisdiction, the tribunal shall nevertheless have the jurisdiction to make an award allocating the costs of the arbitration incurred up to and including the making of its award on costs. For the making an award on costs, the tribunal shall have the power to invite the parties to provide written and/or oral evidence or submissions on this matter.”

8.29 This part of the Consultation Paper addresses the issue of costs where the tribunal rules on its own jurisdiction and determines it is lacking. However, this raises a further question as to what the position on costs should be where the court determines that the tribunal has no jurisdiction, as a consequence of an application under either section 32, 67 or 72. Whilst the court can make an order as to the costs of the application, there is no provision in the Act which would allow it to award the costs of the arbitration which have been incurred prior to the court issuing a decision finding that the tribunal has no jurisdiction. We do note that the court does have power to make an order with respect to costs incurred in the arbitration elsewhere in the Act; section 70(5) allows the court to make such order as it sees fit as a consequence of it ordering the tribunal under section 70(4) to state the reasons for its award. However, no express power exists in the case of a challenge under section 32, 67 or 72.

8.30 This is an altogether different scenario as the tribunal's jurisdiction is determined by the court in circumstances where existence of any residual jurisdiction is even less clear than if the tribunal itself determines it lacks substantive jurisdiction. In particular, if an award (either on the merits under section 67(1)(b) and – if the proposal in Question 25 is adopted – specifically on the tribunal's jurisdiction) is declared to be of no effect, then the tribunal will have become *functus officio* by virtue of the court's order than by its own award.

8.31 Sections 32, 67 and 72 could be amended so as to enable the court to determine and allocate the costs of the proceedings prior to its ruling that the tribunal has no substantive jurisdiction and any consequential declaration that any award of the tribunal is of no effect (or other order that renders the tribunal *functus officio* such that it cannot award costs). However, for the reasons set out above, court involvement in allocating costs is unlikely to be welcome.

8.32 Therefore, we would propose that provisions are added to each of sections 32, 67 and 72 which, notwithstanding a decision of the court finding that the tribunal has no substantive jurisdiction, expressly confer jurisdiction on the tribunal to make an award as to the costs of the proceedings up to that point, in similar terms to the proposed text at paragraph 8.28 above.

9. APPEALS ON A POINT OF LAW

9.1 Contrary to the provisional conclusion in the Consultation Paper, we consider that certain modest amendments to section 69 of the Act are warranted.

9.2 Overall, we consider that the threshold set by section 69 for the courts to grant leave to appeal is pitched at the correct level. In the absence of an agreement between the parties, the requirements which must be met are stringent, and ensure that only questions of law that are of substantial importance to the parties (and, in certain cases, of wider public importance) are capable of being appealed.

- 9.3 Indeed, even in circumstances where the parties have expressly agreed that appeals on points of law can be made (thereby allowing consensual appeals under section 69(2)(a)), the courts have nevertheless inferred into such an agreement the requirement that the determination of the question of law must substantially affect the rights of the parties.⁹⁸ Accordingly, the ability to refer points of law pursuant to an agreement which satisfies section 69(2)(a) is not unfettered; the courts will still apply the first limb of the statutory test that must be met before leave will be granted, meaning that purely academic questions of law, or those which will have no significant impact on the parties' rights, will not be entertained.
- 9.4 We do not, therefore, propose that any changes should be made to the threshold requirements for leave to be granted. However, we do consider that an adjustment should be made to the nature and timing of the agreement to exclude the court's powers under section 69, which we propose should be amended so as to exclude agreements made prior to the commencement of arbitral proceedings.
- 9.5 We also consider that the opportunity should be taken to codify the requirement set out in case law (referred to above) that a consensual appeal made pursuant to section 69(2)(a) must relate to a question of law that will substantially affect the rights of one or more of the parties.
- 9.6 We set out our reasoning in support of these two amendments below.

A. The nature and timing of the agreement to exclude the court's powers

- 9.7 Section 69 of the Act is a non-mandatory provision, and the right to appeal on a question of law is subject to an agreement between the parties to the contrary,⁹⁹ commonly referred to as an 'exclusion agreement'.
- 9.8 What constitutes an exclusion agreement has been broadly defined by the courts. Accordingly, it has been held that the provisions found in many institutional rules¹⁰⁰ which stipulate that the tribunal's awards are final and binding, and that the parties are deemed to have waived any right to recourse, are sufficient to demonstrate an agreement to exclude the court's powers under section 69.¹⁰¹
- 9.9 As explained by High Court in *Sukuman Ltd v The Commonwealth Secretariat*,¹⁰² the rationale for permitting an exclusion agreement to be incorporated by reference is based on the development of English public policy in favour of the finality of arbitral awards over the residual supervisory control of the courts. The court cited the decision of Leggatt J (as he then was) in *Arab African Energy Corporation v Oliproducten Nederland*,¹⁰³ in which the judge (considering the provisions on exclusion agreements in section 3(1) of the 1979 Act) stated that public policy which had formerly preferred that the courts retain a degree of control "has now give way to the need for finality". Indeed, the judge went further, stating that "the striving for legal accuracy may be said to have been overtaken by commercial expediency".¹⁰⁴

⁹⁸ *ST Shipping and Transport Pte Ltd v Space Shipping Ltd (the "CV Stealth")* [2016] EWHC 880 (Comm), per Popplewell J (as he then was) at [40] – [42].

⁹⁹ Section 69(1).

¹⁰⁰ For example, ICC Rules (2021), Art. 35(6); LCIA Rules (2020) Art. 26.8.

¹⁰¹ See, for example, *Lesotho Highlands Development Authority v Impregilo SpA & Ors* [2005] UKHL 43, [2006] 1 AC 221, per Lord Steyn at [5].

¹⁰² [2006] EWHC 304 (Comm), per Colman J at [12] – [16].

¹⁰³ [1983] 2 Lloyd's Rep. 419.

¹⁰⁴ *Ibid*, at 423.

- 9.10 The courts in those judgments took the view that the change in public policy in favour of the finality of arbitration justified a departure from the requirement for reasonable notice to be given before incorporating exclusions clauses by reference to general conditions. Colman J noted that the consensual exclusion of the right to appeal was a means of enhancing two of the policy foundations of the 1996 Act, namely party autonomy and finality, and therefore “*it is hard to see why the test of what is reasonable notice of an exclusion agreement should present a particularly high threshold*”.¹⁰⁵
- 9.11 It is undoubtedly the case that the permissive approach of the courts as to what constitutes a valid exclusion agreement ensures the finality of arbitration. However, in our view this approach mischaracterises the concept of party autonomy in the determination of how disputes are to be resolved.
- 9.12 In practice, the incorporation by reference to institutional rules of the parties’ ‘agreement’ to exclude the right of appeal under section 69 typically occurs at the outset of a contractual relationship, when the parties negotiate the terms of their contract and agree to arbitrate in accordance with certain institutional rules. Parties may not give detailed consideration as to the specific consequences that will flow from the choice of a particular set of institutional rules.
- 9.13 Moreover, dispute resolution provisions are often treated as ‘boilerplate’ clauses, and those advising them may not be aware of the exclusion clause that will be incorporated by reference when negotiating the contract. Indeed, in certain cases the terms of the arbitration agreement may form part of a standard form contract (i.e., the FIDIC Suite of Contracts, which provide for ICC arbitration) which would require the parties to know that the terms incorporate an exclusion agreement and actively amend the agreement if they wish to remove it, or the arbitration agreement forms part of one party’s standard terms on which the other is obliged to contract.
- 9.14 In our view it is, therefore, incorrect to treat the incorporation of an exclusion agreement by reference to institutional rules as a valid agreement to exclude the jurisdiction of the court under section 69. The reality is that parties on the whole are unlikely to have made a conscious choice to alienate their right to appeal on a point of law, therefore it cannot be said that an exclusion agreement incorporated into a contract by reference to institutional rules is a consequence of the parties exercising their autonomy in determining how their disputes will be resolved. In such cases the incorporation of the exclusion agreement will instead be the unintended consequence of the parties’ adoption (either by agreement or otherwise) of institutional rules, the effect of which – in the absence of specialist knowledge – will not have been known or understood at the time of entering into the contract.
- 9.15 Accordingly, once an award that is potentially wrong on the law has been issued, holding the parties to an exclusion agreement that was unintentionally incorporated by reference – sometimes many years prior to a dispute arising – does not, we would argue, enhance party autonomy.
- 9.16 Furthermore, we disagree with the view expressed in *Arab African Energy* (and endorsed in *Sukiman*) noted above that the incorporation by reference of exclusion agreements found in institutional rules is justified on the basis that the desire for legal accuracy has been overtaken by the desire for commercial expediency. As the DAC noted in its report,¹⁰⁶ where parties have chosen to arbitrate, and have also chosen the law that will govern

¹⁰⁵ [2006] EWHC 304 (Comm), [20]. The judge also drew a distinction between exclusion clauses which go to the substantive rights of the parties, and exclusion clauses which exclude the court’s supervisory jurisdiction under section 69, which only go to “*the ancillary dispute resolution machinery under the statute*”.

¹⁰⁶ DAC Report, paragraph 285.

their rights and obligations, the parties have agreed that the tribunal will properly apply the law (and, we would add, have a legitimate expectation that the tribunal will, in fact, do so).

- 9.17 In our view, to treat the parties as having agreed to subordinate obtaining the right result in favour of a quick result on the basis of an exclusion agreement they may not have been aware had been incorporated places too much emphasis on the pursuit of finality, to the detriment of maintaining confidence in arbitration in view of the potential for decisions which are patently incorrect on the law to stand unchallenged. Arbitration, whilst a fundamentally consensual process, is nevertheless quasi-judicial in nature; the process is governed by considerations of natural justice, and awards can be enforced as court orders with only minimal grounds for refusal. Moreover, unlike other forms of ADR such as mediation which seek a compromise between the parties' respective positions, arbitration (as noted above) typically involves the application of the laws of the chosen jurisdiction. This necessarily involves assessing the parties' respective rights and obligations by reference to those laws and, by implication, arriving at the correct outcome. In these circumstances, reaching the right decision should be given at least equal weight to considerations of expediency, and therefore the latter should not create a presumption in favour of upholding an exclusion agreement implied at a time when the parties may not have given much if any thought to as to how their dispute resolution mechanism would operate.
- 9.18 It is worth noting that parties can, of course, decide to prioritise expediency over obtaining a legally correct result. They can include an explicit exclusion agreement in their arbitration agreement which makes clear their intention to exclude the courts' appellate jurisdiction; indeed, they can agree that the tribunal can act as an amiable *compositeur*, thereby removing their dispute from the strict ambit of the chosen legal system. However, in both those cases the parties will have given active consideration to the effect of their choice on the ability to appeal the outcome. The same cannot be said for parties that have simply adopted (either by choice or otherwise) institutional rules, and in doing so have excluded the right of appeal under section 69.
- 9.19 The prioritisation of expediency over accuracy also appears to be at odds with the views of businesses which use arbitration. In a 2011 survey of corporate counsel in Fortune 1,000 corporations, the leading reason given by over 51% of respondents when asked why their company had not used arbitration in disputes was the difficulty in appealing the award.¹⁰⁷ The right of appeal, it was noted, was a feature of the litigation process concerned with getting the 'right' result, which was equated to the control which corporate counsel wanted to exert over their companies' activities.¹⁰⁸ Similarly, the 2015 Queen Mary International Arbitration Survey revealed that the in-house counsel group of respondents cited the lack of an appeal mechanism as the third worst characteristic of international arbitration, yet 77% of all those polled were against the inclusion of an appeals mechanism.¹⁰⁹
- 9.20 We consider that a minor amendment to the existing wording of section 69 is necessary in order to properly support the policy goal of achieving party autonomy, as well as strike the correct balance between the finality and accuracy of awards. The purpose of the amendment would be to provide that an agreement to exclude the jurisdiction of the court must be expressly made by the parties, and could not be accidentally made as an unintended consequence of agreeing to incorporate a set of institutional rules. This could be achieved by adding

¹⁰⁷ Stipanowich, T., Lamare, R., *Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration, and Conflict Management in Fortune 1000 Corporations* (2014) 19 Harv Negotiation L Rev 1, at page 51.

¹⁰⁸ *Ibid*, at p. 63.

¹⁰⁹ Queen Mary University, White & Case *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration*, at p. 8.

a new subsection (1)(A) in one of the two following forms, which provide stipulations as to either the timing or the form of the exclusion agreement:

9.20.1 The first option would be to provide that (similar to the provision found in section 87) an exclusion agreement will only be valid if it is made once the proceedings have commenced. The new subsection could adopt the following wording:

“For the purposes of this section, any agreement to exclude the jurisdiction of the court is not effective unless entered into after the commencement of the arbitral proceedings in which the award is made”.

9.20.2 Alternatively, the new subsection could stipulate that the exclusion of the right of appeal must be expressly agreed between the parties, and cannot be incorporated by reference to institutional rules, as follows:

“For the purposes of this section, any agreement to exclude the jurisdiction of the court is not effective unless it is expressly made in writing either before or after the commencement of the arbitral proceedings in which the award is made. An agreement to apply institutional rules which contain an agreement to waive any right to recourse against an award or otherwise exclude the jurisdiction of the court shall not satisfy the requirements of this subsection”.

9.20.3 We would propose that the amending legislation should make clear that either provision would only apply to arbitration agreements concluded after the amendments have come into effect.

9.21 Both of these proposals would require the parties to an arbitration to have taken a positive step to agree the exclusion of the court's jurisdiction, rather than unwittingly losing the right to appeal on a point of law by having adopted a set of institutional rules. However, on balance we prefer the second approach as it would allow for parties to agree as part of their contract negotiations to exclude the right of appeal, rather than attempt to reach such an agreement once a dispute has commenced, which may not be possible if the parties' relationship has deteriorated.

9.22 Nevertheless, we consider that the amendment should be sufficiently flexible so as to accommodate an agreement to exclude the right of appeal under section 69 either before proceedings have been commenced (but after the original arbitration agreement has been executed) or after proceedings have been commenced. This would allow parties which have not made provision for appeals in their original arbitration agreement to exclude them if they so wish once the prospect of arbitration has arisen.

9.23 We recognise that this could result in a situation whereby parties have agreed to apply institutional rules but have not excluded the right of appeal when negotiating their arbitration agreement (but would have done, if they had addressed their minds to it), and are then not able to do so once the arbitration has commenced because they cannot agree because, for example, one party considers that it could obtain a tactical advantage by appealing the award, particularly if it has a weak case.

9.24 However, we consider that this scenario is preferable to the current situation wherein a failure to address the issue directly results in the loss of the right to appeal where institutional rules have been adopted. In the former, the consequence is that a valuable right is retained by default, whereas in the latter it is lost. In circumstances

where there has been an absence of a positive choice by the parties, the balance of convenience should, we would argue, result in the right being retained. Moreover, this is the position that would result if the parties had agreed to *ad hoc* arbitration, which are not governed by institutional rules that contain an exclusion agreement.

9.25 Furthermore, the potential 'harm' that would eventuate if parties are unable to agree to exclude the right shortly before or once proceedings have commenced is, we would argue, minimal in reality. The substantive threshold test for obtaining leave of the court to appeal an award is strict, requiring a party to show, *inter alia*, that the tribunal's decision on the question of law is at least open to serious doubt, and determination of the question will substantially affect the rights of the parties. Spurious appeals aimed at delaying enforcement will therefore be denied, and will be denied relatively quickly in circumstances where – by default – applications for leave are determined without a hearing. Accordingly, any delay is likely to be minimal, and in our view the risk of such delay does not justify excluding *bona fide* appeals that would meet the threshold criteria but in respect of which the court's jurisdiction is excluded.

9.26 Overall, we consider that this approach more properly supports the policy objective of party autonomy in arbitration by ensuring that only positive choices of the parties concerning the resolution of their disputes are enforced, instead of implied (and possibly unintended) choices. As the survey figures noted above demonstrate, it cannot be said that parties which adopt institutional rules containing exclusion agreements do so in the full knowledge that they are waiving the right of appeal on a point of law; those involved in negotiating arbitration agreements consider the lack of an appeal mechanism to be one of the worst aspects of arbitration. Amending section 69 so as to exclude the court's jurisdiction only where the parties have expressly agreed to do so (and can therefore be deemed to have considered the consequences of doing so) will result in a more accurate reflection of party autonomy.

B. Codification of the requirement that consensual appeals must relate to questions of law which “substantially affect” the rights of one or more parties

9.27 The second amendment we propose to section 69 relates to the substance of appeals that may be brought with the agreement of all parties under section 69(2)(a).

9.28 Where parties have agreed that appeals on points of law may be made, the courts have confirmed that the exercise of this right is not dependent upon first obtaining the leave of the court. This is the case even where the parties have also agreed to apply institutional rules which include an agreement excluding the right of appeal.

9.28.1 In *Royal and Sun Alliance Insurance plc v BAE Systems (Operations) Ltd & Ors*,¹¹⁰ the parties had entered into a Disputes Resolution Agreement which provided for the settlement of disputes by arbitration in accordance with the LCIA Rules (which included a waiver of any form of appeal), but also expressly permitted any party to a dispute to “*appeal to the court on a question of law arising out of an award made in the arbitral proceedings*”.

9.28.2 Whilst it was agreed that this constituted an 'agreement' for the purposes of section 69(2)(a), it was contended by the defendants that the effect of this was to simply reinstate the statutory right of appeal which the waiver in the LCIA Rules would have otherwise excluded. Consequently, the defendants

¹¹⁰ [2008] EWHC 743 (Comm).

argued, the right remained constrained by the other requirements to which the right of appeal is subject (i.e. the requirement to seek leave and comply with sections 70(2) and (3)).

9.28.3 However, the court rejected this analysis, finding that an ordinary reading of the language of section 69 meant that, where an agreement of the kind set out in section 69(2)(a) existed, then leave to appeal was not required. Leave would only be necessary in the absence of such an agreement.¹¹¹ The judge considered that there was no requirement for a specific agreement to dispense with leave and, whilst there were constraints in section 69 (which we assume to be a reference to the criteria to be met in order for leave to be granted), the judge saw “*no reason why the court should do anything other than apply ordinary principles of construction in determining whether those constraints are engaged*”.¹¹²

9.29 Following this analysis, it appears the right of appeal where a section 69(2)(a) agreement exists is essentially automatic and unfettered. There is no requirement to meet the strict threshold criteria that apply when leave to appeal is necessary under section 69(2)(b) in the absence of an agreement. All that is required is that the issue is a question of English law,¹¹³ arising out of the award,¹¹⁴ in respect of which the applicant has exhausted any arbitral process of appeal and recourse under section 57,¹¹⁵ and the application is brought within 28 days of the date of the award.¹¹⁶ Subject to fulfilling these criteria, the court is bound to consider the appeal.

9.30 It is therefore possible that a party could launch an appeal pursuant to a section 69(2)(a) agreement on a question of law, the determination of which is unlikely to alter the outcome of the award, but as a tactic aimed at delaying enforcement.

9.31 The High Court has since sought to qualify the absolute right to appeal by construing a section 69(2)(a) agreement by reference to the first limb of the statutory test in section 69(3)(a) for granting leave to appeal (under section 69(2)(b)) that the determination of the question “*will substantially affect the rights of one or more of the parties*”.

9.31.1 In *St Shipping and Transport Pte Ltd v Space Shipping Ltd (the “CV Stealth”)*,¹¹⁷ an appeal was made to the High Court relating to an arbitrator’s award concerning the breach of a charterparty. The parties had agreed that either of them could “appeal to the High Court on any question of law arising out of an award”.

9.31.2 The court held that the questions on appeal were actually questions of fact, rather than of law, which was sufficient to dispose of the appeal.¹¹⁸ However, it had been contended by the claimant when

¹¹¹ *Ibid*, per Walker J at [29].

¹¹² *Ibid*, at [30].

¹¹³ A question of law is defined in section 82(1) as being a question of the law of England and Wales (or Northern Ireland).

¹¹⁴ The right of appeal is defined in section 69(1) as being an appeal to the court on a question of law “*arising out of an award made in the proceedings*”.

¹¹⁵ Section 70(2). The judge in *Royal and Sun Alliance Insurance plc v BAE Systems (Operations) Ltd & Ors* did not consider it necessary to decide whether it was possible to contract out of the requirements under sections 70(2) and (3). We think that it would be possible to contract out of those provisions. Section 70 is only mandatory so far as it relates to sections 67 and 68. Accordingly, as sections 69 and 70 (for the purposes of section 69) are non-mandatory sections, the power granted to the parties by sections 4(2) and (3) to make their own arrangements by agreement in relation to non-mandatory matters would therefore mean that they are able to disapply or vary the section 70 requirements, which will nevertheless apply in the absence of any such agreement.

¹¹⁶ Section 70(3).

¹¹⁷ [2016] EWHC 880 (Comm).

¹¹⁸ *Ibid*, per Popplewell J (as he then was) at [35] – [37].

making its application to appeal that leave to appeal was not required as an agreement for the purposes of section 69(2)(a) existed.

9.31.3 In determining this procedural point, the judge accepted the defendant's argument that where (as in this case) the question on appeal is not a question of law arising out of the award, it does not come within the scope of the parties' section 69(2)(a) agreement, and therefore leave to appeal would be required.¹¹⁹

9.31.4 Even where the issues may have been points of law arising out of the award, the judge agreed that the section 69(2)(a) agreement must be construed as an agreement to only bring appeals on questions of law which will substantially affect the rights of the parties. Popplewell J (as he then was) stated that:

"Clause 41 [the section 69(2)(a) agreement] was clearly drafted with the terms of section 69 of the Act in mind. Once it is accepted that the scope of clause 41 must be limited to a question of law whose determination by the Court may serve a useful purpose for the parties, and which is not academic in that sense, the statutory context suggests that the criterion should be that the question will substantially affect the right of the parties."

9.32 Following this judgment, the right of appeal pursuant to a section 69(2)(a) agreement is not unfettered; the courts will imply into such agreements the requirement that determination of the question of law will substantially affect the rights of one or more of the parties.

9.33 We do not necessarily agree with the way in which the court justified the implication of this requirement. An agreement to allow appeals on questions of law which follows the language of section 69 is, by definition, an agreement that appeals can be made without the need to seek leave. It therefore follows that, by agreeing to allow appeals without obtaining leave, the parties did not intend to make their appeals subject to the criteria that the court would need to satisfy itself of if leave was required in the absence of an agreement. If the parties had wanted these preconditions to apply to their appeals, they would have simply stated in their agreement that section 69 of the Act applies, rather than include an agreement which complies with section 69(2)(a).

9.34 However, we do agree with the result in *The CV Stealth* that an agreement to appeal under section 69(2)(a) should be subject to the requirement that determination of the question of law will substantially affect the rights of one or more of the parties. It is evident that parties are unlikely to agree to incur the time and cost in appealing academic points of law that will serve no practical use in altering the outcome of their arbitration. It also provides parties with a broader right of appeal than is available to parties in litigation,¹²⁰ despite the policy in favour of finality in arbitration. Including such a precondition will avoid spurious claims being made by either discouraging them in the first place, or providing grounds for summary dismissal.

9.35 We would therefore propose that section 69(2)(a) is amended so that any appeal by agreement is subject to the same requirement as the first limb of the test for the granting of leave under section 69(2)(b). This could be achieved with the addition of the following text after the word "proceedings,":

¹¹⁹ *Ibid*, at [39] and [43] – [44].

¹²⁰ Pursuant to the CPR, permission to appeal may only be given where the court considers the appeal would have a "real prospect of success", or there is "some other compelling reason for the appeal to be heard" (CPR r. 52.6).

“and where the determination of the question will substantially affect the rights of one or more of the parties,”

9.36 We do not consider that it is necessary to import any of the other limbs of the test for granting leave into section 69(2)(a). In particular, the requirement that the question is one that the tribunal was asked to determine is, we believe, satisfied in any event by the requirement governing section 69 appeals generally that the question of law must arise out of the award. The requirement that the tribunal's decision on the question is either obviously wrong or open to serious doubt and the question is one of general public importance should also not be relevant in circumstances where the parties have agreed to allow appeals. In so agreeing, the parties are deemed to have prioritised accuracy of the outcome over commercial expediency, and so appeals should not be limited to instances where the tribunal has obviously gone wrong, but where the issues for determination are more nuanced. Equally, the parties should not be bound by considerations of public importance; they should be entitled to appeal points which are of importance only to themselves.

10. MINOR AMENDMENTS

A. Section 7 (Separability of the Arbitration Agreement)

10.1 At present, section 7 applies in circumstances where either: (i) an arbitration is seated in England & Wales or Northern Ireland;¹²¹ or (ii) where the arbitration is seated outside of England & Wales or Northern Ireland, but the law applicable to the arbitration agreement is that of England & Wales or Northern Ireland.¹²² However, if the arbitration agreement is governed by a foreign law (irrespective of whether or not the arbitration is seated in England & Wales or Northern Ireland), then, as a non-mandatory provision, section 7 would not apply.¹²³

10.2 The effect of the proposal to make section 7 a mandatory provision would therefore be to provide that, where an arbitration is seated in this jurisdiction, irrespective of the law that governs the arbitration agreement, section 7 would nevertheless apply so as to provide for the separability of the arbitration agreement.

10.3 We agree that the principle of the separability of the arbitration agreement is of utility and importance for the reasons set out in the consultation Paper. It is plainly preferable for an arbitration agreement to be given separate (legislative) validity on grounds that are distinct from those on which the validity of the rest of the contract will be assessed, as it prevents the question of the validity of the contract being rendered effectively unresolvable in circumstances where the potential invalidity of the arbitration agreement undermines the jurisdiction of the tribunal which is asked to determine the dispute.

10.4 However, our view is that section 7 should not be made a mandatory provision of the Act.

10.5 In the first instance, the principle of separability does not in our view qualify as a matter which should be treated as 'mandatory' such that it must apply in all circumstances. The imposition of mandatory provisions in the Act directly infringes on the principle of party autonomy in the resolution of disputes. The Act recognises the primacy of party autonomy in this respect as one of the 'general principles' on which the provisions of Part I of the Act are founded and construed, which is only subject to "*such safeguards as are necessary in the public interest*".¹²⁴

¹²¹ Section 2(1).

¹²² Section 2(5).

¹²³ Section 4(5).

¹²⁴ Section 1(b).

- 10.6 The term “public interest” is not defined in the Act, but it has been suggested that it should be construed by reference to the mandatory provisions of the Act, and in particular the general duty of the tribunal in section 33 to act fairly and impartially, allow parties a reasonable opportunity to put their case and adopt suitable procedures.¹²⁵ Other commentators have contended that the term refers to public policy, such that the mandatory provisions would “prevent the enforcement of an agreement to perform an unlawful act”.¹²⁶
- 10.7 It follows from the above that the inclusion of mandatory provisions in the Act is limited to those which are required to achieve narrowly defined public policy objectives, and without intruding any further than is absolutely necessary on party autonomy. Those policy objectives, it is submitted, include the fair and efficient resolution of disputes by arbitration in this jurisdiction. This is evident from the matters which are treated as mandatory by the Act,¹²⁷ which together provide an irreducible core of essentially procedural provisions which are intended to ensure the fair, just and orderly conduct of arbitrations that are seated in this jurisdiction. The mandatory provisions effectively import aspects of the Civil Procedure Rules governing civil litigation in England & Wales (alongside other basic provisions) in view of the quasi-judicial nature of arbitration.
- 10.8 Whilst the separability of the arbitration agreement is undoubtedly advantageous, it is not a procedural matter in the same sense as the existing mandatory provisions which must be regulated irrespective of the applicable law in order to achieve specific public policy objectives. Instead, it is a matter which goes to the validity of the arbitration agreement, which in some cases will be a matter of substantive dispute between the parties. In circumstances where the parties to an arbitration agreement which provides for the seat to be in this jurisdiction but for the arbitration agreement to be governed by the law of another jurisdiction are likely to have made that choice, there is no evident overriding public interest which requires that the English law position on the separability of the arbitration agreement must succeed over the parties’ autonomy in this regard.
- 10.9 Secondly, making section 7 a mandatory provision could result in arbitral awards being unenforceable in other jurisdictions.
- 10.10 Under the current framework of the Act, if a contract provided for arbitration seated in London, but stated that the arbitration agreement was governed by the law of another jurisdiction (or, in the absence of such a choice, the applicable conflicts of law rules resulted in the arbitration agreement being subject to the law of that other jurisdiction), the validity of the arbitration agreement would fall to be determined by the law of that other jurisdiction. In circumstances where the law governing the arbitration agreement does not recognise the principle of separability, it would therefore follow that if a tribunal found that the underlying contract was void, the parties’ express or implied choice of law governing the arbitration would mean that the arbitration agreement would be void as well, resulting in any award being a nullity, thus unenforceable.
- 10.11 If section 7 was a mandatory provision, the effect of this would be that even if the contract was found to be void, the tribunal could nevertheless issue an award to that effect (as well as ordering, i.e. restitution) on the basis that the arbitration agreement – and therefore the tribunal’s jurisdiction – was unaffected by its determination on the status of the contract. However, if the successful party was to subsequently seek to enforce the award in the jurisdiction whose law governed the arbitration agreement, the other party could apply

¹²⁵ Sutton, D., Gill, J., Gearing, M., *Russell on Arbitration* (Sweet & Maxwell, 24th ed. 2015) para. 1-011, as cited in Bashayreh, M., 2002, *The Separability Doctrine in English Arbitration Law*, PhD thesis, Oriel College, Oxford, p. 67.

¹²⁶ Hunter, M., Landau, T., *The English Arbitration Act 1996: Text and Notes* (Kluwer Law International, 1998), p. 9, as cited in Bashayreh (*op. cit.*, n. 125), p. 67.

¹²⁷ Schedule 1.

to have enforcement refused on the grounds that the arbitration agreement is not valid under that jurisdiction's law, which is one of the grounds for refusal under the New York Convention.¹²⁸

10.12 In view of the foregoing, we do not consider that section 7 of the Act should be mandatory.

B. Appeals from Section 9 (Stay of Legal Proceedings)

10.13 We agree that an appropriate amendment should be made to section 9 in order to confirm that an appeal is available from a decision of the court.

10.14 As set out in the analysis in the Consultation Paper, the effect of paragraph 37(2) of Schedule 3 to the Act is to exclude the right of appeal to the Court of Appeal from a decision of the High Court, unless expressly provided for in Part I of the Act. Where the Act permits elsewhere the involvement of the court in the arbitral process, the provisions stipulate the circumstances in which the court's decision may be appealed.

10.15 However, no such provision is made in respect of section 9. There does not appear to be any justifiable reason as to why the court's decision as to whether to grant a stay of proceedings should not be subject to at least the same qualified right of appeal as other court decisions related to arbitration (i.e. leave to appeal must be granted by the court). Indeed, in circumstances where the court's discretion to grant a stay is limited,¹²⁹ the right of appeal is arguably of greater necessity than in instances where the court's discretion is wider.¹³⁰

10.16 Accordingly, we would propose that the following is included as a new sub-section (6) to section 9:

"The leave of the court is required for any appeal from a decision of the court under this section".

C. Sections 32 and 45 (Court Determination of Preliminary Matters)

10.17 We consider that the identified requirements in sub-section (2)(b) and (3) of both sections 32 and 45 are superfluous and should be deleted by way of amendment so that only the agreement of the parties or the permission of the tribunal is required for applications to be made.

10.18 In the first instance, the factors which a court is currently required by sub-section (2)(b) to satisfy itself of are, in reality, factors which the court would be likely to consider even if not bound to do so by the Act. In exercising its discretion, it is unlikely that the court will consider an application to determine a preliminary point of jurisdiction or law which is merely academic (such that determining it will produce no cost saving), is late, and/or where there is no good reason to do so.

10.19 Secondly, we agree with the analysis in the Consultation Paper that concern about cost is misplaced,¹³¹ but not for the same reasons.

10.19.1 In practice, a determination by the court of an issue as to the substantive jurisdiction of the tribunal will usually result in a substantial cost saving as, if the issue was to be determined by the tribunal under sections 30 and 31 of the Act, its award on jurisdiction would be open to challenge under section

¹²⁸ Article V(1)(a).

¹²⁹ Section 9(4) provides that the court "shall grant a stay", unless it is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed.

¹³⁰ For example, when considering whether to grant leave to appeal on a point of law under section 69 (see section 69(3)(d)).

¹³¹ Paragraph 10.26.

67 of the Act, which could involve a complete re-hearing of the evidence. Accordingly, a determination by the court under section 32 (from which there is only a limited right of appeal)¹³² would avoid the issue being re-litigated.¹³³

- 10.19.2 In the case of both sections 32 and 45, in order to refer an issue of jurisdiction or a point of law to the court, the issue or question itself must meet the threshold requirements under sub-section (1) of each section. In the case of an application under section 32, the application must be an issue as to the “*substantive jurisdiction*” of the tribunal, whilst under section 45 the question of law must be one that “*substantially affects the rights of one or more of the parties*”.
- 10.19.3 Accordingly, the nature of the issue or question to be determined is such that it is likely to result in a substantial cost saving as a matter of course. Where an application is made under section 32, the matter relates to the substantive jurisdiction of the tribunal, which the Act defines as being: (i) whether there is a valid arbitration agreement; (ii) whether the tribunal has been properly constituted; or (iii) what matters have been submitted to arbitration in accordance with the arbitration agreement.¹³⁴ If no valid arbitration agreement exists or the tribunal has been improperly constituted, a determination to that effect by the court is likely to result in the immediate nullification of the arbitral proceedings, as opposed to the proceedings necessarily continuing to their conclusion in order for an award to be produced which is then challenged under section 67, which would obviously involve further cost.
- 10.19.4 Insofar as the third aspect of substantive jurisdiction is concerned, whilst a determination as to whether a specific matter has been submitted to arbitration in accordance with the arbitration agreement may not – where multiple issues have been referred to a tribunal – result in the termination of the proceedings, it may nevertheless result in a substantial cost savings if the issue is one which would have involved lengthy submissions and a significant amount of factual and/or expert evidence.
- 10.19.5 Equally, the requirement that a question of law submitted under section 45 must substantially affect the rights of at least one of the parties is also likely to result in a substantial cost saving as a matter of course. The limited authorities which address section 45 couch this in terms that the question is one which goes “*to the heart of the dispute between the parties*”, and which will result in significant aspects of one or more of the parties’ cases not succeeding.¹³⁵ It follows that, if a determination of a point of law results in a substantial part or parts of a party’s case falling away, then the parties will save the costs involved in – respectively – pursuing and defending that part of the case.

- 10.20 We also agree that the issue of delay which sub-section (2)(b)(ii) seeks to address is misplaced. As noted in the Consultation Paper,¹³⁶ the question of whether an application under section 32 has been made in a timely fashion is already adequately addressed by reference to the provisions of section 73, pursuant to which a party can lose the right to object if it fails to do so promptly. Although no such provision is made for applications under section 45, it follows that the later an application is made during the proceedings, the fewer costs will be saved.

¹³² Section 32(6).

¹³³ See: *VTB Commodities Trading DAC v JSC Antipinsky Refinery* [2019] EWHC 3292 (Comm), per Teare J at [28].

¹³⁴ Section 82(1), which defines “*substantive jurisdiction*” by reference to the matters set out in section 30(1)(a) to (c).

¹³⁵ See: *Taylor Woodrow Holdings Ltd & Anor v Barnes and Elliott Ltd* [2006] EWHC 1693 (TCC), per Jackson J (as he then was) at [61]; and *Secretary of State for Defence v Turner Estates Solutions Ltd* [2015] EWHC 1150 (TCC), per Coulson J (as he then was) at [11] – [15].

¹³⁶ Paragraph 10.27.

- 10.21 Dispensing with these criteria will also avoid the need for the parties to make what could be detailed and lengthy submissions as to whether the criteria have been met. In particular, the question of what constitutes “*substantial savings in costs*” is likely to involve a hypothetical assessment of both the overall costs of the arbitration and the specific portion of those costs which would be incurred if the jurisdictional issue or question of law referred to the court is resolved in a particular way, which would then need to be assessed against the backdrop of the amounts in dispute. Equally, in the context of a section 45 application, whether the question of law has been referred to the court “*without delay*” could prove contentious, particularly in circumstances where the application is made once the arbitral proceedings have been underway for some time, but the question had arguably arisen at the outset (albeit perhaps not as a central issue that could have been said to substantially affect the rights of the parties at that time).
- 10.22 Finally, we concur with the comment in the Consultation Paper concerning the peculiarity of the position that these criteria must be met where the application is made with the permission of the tribunal, but not the agreement of the parties.¹³⁷ This is particularly so where, in deciding whether to grant permission for the requesting party to make the application, the tribunal is likely to have in mind the extent to which resolution of the issue will save costs and whether the application has been made without delay, in the course of discharging its general duty under section 33.
- 10.22.1 Moreover, the parties’ agreement to refer issues as to the tribunal’s substantive jurisdiction and/or questions of law could conceivably be contained in a pre-existing agreement (i.e. the arbitration agreement). A party would therefore be entitled to apply to the court under sections 32 or 45 in circumstances where the court’s determination would not result in any substantial cost saving being made and, in the case of an application under section 45, at any stage of the proceedings irrespective of when the question of law became apparent. The entitlement to apply under sections 32 and 45 pursuant to a pre-existing agreement could therefore be open to abuse by a party wishing to frustrate the arbitral proceedings.
- 10.22.2 In this regard, we note that the removal of the criteria in sub-section (2)(b) would not address the risk of abuse as these criteria do not currently apply to applications made with the written agreement of the parties. We would therefore propose that sub-section (2)(a) of sections 32 and 45 is amended to make clear that an agreement for the purposes of this provision means an agreement in writing between the parties made once the arbitral proceedings in which the issue arises have commenced.
- 10.23 Accordingly, we agree that applications under sections 32 and 45 of the Act should simply require the agreement of the parties or the permission of the tribunal (subject to the proposal in paragraph 10.22.2 above concerning the timing of any such agreement between the parties).

D. Modern Technology

- 10.24 We do not consider that any amendments are required to the Act in order for tribunals to give directions for remote hearings and electronic documentation. However, as set out below, this review presents an opportunity to underscore the importance of reducing the environmental impact of arbitration by establishing it as one of the general principles by which the provisions of the Act are to be construed.

¹³⁷ Paragraph 10.29.

- 10.25 Anecdotally, we have not encountered any difficulties in adopting modern technology in arbitration proceedings to which the Act applies. As noted in the Consultation Paper,¹³⁸ section 34 of the Act already provides the tribunal with a broad discretion to determine all procedural and evidential matters. We consider that this is wide enough to encompass the giving of directions which permit the use of technology during the course of the arbitration (including the filing of submissions and evidence by email or file transfer protocol (“FTP”), remote hearings, the electronic presentation of evidence at hearings, etc.).
- 10.26 We also do not consider that it would be desirable for the Act to make specific provision for the use of remote hearings and electronic documentation (or the adoption of any other specific technology). To do so would be to encroach upon both the autonomy of the parties to agree on the procedure that best suits their specific requirements, and the authority of the tribunal to conduct the arbitration as it sees fit. Moreover, specifying such matters reduces the existing flexibility in the Act, and could lead to it having to be updated on a more regular basis to take account of further technologies suited to use in arbitration as they develop.
- 10.27 However, one specific provision where clarity could be provided is section 43, by which a party may avail itself of the same court procedures as are available in relation to legal proceedings to secure the attendance of a witness to give oral testimony or produce documents.
- 10.27.1 As currently drafted, this provision refers to the attendance of a witness “*before the tribunal*”, which implies a physical presence. However, if proceedings are being held fully remotely,¹³⁹ the physical presence of a witness before the tribunal may not be possible.
- 10.27.2 As with section 44, section 43 effectively imports the relevant powers of the court from the Civil Procedure Rules, specifically Rules 34.1 to 34.7. These Rules do not make provision for a witness to be summonsed to attend remotely, despite the fact that the Rules applicable to witness evidence generally in Part 32 permit the court to allow witnesses to give evidence by video link or other means.¹⁴⁰
- 10.27.3 We would therefore propose that section 43 is amended so as to make clear that, for the purposes of this section, the phrase “*attendance before the tribunal*” includes remote attendance by means of videoconferencing where agreed by the parties or directed by the tribunal.
- 10.28 We agree with the view set out in the Consultation Paper that the use of remote hearings and electronic documentation will become increasingly more relevant in light of climate change. Indeed, we consider that the Act as presently drafted allows for the introduction of new technology to meet the growing demand for cleaner, greener arbitrations. However, with a modest amendment the Act could ensure that environmental considerations permeate the manner in which arbitrations governed by the Act are conducted.
- 10.28.1 The adoption of new technologies and procedures such as remote hearings and the use of electronic documentation is likely to be driven by the imperatives of both disputants and their legal representatives to reduce their environmental impact.
- 10.28.2 Pinsent Masons is a proud signatory of the Green Pledge introduced by the Campaign for Greener Arbitrations, and is taking active steps to reduce the carbon footprint of the arbitrations it is involved

¹³⁸ Paragraph 10.41.

¹³⁹ As opposed to partially remotely, where the tribunal members of a multi-member panel may be located in the same place.

¹⁴⁰ Rule 32.3.

in by, for example, eliminating hard copy bundles and using technology to minimise where possible the need for long-haul travel.

10.28.3 The adoption of these sorts of principles and practices, along with the commitments which parties to arbitration proceedings are increasingly making to de-carbonising their activities and supply chains, will inevitably lead to parties, their lawyers and tribunals agreeing to adopt more environmentally friendly ways of conducting arbitration, all of which is possible under the existing permissive framework of the Act.

10.28.4 Nevertheless, the importance and urgency of reducing the environmental impact of arbitration cannot be overstated, particularly in view of the disproportionately large volume of carbon emissions that arbitration proceedings can create, often over a long period of time. Parties to proceedings as well as tribunals should therefore feel they are empowered to take whatever steps they can to limit the environmental impact of their arbitration, whilst at the same time ensuring that the arbitration is procedurally regular and meets the requirements of fairness and natural justice.

10.28.5 As noted above, the Act does not prevent parties and tribunals from adopting procedures aimed at reducing the environmental impact of an arbitration, but nor does it do anything to actively promote the adoption of such procedures.

10.28.6 We would therefore propose that section 1 is amended so as to include a reference to the reduction of the environmental impact of arbitration in the 'general principles' by which the provisions of Part I are to be construed. This could be achieved by either:

(a) Deleting the final two words of sub-section (a) and replacing with:

“, expense, or impact on the environment”.

or

(b) Inserting the following words in sub-section (b) after *“the parties should be free to agree how their disputes are resolved”*:

“, including the adoption of measures aimed at reducing the environmental impact of arbitration proceedings,”.

10.28.7 By introducing the concept of reducing the environmental impact of arbitration into the general principles governing interpretation, the provisions of Part I of the Act will be construed in light of such concerns, thereby creating a presumption in favour of environmentally compatible procedures and conduct. If environmental concerns are seen as being treated on a par with principles of fairness and efficiency and/or as an aspect of party autonomy, it is envisaged that parties and tribunals would be able to more confidently adopt behaviours which allow them to pursue carbon reduction activities.

10.29 Accordingly, whilst we do not consider that specific amendments are required to permit the use of remote hearings (save for the clarification in respect of proceedings under section 43) and electronic documentation, the addition of environmental concerns to the list of principles in section 1 could help to normalise and promote the adoption of environmentally friendly practices and procedures in arbitrations governed by the Act.

E. Section 39 (Power to Make Provisional Awards)

- 10.30 We agree that the current wording of section 39 gives rise to confusion, and that the opportunity should be taken to clarify this provision by amending the section heading so that it refers to the tribunal's power to make provisional *orders*, as opposed to awards.
- 10.31 In the first instance, the term 'award' gives rise to confusion as to the nature of the remedy which a tribunal may grant, and has resulted in the courts applying a strained interpretation of the provision so that it accords with the definition of 'award' in the Act.
- 10.31.1 Reading the body of section 39 without its heading, it is apparent that the powers it allows the parties to confer on a tribunal are to make orders during the course of the proceedings that will either be confirmed, reversed, or amended by the tribunal in its final award once it has finally determined all of the issues that have been referred to it.
- 10.31.2 Such orders are therefore, by their very nature, temporary; they are intended to provisionally grant certain remedies to which the applying party has a *prima facie* undisputable entitlement, on the understanding that the remedy will be subject to change if the basis of the requesting party's entitlement proves to be different once all of the submissions and evidence have been fully ventilated before the tribunal. In this regard, the power envisaged under section 39 has been likened to the English courts' power to grant an interim payment order under CPR 25.¹⁴¹
- 10.31.3 The provisional nature of the 'awards' that a tribunal can render under section 39 means that they cannot be treated as final. However, section 58(1) of the Act provides that "*an award made by the tribunal pursuant to an arbitration agreement is both final and binding*". It follows that a section 39 'award' does not meet the criteria laid down elsewhere in the Act as to what constitutes a valid award.
- 10.31.4 Commentators and the courts have sought to reconcile the inherently temporary and provisory nature of 'provisional awards' with the requirement of finality in section 58(1) by characterising the granting of provisional relief under section 39 as an exception to the principle that awards are final and binding.¹⁴²
- 10.31.5 The issue has been considered more recently in the case of *EGF v HVF & Ors*.¹⁴³ In that case, the High Court (in *obiter*) found that the exercise of the power in section 39 could be done by way of an award granting the provisional relief on the grounds, it would seem, that the heading to section 39 uses the term 'award'.¹⁴⁴ The judge stated that:

"it is implicit in section 39 and the structure of the Act that, so far as the Act is concerned, a power as contemplated by section 39, if conferred by the parties on their arbitrators, may,

¹⁴¹ Fenwick Elliott, R., Glover, J., *Building Contract Disputes: Practice and Precedents* (Sweet & Maxwell 2021), para. 11-455. CPR Rule 25.1(1)(k) provides that the court may grant an order "*referred to as an order for interim payment*) under rule 25.6 for payment by a defendant on account of any damages, debt or other sum (except costs) which the court may hold the defendant liable to pay". One of the conditions to be satisfied in order for the court to make an order for interim payment is that, if the claim went to trial, the claimant would obtain judgment for a substantial amount of money against the defendant (CPR Rule 25.7(1)(c).

¹⁴² Blackaby, N., Partasides, C., *Redfern and Hunter on International Arbitration* (OUP, 6th ed., 2015), page 502, fn. 4. *Ronly Holdings Ltd v JSC Zestafoni G Nikoladze Ferroalloy Plant* [2004] EWHC 1354 (Comm), per Gross J (as he then was) at [23].

¹⁴³ [2022] EWHC 2470.

¹⁴⁴ [2022] EWHC 2470, per Baker J at [117].

all things being equal, be exercised by the publication of an award granting the relevant provisional relief¹⁴⁵.

10.31.6 The court reasoned in that case that the ability of a tribunal to make an award granting an interim remedy would not offend the requirement in section 58(1) that an award must be final and binding, as section 58(1) is non-mandatory and therefore conditional upon the agreement of the parties. The granting of the power to issue interim relief contemplated by section 39 effectively constituted an agreement to the contrary that awards must be final and binding, which would therefore allow the tribunal to issue awards that are not final and binding.¹⁴⁵

10.31.7 In our view, neither the approach of treating section 39 'awards' as an exception to the requirement of finality, nor the approach of characterising the granting of power to the tribunal under section 39 as an agreement to the contrary for the purposes of section 58(1) are satisfactory. In practice, parties routinely grant their tribunals the power to make provisional orders by adopting institutional rules to govern their arbitration,¹⁴⁶ which would (if the approach of the courts is correct) have the effect of entrenching an exception to the generally recognised position that tribunal awards are final (and binding).

10.31.8 We find it unlikely that this was the intention of those who drafted the Act. The theoretical and practical difficulties presented by the current drafting of section 39 can easily be remedied by amending the section heading to refer to orders instead of awards. If this change is made, it would not be necessary to maintain an artificial exclusion to the general rule that awards are final and binding, nor would it be necessary to construe (likely against the intention of the parties) an agreement to grant section 39 powers to the tribunal as an agreement to the contrary for section 58.

10.32 Secondly, the fact that a provisional remedy is characterised as an award creates uncertainty in terms of enforceability.

10.32.1 Section 66 of the Act makes no distinction when it comes to enforcement between awards that are final and binding (in accordance with section 58) and 'awards' issued under section 39 which, whilst binding, are nevertheless not final. Therefore, there is no reason on the face of section 66 why an 'award' issued under section 39 would not be capable of being enforced.

10.32.2 However, in view of the fact that section 66 is concerned with the enforcement of awards in the same manner as a judgment or order of the court, evidently an award must be final and binding in accordance with section 58 in order to be enforced. As an 'award' under section 39 is provisional and subject to change, it should not – despite it being called an 'award' – be capable of being enforced as an award in the same way as a judgment or order of the court, with all of the consequences of enforceability that that entails. There must be certainty as to precisely what the court is enforcing, particularly given the consequences that enforcement has in terms of the execution of the award. It would arguably be inappropriate to enforce a provisional 'award' and allow the award creditor to execute against the debtor's assets if the 'award' could be reversed by the tribunal at a later date. This could give rise to concerns that the money or assets seized by the creditor will be dispersed and

¹⁴⁵ *Ibid*, at [119] – [120].

¹⁴⁶ For example, ICC Rules (2021), Art. 28(1); LCIA Rules (2020) Art. 25.1.

therefore unavailable to the other party was subsequently entitled to be reimbursed as a result of the reversal of the provisional 'award'.

- 10.32.3 Additionally, commentators have expressed doubts as to whether 'awards' made under section 39 would be enforceable under the New York Convention, noting that it would be a matter to be determined by the foreign court in which enforcement of such an 'award' is sought.¹⁴⁷ In this regard, we note that one of the grounds for resisting enforcement under the New York Convention is where the award has not yet become binding on the parties. The lack of finality of a section 39 'award' could contribute to a finding that it is not binding on the parties as it may be subject to alteration, which would allow a party to resist enforcement.
- 10.32.4 Amending the heading of section 39 to make it clear that the provisional remedy takes the form of an order rather than an award will resolve this uncertainty, and make clear that the route for enforcing a section 39 order is by means of a peremptory order.
- 10.33 Thirdly, if provisional remedies under section 39 can take the form of awards, this could have the effect of rendering redundant the tribunal's power to issue awards on different issues under section 47.
- 10.33.1 Section 47 allows the tribunal to make more than one award at different times on different aspects of the matters to be determined. Accordingly, unless the parties decide not to grant it the ability to exercise this power, the tribunal is able to issue interim or partial awards on issues affecting the whole or part of a claim or claims, which can then be enforced as awards of the tribunal.
- 10.33.2 If a tribunal has the power to provisionally grant by means of an award under section 39 any remedy it would have the power to grant in its final award, it could in theory issue an 'award' on a specific aspect of matters in dispute. If such an 'award' was to be enforceable, there would be little practical difference between a provisional 'award' under section 39 and an interim or partial award under section 47, other than that the former could be subject to revision by the tribunal.
- 10.33.3 It cannot have been the intention of the Act to provide for effectively the same outcome to be achieved by two different mechanisms. Instead, we consider that the correct interpretation is that section 47 enables the tribunal to issue partial or interim awards that are final, binding and fully enforceable, and subject to the same enforcement and challenge / appeal provisions as final awards, whilst section 39 enables the tribunal to grant by way of orders any remedy that it can grant in the final award, but on a preliminary basis and subject to the separate enforcement regime that applies to other orders of the tribunal.
- 10.34 Finally, we agree that the reference to 'relief' in section 39 should be amended to 'remedy' in order to ensure internal consistency in the Act.
- 10.35 The terms are often used interchangeably when referring to the consequences of the alleged wrong to which the claimant asserts a right and seeks to be granted as part of the tribunal's award.¹⁴⁸ There is no evident

¹⁴⁷ Blackaby, N., Partasides, C., *Redfern and Hunter on International Arbitration* (OUP, 6th ed., 2015), page 502, fn. 4.

¹⁴⁸ By way of example, under the chapter heading "*Equitable remedies*" Chitty refers to the "*equitable remedy of rescission of a contract on the ground of misrepresentation*" as having restitutionary consequences, and in the same paragraph states that rectification of a written document which fails to give effect to a prior oral agreement "*may also lead to restitutionary relief*". See: Beale, H., *Chitty on Contracts* (Sweet & Maxwell, 32nd ed. 2019), para. 29-051.

reason why section 39 should not mirror section 48 in this regard, particularly in circumstances where the power in section 39 is to make orders in respect of remedies which the tribunal would be entitled to grant pursuant to section 48 in its final award.

F. Section 70 (Challenge or Appeal: Supplementary Provisions)

Section 70(3)

- 10.36 We agree that section 70(3) of the Act should be amended so as to make clear that, if a request has been made for the correction of an award or the issuance of an additional award under section 57, the 28-day time period for making an application or appeal under sections 67 to 69 should run from the date on which the section 57 process has been completed and the outcome is known.
- 10.37 The difficulty caused by the existing wording of section 70(3) as highlighted in the Consultation Paper is unlikely to have been intentional.¹⁴⁹ Indeed, in describing the operation of section 70(3), the DAC simply omitted reference to time running from the date that the outcome of any recourse under section 57 is communicated, rather than explaining that this should not give rise to another point in time from which time should run. This suggests that the lack of reference in section 70(3) to the section 57 processes was an oversight, not an intentional decision to create a logical (and practical) inconsistency between the two sections.
- 10.38 We also agree that, in order for an application to the tribunal under section 57 to provide a different starting date for the purposes of section 70(3), the application must be material to the application or appeal under sections 67 to 69 in order to avoid the potential abuse of section 57 as outlined in the Consultation Paper.¹⁵⁰
- 10.39 It is for this reason that we favour the proposed approach of amending section 70(3) to account for the time periods in section 57 over the approach – advocated by the High Court in *McLean Homes South East Limited v Blackdale Limited* – of treating the date of the award (as defined in section 54(2) of the Act) as being the date on which the award is corrected following an application under section 57.¹⁵¹ If the latter approach was to be adopted, the effect would be that the date of the award for the purposes of triggering the 28 day period in section 70(3) would be subject to the completion of any application for correction (or provision of an additional award) under section 57, irrespective of whether the correction or additional award was material to the pending application or appeal under section 67 to 69.
- 10.40 We note the issue raised in the Consultation Paper regarding the precise trigger for the commencement of the 28-day time period in section 70(3) where section 57 has been invoked, specifically the fact that the current rule derived from case law that time should run from the date of the correction does not account for the situation where the tribunal rejects the request for a correction.¹⁵² We do not agree with the current proposal that the existing language in section 70(3) (used to define the start of the time period where there has been an arbitral process of appeal or review) should be adopted so that the 28-day period begins when the party challenging or appealing the award “*was notified of the result of its request*”.

10.40.1 In the first instance, it will not always necessarily be the case that the party seeking to challenge or appeal the award under sections 67 to 69 will be the same party that applied for the correction of the

¹⁴⁹ Paragraphs 10.53 – 10.55.

¹⁵⁰ Paragraph 10.56.

¹⁵¹ [2001] 11 WLUK 79, per HHJ Humphrey Lloyd KC, at [19].

¹⁵² Paragraph 10.58.

award under section 57. Indeed, once an award has been corrected at the request of one party, it may be that the corrected award gives rise to grounds on which the other party subsequently seeks to challenge or appeal it under sections 67 to 69.

10.40.2 Secondly, the wording is somewhat ambiguous. The power of the tribunal to correct an award or issue an additional award is discretionary, and before agreeing to exercise these powers the tribunal is required to afford the other party a reasonable opportunity to make representations in response to the request.¹⁵³ Arguably, therefore, the “*result*” of a party’s request under section 57 will be the tribunal’s decision to exercise its power to correct the award or issue an additional award, not the handing down of a corrected or supplementary award. This is, in effect, the position that obtains under the relevant provision of the Scottish Arbitration Act, cited in the Consultation paper, which states that the trigger is the “*date on which the tribunal decides whether to correct the award*”.¹⁵⁴

10.40.3 If the date of the tribunal’s decision on a party’s application under section 57 (rather than the date on which a corrected or supplementary award is issued, if the tribunal agrees to do so) was to be treated as the trigger for the 28-day period the same issue which this proposal seeks to resolve would arise. Time would begin to run under section 70(3) without the tribunal having issued its correction or additional award.

10.40.4 Evidently, the intention of any amendment to section 70(3) must be to ensure that the 28-day time period does not start to run until the tribunal’s final award has been issued, whether that be the final award as first issued by the tribunal, as amended following an arbitral appeal or review process, as confirmed by the tribunal following its rejection of an application under section 57, or as corrected or supplemented with an additional award following the tribunal’s acceptance of an application under section 57.

10.40.5 We would therefore favour wording akin to that which is used in the UNCITRAL Model Law, so that section 70(3) makes clear that the 28-day period runs from point at which the tribunal *either* rejects an application under section 57, or issues a corrected or supplemental award (as the case may be) pursuant to a section 57 application. We have set out at the end of this Sub-section some proposed replacement wording for section 70(3) which deals with this point.

10.41 The proposed amendment to section 70(3) also highlights a further discrepancy in the provision concerning the trigger for the 28-day time period where there are no available arbitral review or appeal processes, or where section 57 does not apply (because, for example, the parties have agreed that the tribunal should not have any power to correct an award or make an additional award).

10.41.1 The 28-day time period for challenging or appealing an award (in the absence of any of the processes referred to in section 70(2)) is stated as being 28 days from the date of the award. Section 54 provides that, in the absence of the parties’ agreement or a decision of the tribunal in this regard, the date of the award is to be taken as being the date on which it is signed by the arbitrator (or the last arbitrator to sign in the case of a multi-member tribunal).

¹⁵³ Section 57(3)
¹⁵⁴ Paragraph 10.58.

- 10.41.2 The DAC noted that difficulties could arise in adopting this definition of the date of the award for the purposes of triggering the 28-day period, particularly in circumstances where the award is held back pending payment by the parties of outstanding fees.¹⁵⁵ It recognised the possibility that the time limit could expire before the award is released, but stated that the date of the award “*is the only incontrovertible date from which the time period should run*” as it avoids any uncertainty as to when the award has been released or delivered.
- 10.41.3 However, the DAC’s position as to the ‘incontrovertibility’ of the date of the award is undermined somewhat by the fact that the trigger for the 28-day period where there has been an arbitral process of review is the date on which the party seeking to challenge or appeal the award under sections 67 to 69 has been “*notified of the result of that process*”. If compliance with the time limit in section 70(3) is at issue, then ascertaining the date on which the parties are notified of the outcome of an appeal or review, (or, following the enactment of the amendment proposed in the Consultation Paper the disposal of an application under section 57) will inevitably involve an enquiry as to when the parties were notified of the same.
- 10.41.4 Indeed, using the date of the award as a trigger for time to start running under section 70(3) has the potential to cause significant prejudice to a party with grounds to challenge or appeal an award under section 67 to 69. Not only could the time for launching a challenge or appeal be reduced as a consequence of the award being withheld for non-payment of fees (which may not be the fault of the party which seeks to challenge or appeal the award), but delays in issuing the award by the arbitral institution, postal delays or disruption to technology could also have an impact in this regard.
- 10.41.5 Although, as the DAC notes, difficulties in this respect (which we take to mean issues caused by the use of the date of the award as the trigger for section 70(3) in circumstances where there is a delay in the subsequent receipt of the award by the parties) can be remedied by an application to the court to extend time, this is a non-mandatory provision (meaning that the court’s power in this regard is not guaranteed), and will put the parties to additional and – as explained below – unnecessary costs.
- 10.41.6 Accordingly, we do not consider that the DAC’s concern regarding the potential uncertainty of using a date other than the date of the award for the purposes of triggering section 70(3) are well-founded. This is particularly so in circumstances where the use of electronic methods of communication such as email allow for the precise date and time of transmission to be recorded, thereby eliminating any uncertainty as to when an award has been notified to the parties.¹⁵⁶
- 10.41.7 We therefore propose that the opportunity is taken, as part of the proposed amendment to section 70(3), to standardise the trigger for the 28-day period so that instead of the date of the award, notification of the award to the parties (or the outcome of any appeal or review, or the disposal of any section 57 process) starts time running.

10.42 Taking the above into account, we propose that section 70(3) is amended as follows:

¹⁵⁵ DAC Report, paragraph 293.

¹⁵⁶ The transmission of arbitral awards to the parties by electronic means is now commonplace. See: LCIA Rules (2020), Art. 26.7; ICC Rules (2021), Art. 35(1), which provides that the Secretariat “*shall notify to the parties the text signed by the arbitral tribunal*”, and Art. 3(2), which provides that notifications from, *inter alia*, the Secretariat may be made “*by delivery against receipt, registered post, courier, email, or any other means of telecommunication that provides a record of the sending thereof*”.

“(3) Any application or appeal must be brought within 28 days of the date on which the award is notified to the parties or—

(a) if there has been any arbitral process of appeal or review, within 28 days of the date when the parties were notified of the result of that process; or

(b) if there has been any application for recourse under section 57, within 28 days of the tribunal finally disposing of said application (either by rejecting the application or issuing a corrected award or additional award, as the case may be) and notifying the same to the parties.

Subsection (3)(b) shall only apply where the application for recourse under section 57 is material to the application or appeal under section 67, 68 or 69.”

Section 70(8)

- 10.43 We agree that section 70(8) serves a useful function, and should be retained (subject to a minor modification to provide clarity as to its meaning).
- 10.44 It appears that the criticism referred to at paragraph 10.61 of the Consultation Paper arises from a lack of clarity in the wording of the provision. The commentary cited here appears to have assumed that the leave to appeal referred to in section 70(8) is leave to appeal a decision of the court under section 70(6) or 70(7) to order that a section 67, 68 or 69 applicant or appellant must provide security for the costs of the section 67, 68 or 69 application or appeal or pay the award sum into court. If that is correct, then requiring the applicant or appellant to provide the very security or payment into court it is contesting would plainly be illogical, and defeat the purpose of the appeal.
- 10.45 However, we share the Law Commission's interpretation of section 70(8) that it is instead concerned with appeals from the substantive decisions of the court under sections 67, 68 or 69. Not only does this interpretation give logical effect to section 70(8), it is also supported by the fact that section 70(1) states that “[t]he following provisions apply to an application or appeal under section 67, 68 or 69”. Accordingly, if each of the subsections in section 70 is read as applying to sections 67, 68 and 69 (rather than applying to the operation of section 70 itself), then the provision has a sensible meaning as a supplementary rule to applications and appeals under those sections (as the heading to section 70 indicates).
- 10.46 We do note, however, that there is some uncertainty as to how section 70 is supposed to operate, particularly in view of the fact that sections 67, 68 and 69 all contain provisions within them which deal with appeals from decisions of the courts to which those sections apply. The scheme of the Act does therefore suggest that section 70(8) would also apply to appeals from decisions in section 70.
- 10.47 We would therefore suggest that a minor amendment is made to section 70(8) so as to make it clear that it applies to appeals from the court decisions made under sections 67, 68 and 69. Section 70(8) could be amended as follows:

“Where the court grants leaves to appeal under sections 67(4), 68(4) 69(6) or 69(8), it may do so subject to conditions to the same or similar effect as an order under subsection (6) or (7).

This does not affect the general discretion of the court to grant leave to appeal subject to conditions.”

G. Sections 85 to 88 (Domestic Arbitration Agreements)

- 10.48 We agree that sections 85 to 87 of the Act should be repealed.
- 10.49 We do not consider there to be any cogent argument in favour of treating ‘domestic’ arbitrations differently from ‘international’ arbitrations. Nor are we aware, based on our experience, of any compelling practical reasons as to why the existing terms of the Act should be amended for the purposes of domestic arbitration, particularly in the ways set out in sections 86 and 87 of the Act.
- 10.50 Indeed, some of the provisions are somewhat anathematic to the notions of party autonomy and the English courts’ modern attitude of support for the arbitral process agreed between parties. Specifically, the provisions of section 86 would, if enacted, allow the court to consider other “*sufficient grounds for not requiring the parties to abide by the arbitration agreement*” when deciding whether or not to grant a stay of legal proceedings in relation to a domestic arbitration. There is no good reason in modern arbitral practice why the nationality of the parties should have any bearing on the enforceability of a valid arbitration agreement and, therefore, the ability of a disputing party to obtain a stay of proceedings which have been launched in breach of said arbitration agreement.
- 10.51 As stated by the DAC when explaining the justification for the retention of separate rules for domestic arbitration, these rules were “*framed at a time when attitudes to arbitration were very different and the courts were anxious to avoid what they described as the usurpation of their process*”.¹⁵⁷ We concur with that assessment, and would suggest that the view expressed by the DAC that consideration should be given to abolishing the distinction between international and domestic arbitrations should now be enacted.
- 10.52 For the same reason, we do not consider that a distinction can justifiably be maintained between international and domestic arbitration in the context of agreements to exclude the court’s jurisdiction under sections 45 and 69 of the Act. The English courts now plainly recognise the ability of parties to arbitration agreements, irrespective of their nationality, to have their disputes determined by arbitration, and to do so – if they so choose – without any involvement of the courts in determining substantive issues of law.

11. OTHER SUGGESTIONS NOT SHORTLISTED FOR REVIEW

- 11.1 We have reviewed the suggestions discussed in Chapter 11 of the Consultation Paper and do not consider that any of them need to be revisited in full. We agree with the explanations provided by the Law Commission as to why these suggestions were not taken up as part of its review.
- 11.2 Broadly speaking, these proposals address matters which are either: (i) better dealt with by and through the development of the common law; (ii) matters that relate to the conduct of proceedings, for which flexibility ought to be maintained for parties and tribunals to determine; or (iii) not yet in need of review / reform.
- 11.3 We do not consider that there are any other significant topics which have not been addressed in the Consultation Paper which require review and reform. Where we have made further proposals for consideration, these have been in the context of the topics in which they have been raised. Beyond these further proposals,

¹⁵⁷ DAC Report, para. 320.

we do not consider that there are any other significant topics which have not been addressed and which require further review and potential reform.

- 11.4 We note and agree with the comments made at the beginning of Chapter 11 concerning the practical benefits of completing this consultation process in a reasonable time, as well as the fact that the Act is not intended to solve every hypothetical scenario, and that therefore a degree of flexibility for party modification and incremental development through the common law should be maintained.

SCHEDULE 1 – RESPONSES TO CONSULTATION QUESTIONS

Question 1 – 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?

1. For the reasons set out at paragraphs 2.1 to 2.14 of our Response, we suggest that leaving confidentiality to be developed by the courts is not an attractive prospect for users of international arbitration choosing to seat their process in London and therefore may adversely impact London's reputation as an arbitral seat. A codified provision on confidentiality would be a more easily accessible source and has been shown to work well in other jurisdictions.

Question 2 – We provisionally conclude that the Arbitration Act 1996 should not impose a duty of independence on arbitrators. Do you agree?

2. As set out at paragraphs 3.1 to 3.7 of our Response, we agree that the Act should not impose a duty of independence separate from its pre-existing duty of impartiality in terms of the Act.
3. We view there to be some potential benefits to a separate duty of independence under the Act, assuming that said duty was distinct from impartiality. It may give comfort to international parties who have different views as to the effect of certain connections on partiality than the English courts.
4. However, we think that this marginal benefit is outweighed by the case against introducing a separate duty of independence. The first is that the most important issue is that the arbitrators are impartial, not that they are independent in every respect, and in this regard we agree with the Commission. The significant overlap between a lack of independence and impartiality means that in most (if not all) cases where there is a significant concern regarding independence then a party already has a route of challenge. The second is the potentially significant prospect of a standalone duty of independence being used by unwilling parties to attempt to frustrate the arbitral process. For these reasons, we do not support a standalone duty of independence.

Question 3 – 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. Do you agree?

5. As set out at paragraphs 3.8 to 3.13 of our Response, we agree that the Act should provide that arbitrators have a continuing duty to disclose any circumstances which may give rise to justifiable doubts as to their impartiality. This should be a mandatory provision of the Act.
6. However, we anticipate that the law with regard to the arbitrator's duty to disclose has some way to develop following the decision in *Halliburton* and it is important to allow the courts sufficient flexibility to do so. Therefore, in our view the duty of disclosure should be expressed as a general principle so as to allow further development of the duty by the courts.

Question 4 – Should the Arbitration Act 1996 specify the state of knowledge required of an arbitrator's duty of disclosure, and why?

7. We agree that if a duty of disclosure is being introduced then it should specify the state of knowledge required. This increases legal certainty and reduces the risk of unnecessary challenges.

Question 5 – 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?

8. As set out at paragraph 3.13 of our Response, we are of the view that the duty should be expressed both in terms of the arbitrator's actual knowledge and what they ought to have known having made reasonable inquiries. It is reasonable to expect arbitrators to have taken sufficient care in providing their disclosure as to have made reasonable enquiries, given the importance of insuring arbitrator impartiality. Further, the 'ought to have known' test introduces a degree of objectivity into what would otherwise be a subjective, and therefore potentially difficult to prove, test.

Question 6 – 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 by the House of Lords)?

9. As set out at paragraphs 4.3 to 4.17 of our Response, the requirement of a protected characteristic in an arbitrator should be enforceable where it can be broadly justified as suggested by the Supreme Court in *Hashwani v Jivraj*. The grounds should be reasonable and objective, not subjective.
10. Allowing the enforcement of such a requirement where applicable and objectively justifiable, is likely to enhance the robustness of arbitral decisions where there are special circumstances. In this regard, we agree with the comment in the Consultation Paper that "[i]t would be hasty to conclude, for example, that nationality or religion ought never to be relevant. An example might be where the dispute concerns details of a particular religious practice." By analogy, it might be argued that specialist knowledge is not required by arbitrators who are appointed to hear disputes on issues which they are not experts in, as they will hear evidence from independent experts. However, this overlooks the fact that what may be relevant to the parties is experience rather than knowledge, which cannot necessarily be imparted through expert evidence.
11. An approach to challenges on arbitral appointments based protected characteristics which considers the merits of each specific case will prevent parties relying on the judgement to achieve the opposite effect of what was intended i.e. arguing that subjective grounds, which are not protected by public interest considerations are a basis for enforcing the requirement of a protected characteristic.

Question 7 – We provisionally propose that:

- (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.

Do you agree?

12. Yes. The proposed reforms will align with the Equality Act and promote diversity and inclusivity which is an important societal issue, whilst still allowing for appointments to be made based on protected characteristics where this can be justified on a reasonable and objective basis. The manner in which the proposed reform is worded maintains the autonomy of parties in how they seek to have their disputes resolved, which is key in maintaining the flexible nature of arbitrations and ensuring confidence in the process and its outcomes.

Question 8 – Should arbitrators incur liability for resignation at all, and why?

13. As set out at paragraphs 5.1 to 5.13 of our Response, we consider that a blanket immunity for arbitrators which excludes liability for all acts and omissions including resignation would be inappropriate. Although arbitrators perform a quasi-judicial role, their position and function does not require that they be afforded the same degree of immunity as judges. Resignation should therefore attract liability in certain circumstances due to the nature of the relationship between the parties and the tribunal, which is a creature of the parties' agreement. Whilst the effects of an arbitrator's resignation on the parties and the proceedings should be of limited relevance in determining liability (as the effects would be the same irrespective of whether the resignation was reasonable or otherwise), they are nevertheless often significant. It is therefore right that arbitrators should not be entitled to act with impunity when resigning and avoid accountability for the impact of their actions.

Question 9 – Should arbitrators incur liability for resignation only if the resignation is proved to be unreasonable?

14. As set out at paragraphs 5.14 to 5.38 of our Response, arbitrators should only incur liability for resignations that could be considered to be manifestly and grossly unreasonable.
15. Any reform of the Act concerning liability for resignation will need to take account of the fact that arbitrators resign for various reasons, many of which are legitimate (i.e. ill health, bereavement, or the emergence of circumstances giving rise to a conflict of interest). It would be unfair to hold arbitrators liable where genuine circumstances arise which necessitate their resignation. Indeed, the threat of liability could result in arbitrators remaining in their role where it is inappropriate for them to do so, and indeed dissuade people from accepting appointments, which could in turn reduce not only the pool of available arbitrators, but also diversity within the pool.
16. Accordingly, immunity should extend to cover legitimate resignations so that liability only attaches to resignations which are unreasonable. The question of what constitutes an 'unreasonable' resignation should be set out in the Act so as to provide clarity and certainty in this regard, and in our view should set a high threshold so as to avoid inadvertently capturing resignations for reasons which may fall outside the norm for legitimate resignation, but are otherwise reasonable. To achieve this, we consider that the test for reasonableness should be articulated in terms of bad faith, defined (non-exhaustively) by reference to fraud, corruption, and deliberate or intentional misconduct.

17. We recognise that there may of course be cases which are on the boundary of what might be considered reasonable, but do not meet the high threshold set out above. Parties may feel particularly aggrieved if, for example, an arbitrator resigns because they have taken on too many appointments for them to adequately discharge their obligations on each arbitration, or an arbitrator wishes to resign as they want to wind down their practice. However, our approach recognises that accepting an appointment as arbitrator – although not a contract of employment – nevertheless involves the provision of services by the arbitrator to the parties, and that personal and professional circumstances can change after accepting an appointment which render provision of those services difficult or impossible. In such cases, the balance of convenience lies in allowing an arbitrator to resign, without attracting liability that would otherwise force them to remain in their role, which could have a deleterious effect on the quality of the quality of the service they provide.
18. Our proposal therefore involves a combined approach when considering reform of arbitrator liability in respect of resignation:
- 18.1 First, that arbitrators must be relieved from proving reasonableness of a resignation before the courts. To this extent, the burden of proof would shift from the arbitrator proving reasonableness to the challenging party proving the unreasonableness of resignation.
- 18.2 Second, that statutory liability must only capture unreasonable resignations.
- 18.3 Third, that the threshold for triggering unreasonable resignation should be very high, in recognition of the quasi-judicial function performed by arbitrators. This would ensure that the level of qualified immunity afforded to arbitrators would better align to (although not match) the immunity afforded to judges.
- 18.4 Finally, that the test for unreasonable resignation should be codified. This would provide greater legislative certainty for arbitrators when performing their duties, professional obligations and arbitral function. We would recommend further fortification of the bad faith principle in respect of arbitrator resignations. Therefore, creating an objective, measurable standard of unreasonable resignation that can only apply where a resignation has been made in bad faith. Future reform of the Act should expressly limit liability to acts of fraud, corruption, or deliberate and intentional misconduct to best protect resigning arbitrators by extending qualified immunity in this way.

Question 10 – 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. Do you agree?

19. As set out at paragraphs 5.39 to 5.42 of our Response, we agree that the Act should be amended in order to make clear that arbitrator immunity extends to the costs of court proceedings which arise out of the arbitration. This is evidently the intention of section 29, yet the line of cases cited in the Consultation Paper has established a precedent to the contrary, which should be reversed.
20. However, the immunity in respect of the costs of court proceedings should not be absolute, as arbitrators should be liable for such costs which are occasioned by any misconduct. Accordingly, the immunity should be subject to a provision excluding costs incurred in applications occasioned by bad faith conduct including acts of fraud, corruption, intentional and deliberate misconduct, or negligence.

Question 11 – 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. Do you agree?

21. As set out at paragraphs 6.1 to 6.10 of our Response, we agree that the Act should expressly provide that a tribunal may adopt a summary disposal procedure to decide a claim or issue. We also agree that it is appropriate that the tribunal should only be empowered to do so upon the application of a party.
22. It is a common refrain that arbitration proceedings are often conducted at significant time and cost. The proper use of summary disposal in arbitration proceedings would increase efficiency by dealing with unmeritorious matters via a truncated procedure, thereby reducing time and cost on matter which are evidently bound to fail. However, summary disposal is underutilised in international arbitration, and we suspect that due process paranoia is to blame. Therefore, a more express recognition in English law that summary disposal is available in arbitration proceedings would increase confidence that deciding a case or issue summarily would be consistent with the arbitrator's duty of due process and, as a result, increase its use.
23. Like the Commission, we think that it is appropriate that summary disposal is only adopted in response to an application by a party to the arbitration. In practice, cases where a tribunal and not a party would propose summary disposal are likely to be rare. A tribunal proposing summary procedure of its own volition may engage due process concerns. Further, making summary procedure available only on the application of the parties will, as the Commission notes, guard against excessive procedural zeal and retain party autonomy over the process.
24. We also agree that summary disposal should not be a mandatory provision of the Act.

Question 12 – 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. Do you agree?

25. As set out at paragraphs 6.11 to 6.14 of our Response, we agree that the Act should not prescribe the summary disposal procedure to be adopted. We also agree that the procedure to be adopted should be a matter for the arbitral tribunal, having consulted with the parties, and subject to the parties having agreed otherwise.
26. The most concern with summary disposal is generated by the potential for a procedure to be adopted which does not give the parties sufficient opportunity to put their respective cases. This would be an injustice. However, like the Commission, we agree that s.33(1)(a) of the Act provides some surety in ensuring cases are not decided without at least the minimally appropriate amount of procedure. Challenges to an improper summary award in terms of s.68 of the Act and Article V.1(b) of the New York Convention also provide some protection against insufficient procedure being adopted.
27. Providing that the tribunal will determine the procedure should help guard against abuse by the parties who may otherwise seek to cherry-picking issues or make multiple applications with the intention of delaying proceedings, which would be contrary to the purpose of adopting a summary disposal procedure.

Question 13 – We provisionally propose that the Arbitration Act 1996 should stipulate the threshold for success in any summary procedure. Do you agree?

28. As set out at paragraph 6.15 of our Response, we agree that the Act should stipulate the threshold for success in summary procedure. The goal of introducing summary disposal is to reduce due process concerns by

increasing legal certainty. Leaving the test to be applied unclear would retain the current level of legal (un)certainty in a key part of the operation of summary judgment. Therefore, the goals of the innovation may be frustrated as tribunals may continue to be reluctant to use summary judgment because of the due process concerns explained above.

Question 14 – 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. Do you agree?

29. As set out at paragraphs 6.16 to 6.20 of our Response, adopting the “*no real prospects of success*” and “*no other compelling reason*” standard from the English CPR would incorporate a well-defined test that would increase certainty for parties and tribunals, whilst also providing comfort to foreign enforcement courts that awards involving summary disposal have been conducted on the basis of well-developed principles.
30. We would propose that the summary decision threshold should also incorporate a materiality requirement so as to ensure that the determination of a summary disposal application has a meaningful effect in terms of reducing the length and/or costs of the proceedings, and avoid potential abuse of the procedure. This, we would suggest, might adopt the same test of materiality that appears in sections 45 and 69, so that an applicant would have to show that disposal of the claim or defence substantially affects the rights of one or more of the parties. Alternatively, if the section 45 / 69 test is considered too stringent, the requirement could be for the applicant to show that disposal of the claim or defence would result in a substantial saving in costs.

Question 15 – 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. Do you agree?

31. As set out at paragraphs 7.20 to 7.22 of our Response, in direct response to this question, we agree in principle that section 44(2)(a) should be amended so as to confirm that it relates to the taking of evidence by witness deposition only. There is no reason to maintain two procedural regimes which accomplish the same objective, and it cannot have been the intention that section 44(2)(a) should render section 43 redundant.
32. However, this issue (and the proposed amendment) highlights a discrepancy between the ability to secure the attendance of a witness on the one hand (which is a mandatory provision), and the ability to obtain a witness' deposition evidence on the other (which is non-mandatory). We can see no reason why these two methods for obtaining witness evidence should be treated differently in this regard. Therefore, we propose that rather than amending section 44(2)(a), section 43 should be amended instead to cover both the power to compel a witness' attendance as well as the power to compel deposition evidence. This would require consequential amendments to section 43, i.e. to make clear that the jurisdictional restrictions in section 43(3) only apply to witness summonses.

Question 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?

33. Yes, as set out at paragraphs 7.15 to 7.19 of our Response we consider that an amendment to confirm that orders made in respect of matters in section 44(2) can be made against third parties.
34. Whilst we agree with the Law Commission's view that the circumstances as to when orders can be made against third parties flows from the current wording of section 44, it would be preferable to take the present

opportunity to amend section 44 so that this is made explicitly clear, and therefore address the confusion that has been created by the cases cited in the Consultation Paper.

35. Bearing in mind the Law Commission's comment that section 44 imports the law on these various matters as it is applied in domestic legal settings, the amendment would need to be worded in such a way that does not inadvertently create the ability to obtain an order against third parties in respect of a matter listed in section 44(2) that is not available to litigants in court. Therefore, we would propose that the amendment could take the form of short clarification at the end of section 44(1) as follows:

“(including the power to make orders about such matters against non-parties to the arbitration)”

Question 17 – 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. Do you agree?

36. As set out at paragraphs 7.23 to 7.26 of our Response, we agree that the restriction in section 44(7) should apply on to parties or proposed parties to the arbitration, and that third parties should have the usual rights of appeal.
37. Although the DAC provides little explanation as to the basis for limiting the right of appeal, this appears to have been driven by the general principles enumerated in section 1, particularly the principle of party autonomy and the limitation on court intervention. Whilst it is appropriate to uphold these principles as between parties which have agreed to arbitrate, these do not apply to third parties, who have not consented to any restriction on the involvement of the courts or the right of appeal.
38. It therefore follows, and is only appropriate, that if section 44 orders can be made against third parties, then third parties should be entitled to avail themselves of the usual rights of appeal.

Question 18 – We provisionally conclude that the provisions of the Arbitration Act 1996 should not apply generally to emergency arbitrators. Do you agree?

39. We agree that the provisions of the Act should not apply to emergency arbitrators. However, for the reasons set out at paragraphs 7.28 to 7.30 of our Response, we do not agree with the rationale set out in the Consultation Paper.
40. In the first instance, concerns that too much of the Act would apply to emergency arbitrators are overstated, as most of the provisions are non-mandatory, and would therefore not apply in circumstances where the emergency arbitrator process is necessarily governed by rules of the institution under which the emergency arbitrator is appointed.
41. Moreover, the fact that the relief which can be ordered by an emergency arbitrator is only provisional is not in our view a reason why the Act should not apply. The Act already provides a mechanism by which a tribunal can make a provisional order under section 39, which can be enforced by the courts under section 42 (after it is made into a peremptory order under section 41), but which can be subsequently varied or set aside by the tribunal in its final award. Indeed, the Consultation Paper goes on to make proposals for the enforcement by the courts of emergency arbitrator awards.

42. Instead, as set out at paragraphs 7.31 and 7.32 of our Response, in our view the Act should not apply to emergency arbitrators because, as noted above, the institutional rules under which emergency arbitrators are appointed provide comprehensive rules which govern the appointment, powers, and procedure for emergency arbitrators.

Question 19 – 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?

43. As set out at paragraphs 7.33 to 7.35 of our Response, we agree that the Act should not include provisions for the court to administer a scheme of emergency arbitrators.
44. As noted in response to Question 18, arbitral institutions already provide well-developed rules for emergency arbitrators and are – in our view – better placed to administer them. The level of direct management is incompatible with court procedure. In any event, the Act already provides a route for a prospective party to arbitration to obtain interim relief from the court via section 44(3), and so it is unclear why a second route would be necessary.

Question 20 – Do you think that section 44(5) of the Arbitration Act 1996 should be repealed, and why?

45. For the reasons outlined in the Consultation Paper, we agree with the proposal that section 44(5) of the Act should be repealed.
46. As explained at paragraphs 7.37 to 7.42, repealing section 44(5) will resolve the uncertainty caused by the interpretation of *Gerald Metals v Timis*, and make clear that relief under section 44 is available irrespective of whether the parties can appoint an emergency arbitrator. There are many instances where, notwithstanding the availability of an emergency arbitrator, relief from the court is preferable.
47. Repeal would also avoid the uncertainty that might arise as a result of the lack of clarity over the whether certain relief is capable of being granted by tribunals and emergency arbitrators (i.e. freezing injunctions). If relief from the court was dependent upon clarifying whether the relief is also available from an emergency arbitrator, a party seeking the relief could not be sure that its application would be considered on its merits or fail on the basis that it could obtain the relief from an emergency arbitrator. This sort of uncertainty – particularly in the context of urgent relief, is unwelcome.
48. Although section 44(5) may hold important symbolic value as a bulwark against overzealous judicial intervention, we do not think – given the evidence from case law since the Act entered into force as to pro-arbitration stance adopted by the courts – that these sorts of provisions are necessary any longer.

Question 21 – 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.

49. We welcome the proposal to include in the Act a mechanism by which orders of emergency arbitrators can be enforced by the courts in the case of non-compliance. Doing so would resolve the long-running uncertainty over the enforceability of such awards in the English courts.
50. An effective means of enforcing emergency arbitrator awards is vital in order to ensure compliance and fulfil the legitimate expectations of the party which applies for relief that the order will be performed. Otherwise, the emergency arbitrator process would be rendered redundant.
51. We agree that section 41 is not suited to emergency arbitrators. However, for the reasons set out in paragraphs 7.47 to 7.49 of our response, we do not consider that the two alternatives presented in the Consultation Paper are the most appropriate means of achieving the objective of enforcing emergency arbitrator orders. The three-step process in the first proposal of emergency arbitrator order > emergency arbitrator peremptory order > court order involves unnecessary delay.
52. Whilst we prefer the brevity of the two-step process of the second option which leads to an application under sections 44(3) or (4), the scope of the interim relief which the court can order is limited to that which is set out in section 44(2). However, the relief which an emergency arbitrator could order may extend beyond the list in section 44(2), which the mandatory provisions of section 44(3) to (7) would not permit the court to do. Moreover, if compliance with an emergency arbitrator's order is not urgent and therefore an application under section 44(4) must be made with the permission of the emergency arbitrator (as per the proposal) this may not be possible if, after issuing its order, the emergency arbitrator is rendered *functus officio* and is therefore unable or unwilling to provide permission.
53. As set out at paragraphs 7.51 to 7.56 of our Response, we would therefore propose that an amendment allowing for the enforcement of emergency arbitrator order is made to section 42 instead such that enforcement can be obtained in the same way as a peremptory order, but without the delay and complexity of first obtaining a peremptory order under section 41. Furthermore, section 42 does not restrict the nature of the relief which the court can grant, nor does it require the permission of the tribunal where the parties have agreed that the powers of the court under this section are available.
- 53.1 We would propose that section 42(1) is amended as follows to achieve this (with the additional wording emphasised):
- "Unless otherwise agreed by the parties, the court may make an order requiring a party to comply with a peremptory order made by the tribunal, or an order made by an emergency arbitrator. For the purposes of this section, an emergency arbitrator need not have made a peremptory order to the same effect as his order prior to an application under this section to be made"* (emphasis added).
- 53.2 We see merit in an emergency arbitrator being empowered to enforce her/his order, and would therefore suggest that section 42(2)(a) is amended as follows:
- "by the tribunal or the emergency arbitrator (upon notice to the parties)"* (emphasis added).

- 53.3 We would also suggest that specific provision is made so that an application for compliance with an emergency arbitrator's order can be made by a party without having to first obtain the agreement of the other parties or permission from the tribunal.
- 53.4 Finally, we note that the Act would require a definition of 'emergency arbitrator' to be included in section 82. We would suggest the following:

““emergency arbitrator” means a person appointed as such in accordance with the provisions of any institutional rules which the parties have agreed shall apply, and which provide for the appointment of an emergency arbitrator (or a like role)”.

Question 22 – We provisionally propose that:

(1) where a party has participated in arbitral proceedings, and has objected to the jurisdiction of the arbitral tribunal; and

(2) 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.

Do you agree?

54. For the reasons set out at paragraphs 8.2 to 8.10 of our Response, we are not convinced that a sufficiently compelling case exists for reform of section 67 so as to limit a challenge to the tribunal's jurisdiction to an appeal rather than a *de novo* rehearing.
55. Challenges under section are different from other forms of challenge as they are concerned with issues which go to the heart of the arbitral process, namely the existence or otherwise of the power of a tribunal to determine the issues which have been referred to it. Whilst other challenges can be excluded by agreement or set a high threshold due to the inherent assumption of risk implied into the parties' agreement to arbitrate, questions of jurisdiction are not matters for which the parties are deemed to tolerate a margin of error in the tribunal's decision. If a tribunal wrongly concludes that it has jurisdiction when it doesn't the result is that it will determine the substantive dispute in circumstances where it has no authority or power to do so, which in our view is intolerable, and offend against the principle of party autonomy.
56. Jurisdiction is a binary question: a tribunal either has it or it does not, and the consequence if the latter is found to be true is that the basis of the entire process and any award rendered by the tribunal will be illusory. For this reason, a challenge under section 67 does not require a showing of substantial injustice or that determination of the issue will substantially affect the rights of the parties, as required by sections 68 and 69.
57. The issue is also one of consent, echoed in Lord Mance's statement in *Dallah Real Estate and Tourism v Ministry of Religious Affairs of the Government of Pakistan* (at [26]) that a party that has not submitted to the jurisdiction of an arbitrator is entitled to a full judicial determination on evidence of jurisdiction before the courts. In our view, if a party does not accept the jurisdiction of the tribunal, it does not consent to the arbitrability of that question by the Tribunal, and it is this absence of consent which warrants a rehearing of the evidence.

58. Whilst we recognise the concerns over the potential delay and cost of a *de novo* hearing and the issues of fairness in allowing a party to use a challenge in the arbitration as a 'dress rehearsal', these matters do not override the more fundamental concerns of ensuring that a tribunal has the power and authority to determine the rights and obligations of the parties. Specifically:
- 58.1 The Commercial Court figures show that there is not a deluge of these cases which requires reform;
 - 58.2 The threshold for bringing a section 67 application is high, requiring a showing of serious grounds, and speculative applications discouraged through the use of adverse costs orders; and
 - 58.3 Questions of fairness must be weighed against considerations of propriety and maintaining confidence in arbitration.
59. Although correct that the court would remain the final arbiter irrespective of whether a challenge is made by way of rehearing or appeal, the limitation in an appeal on the court's ability to review the evidence afresh and draw its own conclusions unconstrained by the tribunal's findings means that the court is in reality not acting as the final arbiter on the tribunal's jurisdiction, rather it is acting as final arbiter on the tribunal's ruling on its own jurisdiction.
60. Finally, the parties to arbitration legitimately expect that the tribunal will only act where it has jurisdiction to do so. Therefore, if a tribunal misinterprets or fails to take proper account of evidence, the court should be entitled to consider the evidence afresh rather than be bound by the tribunal's (potentially incorrect) findings on the evidence.

Question 23 – 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?

61. As set out in response to Question 22, we do not agree that section 67 should be limited to an appeal. However, if section 67 is amended in the manner proposed, for the sake of consistency in approach and clarity the same limitation should apply to Section 32 (but only where the tribunal has already issued an award on its jurisdiction which is final and binding).

Question 24 – We provisionally conclude that our proposed change to section 67 of the Arbitration Act 1996 would not require any similar change to section 103. Do you agree?

62. We agree that, if section 67 was amended so that the consideration of jurisdictional challenges was limited to appeals rather than a full rehearing, no equivalent change under section 103 concerning the recognition and enforcement of foreign arbitral awards would be required.
63. As set out at paragraphs 8.13 and 8.14 of our Response, enforcement is an entirely separate issue, governed by the provisions of the New York Convention, which does restrict the procedure to be adopted when determining challenges to enforcement. Moreover, it is appropriate that an enforcement court should be able to consider evidence as to the tribunal's jurisdiction in circumstances where the curial jurisdiction may have afforded no – or a limited – right to challenge jurisdiction. The English courts should not be in the business of enforcing awards unless it is satisfied that the tribunals which rendered them had jurisdiction to do so.

Question 25 – 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. Do you agree?

64. We agree with the proposed addition of the remedy of declaring an award to be of no effect, either in whole or in part.
65. However, as set out at paragraphs 8.16 to 8.23 of our reply, section 67(1) addresses challenges to two different types of award, one as to the tribunal's substantive jurisdiction, and the other as to the merits in circumstances where the tribunal had no jurisdiction.
66. Whilst we agree that the ability to declare an award of the first type to be of no effect – if the court considers that the tribunal had no jurisdiction – should be expressly provided for in section 67(3), we also consider that the option to remit awards of the second type should be available.
67. Presently, awards of the second type can only be declared of no effect, in whole or in part, as this is the only order which can be sought under section 67(1)(b), and the remedies in section 67(3) are only available for the first type of award (on the tribunal's jurisdiction).
68. However, declaring parts of an award to be of no effect due to a lack of jurisdiction risks leaving the remainder of the award unenforceable, as amendments might need to be made to account for the part of the award that has been carved out by the tribunal.
69. It is unlikely that the court could make consequential adjustments to the award as part of an order declaring part of it to be of no effect, and the tribunal would be *functus officio* and therefore unable to issue a revised award.
70. We would therefore propose that section 67 is amended as follows:

70.1.1 Section 67(1)(b) is deleted and replaced with:

“challenging any award made by the tribunal on the merits on the grounds that the tribunal did not have substantive jurisdiction.”

70.1.2 A new section 67(4) is inserted (with the existing section 67(4) becoming a new section 67(5)) which states that:

“On an application under this section challenging an award of the arbitral tribunal on the merits, the court may by order—

(a) confirm the award,

(b) declare the award to be of no effect, in whole or in part, and/or

(c) remit the award to the tribunal for reconsideration”.

Question 26 – 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?

71. For the reasons set out at paragraphs 8.24 to 8.32 of our Response, we agree that a tribunal should, once it has determined that it does not have substantive jurisdiction, nevertheless retain residual jurisdiction in order to issue a binding award on costs.
72. Neither of the alternatives proposed at paragraph 8.68 of the Consultation Paper are appealing. Involvement of the court is likely to result in additional time and expense, and if an English CPR approach was to be adopted to the determination of costs, a significantly lower recovery than if costs were to be determined by the tribunal. Alternatively, providing that costs are irrecoverable is inherently unfair, particularly where a challenge to jurisdiction can involve significant legal submission and factual and expert evidence.
- 72.1 Accordingly, the Act should be amended so as to make specific provision as to the ability of a tribunal which has determined that it has no jurisdiction to nevertheless make an award as to the costs of the arbitration up to the point it determines that it lacks jurisdiction.
- 72.2 We would suggest that, rather than section 61, provision in this regard should be made in section 31, which is a mandatory provision. A new section 31(6) could be introduced as follows:

“If, in a ruling made pursuant to subsection (4), the tribunal rules that it has no substantive jurisdiction, the tribunal shall nevertheless have the jurisdiction to make an award allocating the costs of the arbitration incurred up to and including the making of its award on costs. For the making an award on costs, the tribunal shall have the power to invite the parties to provide written and/or oral evidence or submissions on this matter.”

73. This issue also raises the question as to how costs should be dealt with if the court determines that the tribunal has no jurisdiction pursuant to section 32, 67 or 72. In circumstances where the court declares that the tribunal's award is of no effect, the tribunal will have become *functus officio* by virtue of the court's order than by its own award. The court can make an order as to the costs of the application it has heard, but there is no provision in the Act as to whether it can make an order as to the costs of the arbitration proceedings up to the point of its decision on jurisdiction.
74. Whilst sections 32, 67 and 72 could be amended to allow the courts to determine and allocate the costs of the arbitration, for the reasons set out above this is unlikely to be welcome. Instead, we would propose that provisions are added to each of sections 32, 67 and 72 which, notwithstanding a decision of the court finding that the tribunal has no substantive jurisdiction, expressly confer jurisdiction on the tribunal to make an award as to the costs of the proceedings up to that point, in similar terms to the proposed text above.

Question 27 – 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?

75. No. Although we consider that the substantive threshold for obtaining leave to appeal under section 69 strikes the correct balance, ensuring that only the most meritorious appeals will be admitted, this review does present an opportunity to address two issues concerning the availability of the right of appeal on a question of law which will redress the balance between the accuracy of awards and the commercial expediency of arbitration.

76. In the first instance, as set out at paragraphs 9.7 to 9.26 of our Response, we consider that the definition of what constitutes an agreement to exclude the jurisdiction of the courts under section 69 is too broad, mischaracterises the concept of party autonomy, and places too much emphasis on finality and commercial expediency to the detriment of legal accuracy.
- 76.1 In practice, provisions excluding rights of appeal are found in many institutional rules, which parties to contracts which incorporate these rules may not have given any or any detailed consideration to as they are often seen as forming part of the 'boilerplate' clauses of the contract, and so may not be aware of the consequences of adopting these rules. Further, these rules may be incorporated as part of a standard form contract, or may form part of one party's standard terms on which the other is obliged to contract. It therefore follows that parties may often unwittingly waive this valuable right of appeal.
- 76.2 The court's rationale for deeming a waiver to have been incorporated via the adoption of institutional rules is that the shift in public policy marked by the 1979 Act demonstrated that the desire for legal accuracy has been overtaken by the desire for commercial expediency. However, this conflicts with the principle, noted by the DAC in its report, that where parties have chosen to arbitrate and have chosen the law which governs their rights and obligations, the parties have also agreed that the tribunal will properly apply the law (and, we would add, have a legitimate expectation that the tribunal will, in fact, do so). Prioritising speed over accuracy risks undermining confidence in arbitration in view of the potential for decisions which are patently incorrect on the law to stand unchallenged. This approach also appears to be at odds with those who use arbitration, with surveys indicating that difficulty in appealing an award is a leading reason why companies had not used arbitration in their disputes.
- 76.2.1 We consider that a minor amendment to the existing wording of section 69 is necessary in order to properly support the policy goal of achieving party autonomy, as well as strike the correct balance between the finality and accuracy of awards. The purpose of the amendment would be to provide that an agreement to exclude the jurisdiction of the court must be expressly made by the parties, and could not be accidentally made as an unintended consequence of agreeing to incorporate a set of institutional rules. This could be achieved by adding a new subsection (1)(A) in one of the two following forms, which provide stipulations as to either the timing or the form of the exclusion agreement:
- (a) The first option would be to provide that (similar to the provision found in section 87) an exclusion agreement will only be valid if it is made once the proceedings have commenced. The new subsection could adopt the following wording:
- "For the purposes of this section, any agreement to exclude the jurisdiction of the court is not effective unless entered into after the commencement of the arbitral proceedings in which the award is made".*
- (b) Alternatively, the new subsection could stipulate that the exclusion of the right of appeal must be expressly agreed between the parties, and cannot be incorporated by reference to institutional rules, as follows:

“For the purposes of this section, any agreement to exclude the jurisdiction of the court is not effective unless it is expressly made in writing either before or after the commencement of the arbitral proceedings in which the award is made. An agreement to apply institutional rules which contain an agreement to waive any right to recourse against an award or otherwise exclude the jurisdiction of the court shall not satisfy the requirements of this subsection”.

- (c) We would propose that the amending legislation should make clear that either provision would only apply to arbitration agreements concluded after the amendments have come into effect.

76.2.2 Both of these proposals would require the parties to an arbitration to have taken a positive step to agree the exclusion of the court's jurisdiction, rather than unwittingly losing the right to appeal on a point of law by having adopted a set of institutional rules. However, on balance we prefer the second approach as it would allow for parties to agree as part of their contract negotiations to exclude the right of appeal, rather than attempt to reach such an agreement once a dispute has commenced, which may not be possible if the parties' relationship has deteriorated.

77. Secondly, as set out at paragraphs 9.27 to 9.36 of our Response, we propose a minor amendment so as to clarify that consensual appeals (i.e. those brought with the agreement of the parties under section 69(2)(a)) must relate to questions of law which “*substantially affect*” the rights of one or more parties.

77.1 Presently, consensual appeals do not need to meet any of the criteria set out in section 69(3) (which applies where a party must first obtain leave to appeal). They are essentially automatic and unfettered. All that is required is that the issue is a question of English law, arising out of the award, in respect of which the applicant has exhausted any arbitral process of appeal and recourse under section 57, and the application is brought within 28 days of the date of the award. Subject to fulfilling these criteria, the court is bound to consider the appeal.

77.2 The courts have sought to qualify this absolute right by construing a section 69(2)(a) agreement by reference to the first limb of the statutory test in section 69(3)(a) for granting leave to appeal (under section 69(2)(b)) that the determination of the question “*will substantially affect the rights of one or more of the parties*”. In doing so, the courts sought to exclude merely academic questions of law being raised on appeal which serve no useful purpose to the parties.

77.3 Although this is, we would argue, the correct outcome, we do not agree with the way in which the courts have arrived at it. An agreement to allow appeals on points of law is by definition an agreement that a party does not need to seek leave to appeal (and therefore meet the criteria in section 69(3)). Where such a clear agreement has been made, the threshold test which the parties have expressly sought to exclude should not – irrespective of that agreement – be implied.

77.4 Nevertheless, including a stipulation as to the substantive effect of determining the question of law is likely to better reflect the parties' intention in this regard, as it is unlikely that they will have agreed to allow appeals that serve no practical purpose. There is also obvious merit in avoiding the abuse of a section 69(2)(a) agreement.

- 77.5 We would therefore propose that section 69(2)(a) is amended so that any appeal by agreement is subject to the same requirement as the first limb of the test for the granting of leave under section 69(2)(b). This could be achieved with the addition of the following text after the word “*proceedings*”:

“and where the determination of the question will substantially affect the rights of one or more of the parties,”

Question 28 – Do you think that section 7 of the Arbitration Act 1996 (separability of arbitration agreement) should be mandatory, and why?

78. We do not agree that section 7 of the Act should be mandatory, for the reasons set out at paragraphs 10.1 to 10.12 of our Response.
79. Whilst the separability of arbitration agreements is of utility and importance for the reasons set out in the Consultation Paper, it is not a matter which is necessary in order to achieve specific and narrowly defined public policy objectives, which is the purpose of denoting certain provisions in the Act as mandatory. Instead, it is a matter which goes to the validity of the arbitration agreement, which may in some cases be a matter of substantive dispute between the parties which they have subjected to the law of another jurisdiction; there is no evident overriding public interest which requires that the English law position on separability must succeed over the parties' choice of law.
80. Making section 7 a mandatory provision could also result in arbitral awards being rendered unenforceable. In circumstances where a London-seated tribunal was to find the contract containing an arbitration agreement governed by the law of another jurisdiction was void, yet determined that it nevertheless had jurisdiction as the arbitration agreement was severable, enforcement could potentially be resisted in the other jurisdiction if, as a matter of that jurisdiction's law, the arbitration agreement would have been void.

Question 29 – 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?

81. As set out at paragraphs 10.13 to 10.16 of our Response, we agree that an appropriate amendment should be made to section 9 in order to confirm that an appeal is available from a decision of the court.
82. There appears to be no justifiable reason as to why the court's decision as to whether to grant a stay of proceedings should not be subject to at least the same qualified right of appeal as other court decisions related to arbitration. Indeed, in circumstances where the court's discretion to grant a stay is limited, the right of appeal is arguably of greater necessity than in instances where the court's discretion is wider.
- 82.1 Accordingly, we would propose that the following is included as a new sub-section (6) to section 9:

“The leave of the court is required for any appeal from a decision of the court under this section”.

Question 30 – 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?

83. We consider that the identified requirements in sub-section (2)(b) and (3) of both sections 32 and 45 are superfluous and should be deleted by way of amendment so that only the agreement of the parties or the permission of the tribunal is required.
84. Both of these provisions give the court discretion when deciding whether to grant an application. The factors in subsection (2)(b) of these provisions are factors which the court is likely to consider in any event when exercising its discretion.
85. We agree that the concern about costs in subsection 2(b)(i) is misplaced, but for different reasons, as set out at paragraph 10.19 of our Response. The issues which can be referred to the court for determination will, by their nature, lead to substantial savings of costs if they result in the tribunal's substantive jurisdiction being found to be limited or non-existent, or a question of law being determined in a way that substantially affects the rights of one or more of the parties.
86. As set out at paragraph 10.20 of our Response, we also agree that concern about delay is misplaced, as the provisions of section 73 can result in the loss of the right to object under section 32. Although section 73 does not apply to section 45, the later an application is made, the fewer costs will be saved, and the less likely an application will receive the agreement of the other party or the permission of the tribunal.
87. Dispensing with these requirements will also avoid the need for the parties to make what could be detailed and lengthy submissions as to what constitutes a "*substantial*" saving in costs or whether there has been a delay in making the application.
88. We concur with the comment in the Consultation Paper concerning the peculiarity of the position that these criteria must be met where the application is made with the permission of the tribunal, but not the agreement of the parties. This is particularly so where, in deciding whether to grant permission for the requesting party to make the application, the tribunal is likely to have in mind the extent to which resolution of the issue will save costs and whether the application has been made without delay, in the course of discharging its general duty under section 33.

Question 31 – 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?

89. As set out at paragraphs 10.24 to 10.26 of our Response, we do not consider that any amendments are required to the Act in order for tribunals to give directions for remote hearings and electronic documentation. However, as set out at paragraph 10.28, this review presents an opportunity to underscore the importance of reducing the environmental impact of arbitration by establishing it as one of the general principles by which the provisions of the Act are to be construed.
90. Anecdotally, we have not encountered any difficulties in adopting modern technology in arbitration proceedings to which the Act applies; tribunals already have a broad discretion to determine all procedural and evidential matters, which they have appeared comfortable doing.

91. We also do not consider that it would be desirable for the Act to make specific provision for the use of remote hearings and electronic documentation (or the adoption of any other specific technology), as this would encroach upon the autonomy of the parties to agree on the procedure that best suits their specific requirements, and the authority of the tribunal to conduct the arbitration as it sees fit.
92. However, as set out at paragraph 10.27 of our Response, one specific provision where clarity could be provided is section 43, by which a party may avail itself of the same court procedures as are available in relation to legal proceedings to secure the attendance of a witness to give oral testimony or produce documents. Presently, this refers to attendance of a witness "*before the tribunal*", which implies a physical presence. We would therefore propose that section 43 is amended so as to make clear that, for the purposes of this section, the phrase "*attendance before the tribunal*" includes remote attendance by means of videoconferencing where agreed by the parties or directed by the tribunal.
93. Although the current flexibility of the Act allows for the introduction of new technology to meet the growing demand for cleaner, greener arbitrations, a modest amendment the Act could ensure that environmental considerations permeate the manner in which arbitrations governed by the Act are conducted. The Act could seek to reinforce the positive steps which parties and their advisors are already taking by including a reference to the reduction of the environmental impact of arbitration in the 'general principles' in section 1 as follows, either:
- 93.1 Deleting the final two words of sub-section (a) and replacing with:
- “, expense, or impact on the environment”.*
- or
- 93.2 Inserting the following words in sub-section (b) after "*the parties should be free to agree how their disputes are resolved*":
- “, including the adoption of measures aimed at reducing the environmental impact of arbitration proceedings,”.*
94. By introducing the concept of reducing the environmental impact of arbitration into the general principles governing interpretation, the provisions of Part I of the Act will be construed in light of such concerns, thereby creating a presumption in favour of environmentally compatible procedures and conduct. If environmental concerns are seen as being treated on a par with principles of fairness and efficiency and/or as an aspect of party autonomy, it is envisaged that parties and tribunals would be able to more confidently adopt behaviours which allow them to pursue carbon reduction activities.

Question 32 – Do you think that section 39 of the Arbitration Act 1996 should be amended to refer to “orders” (rather than “awards”), and why?

95. For the reasons set out at paragraphs 10.31 to 10.33, we agree that the current wording of section 39 gives rise to confusion, and that the opportunity should be taken to clarify this provision by amending the section heading so that it refers to the tribunal's power to make provisional *orders*, as opposed to awards.

96. The use of the term 'awards' in the section heading gives rise to confusion over the nature of the remedy the tribunal may grant, and has resulted in the courts applying a strained interpretation of the provision in order to reconcile it with the definition of award elsewhere in the Act.
- 96.1 It is evident from the body of section 39 that the power conferred on the tribunal is to make orders during the proceedings that can either be confirmed, reversed, or amended in the final award. These are by their nature temporary, and have been likened to the English court's power to grant an interim payment order under CPR 25.
- 96.2 These awards are therefore not capable as being treated as final, however section 58 states that an award made by the tribunal is "*final and binding*". The courts and commentators have sought to reconcile this apparent discrepancy by either characterising section 39 'awards' as being an exception to the principle that awards must be final, or treating the granting of the power to the tribunal to issue 'awards' under section 39 as an agreement to the contrary for the purposes of section 58 (which is non-mandatory) to the effect that awards need not be final.
- 96.3 In our view, neither of these approaches are satisfactory. Parties routinely grant tribunals the power to make provisional orders by adopting institutional rules which contain such provisions. If the courts' approach was correct, this would have the effect of entrenching an exception to the generally recognised position that tribunal awards are both final and binding, which was unlikely to have been the intention of the those who drafted the Act.
97. The current position also creates uncertainty in terms of enforceability. Section 66 makes no distinction between awards that are final and binding (pursuant to section 58) and 'awards' issued under section 39 which may be binding, but are not final. Accordingly, section 39 'awards' would, on the face of section 66, be enforceable. However, as section 66 is concerned with the enforcement of awards in the same manner as a judgment or order of the court, it is clear that an award must be final so that there is certainty as to what the court is actually enforcing. It would be inappropriate for the court to enforce a provisional 'award' – with all of the attendant consequences such as the ability to execute against the 'award' debtor's assets – in circumstances where the 'award' could be reversed. It is also doubtful whether a section 39 'award' would be enforceable in a foreign jurisdiction under the New York Convention.
98. If provisional remedies under section 39 can take the form of awards, this could render redundant the power to issue awards on different issues under section 47. Both of these provisions can, based on the current approach to section 39, result in the tribunal issuing an enforceable award on specific aspects of the matters to be determined, meaning that there is little practical difference between them other than the fact that a section 39 'award' could be subsequently revisited by the tribunal. It cannot have been the intention of the Act to provide for effectively the same outcome to be achieved by two different mechanisms. The preferable position would therefore be for section 47 to cover the issuance of partial or interim awards which are final, binding, enforceable and subject to challenge or appeal, and section 39 to cover the issuance of provisional orders which are subject to revision and the separate enforcement regime that applies to other orders of the tribunal.

Question 33 – Do you think that section 39(1) of the Arbitration Act 1996 should be amended to refer to “remedies” (rather than “relief”), and why?

99. As set out at paragraphs 10.34 and 10.35 of our Response, we agree that the reference to 'relief' in section 39 should be amended to 'remedy' in order to ensure internal consistency in the Act. The terms are often used

interchangeably when referring to the consequences of the alleged wrong to which the claimant asserts a right and seeks to be granted as part of the tribunal's award. There is no evident reason why section 39 should not mirror section 48 in this regard, particularly in circumstances where the power in section 39 is to make orders in respect of remedies which the tribunal would be entitled to grant pursuant to section 48 in its final award.

Question 34 – 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?

- 99.1 For the reasons set out at paragraphs 10.36 to 10.42, we agree that section 70(3) of the Act should be amended so as to make clear that, if a request has been made for the correction of an award or the issuance of an additional award under section 57, the 28-day time period for making an application or appeal under sections 67 to 69 should run from the date on which the section 57 process has been completed and the outcome is known.
100. It is unlikely that the difficulty created by the omission of a reference to recourse under section 57 was intentional, and the Act should be amended to remedy this, and adopt the position which has been provided for at common law.
101. We also agree that, for an application under section 57 to provide a different starting date for section 70(3), the application must be material to the application or appeal under sections 67 to 69 so as to avoid the potential for abuse of section 57.
102. However, we do not agree that the existing wording in section 70(3) used to define the start date where there has been an arbitral process of appeal or review is adequate for defining the start date where section 57 has been invoked, so that time starts to run from the date the applicant or appellant was notified of the result of its request. In the first instance, it may not be the case that the party seeking to challenge or appeal the award is the same as the party which applied under section 57, and in any event this wording is somewhat ambiguous, as the 'result' of an application under section 57 may, strictly speaking, be the tribunal's decision whether or not to exercise its powers under section 57, not the handing down of a corrected or supplementary award.
103. Furthermore, the proposed change to section 70(3) highlights a further discrepancy which we think ought to be addressed concerning the trigger date in circumstances where there are no arbitral processes of appeal and section 57 is not available. Currently, in the absence of party agreement, the date of the award is taken as being the date on which it is signed by the arbitrator, which then triggers the 28-day process in section 70(3). The DAC adopted this as the date of the award is as it is 'incontrovertible', and avoided uncertainty as to when the award was actually delivered. However, this gives rise to difficulties where the award may be held up after it has been signed, risking a party with valid grounds for challenging being time barred.
104. For the reasons set out at paragraph 10.41, we consider that the trigger for the 28-day period is standardised so that it refers to the date on which the parties were notified of the award, or the outcome of any appeal or review, or the disposal of any section 57 process. We therefore propose that section 70(3) is amended as follows:

“(3) Any application or appeal must be brought within 28 days of the date on which the award is notified to the parties or—

(a) if there has been any arbitral process of appeal or review, within 28 days of the date when the parties were notified of the result of that process; or

(b) if there has been any application for recourse under section 57, within 28 days of the tribunal finally disposing of said application (either by rejecting the application or issuing a corrected award or additional award, as the case may be) and notifying the same to the parties.

Subsection (3)(b) shall only apply where the application for recourse under section 57 is material to the application or appeal under section 67, 68 or 69.

Question 35 – 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?

- 11.5 For the reasons set out at paragraphs 10.43 to 10.47, we agree that section 70(8) serves a useful function, and should be retained (subject to a minor modification to provide clarity as to its meaning).
- 11.6 The issue referred to in the Consultation Paper appears to arise out of a lack of clarity in the wording of the provision. The authors referred to at paragraph 10.61 have interpreted section 70(8) as referring to appeals from decisions made under sections 70(6) or 70(7) to order security for costs or payment into court, which would lead to the illogical outcome that a party appealing such an order would be required to do precisely the thing it was objecting to being ordered to do.
- 11.7 Whereas the Law Commission's interpretation (with which we agree) is that section 70(8) actually refers to conditions under which the court may grant leave to appeal decisions rendered under sections 67, 68 or 69. This interpretation is supported by the wording of section 70(1), which states that the provisions of section 70 apply to applications and appeals under sections 67, 68 or 69, as well as the fact that it gives section 70(8) a sensible meaning.
- 11.8 The lack of clarity in the wording of section 70(8) is unfortunate, particularly as the scheme of sections 67, 68 and 69 makes provision for appeals from a decision of the court within each of the sections. We would therefore propose a minor amendment to section 70(8) to clarify the intention of the provision, so that it reads as follows:

"Where the court grants leaves to appeal under sections 67(4), 68(4) 69(6) or 69(8), it may do so subject to conditions to the same or similar effect as an order under subsection (6) or (7).

This does not affect the general discretion of the court to grant leave to appeal subject to conditions."

Question 36 – We provisionally propose that sections 85 to 87 of the Arbitration Act 1996 (on domestic arbitration agreements) should be repealed. Do you agree?

105. As set out at paragraphs 10.48 to 10.52, we agree that sections 85 to 87 of the Act should be repealed.
106. We do not consider there to be any cogent argument in favour of treating 'domestic' arbitrations differently from 'international' arbitrations. Nor are we aware, based on our experience, of any compelling practical reasons as to why the existing terms of the Act should be amended for the purposes of domestic arbitration, particularly in the ways set out in sections 86 and 87 of the Act.

Question 37 – Do you think that any of the suggestions discussed in Chapter 11 needs revisiting in full, and if so, why?

107. No. Whilst the other proposals for review which have not been short-listed all raise valid points, we agree with the reasons given by the Law Commission in each instance for not taking these proposals further at this stage.
108. Broadly speaking, these proposals address matters which are either: (i) better dealt with by and through the development of the common law; (ii) matters that relate to the conduct of proceedings, for which flexibility ought to be maintained for parties and tribunals to determine; or (iii) not yet in need of review / reform.

Question 38 – 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?

109. No. Where we have made further proposals for consideration, these have been in the context of the topics in which they have been raised. Beyond these further proposals, we do not consider that there are any other significant topics which have not been addressed and which require further review and potential reform.
110. We note and agree with the comments made at the beginning of Chapter 11 concerning the practical benefits of completing this consultation process in a reasonable time, as well as the fact that the Act is not intended to solve every hypothetical scenario, and that therefore a degree of flexibility for party modification and incremental development through the common law should be maintained.

Pinsent Masons LLP is a limited liability partnership, registered in England and Wales (registered number: OC333653) authorised and regulated by the Solicitors Regulation Authority and the appropriate jurisdictions in which it operates. Reference to "Pinsent Masons" is to Pinsent Masons LLP and/or one or more of the affiliated entities that practise under the name "Pinsent Masons" as the context requires. The word "partner", used in relation to the LLP, refers to a member or an employee or consultant of the LLP or any affiliated firm, with equivalent standing. A list of members of Pinsent Masons, those non-members who are designated as partners, and non-member partners in affiliated entities, is available for inspection at our offices or at www.pinsentmasons.com. For a full list of the jurisdictions where we operate, see www.pinsentmasons.com

Response ID ANON-PT57-RURW-Z

Submitted to Law Commission Consultation: Review of the Arbitration Act 1996
Submitted on 2022-12-08 19:08:16

About you

What is your name?

Name:
Rowan Planterose

What is the name of your organisation?

Enter the name of your organisation:
Society of Construction Arbitrators

Are you responding to this consultation in a personal capacity or on behalf of your organisation?

Personal response

If other, please state::

[REDACTED]

What is your email address?

Email:
[REDACTED]

What is your telephone number?

Telephone number:
[REDACTED]

If you want the information that you provide in response to this consultation to be treated as confidential, please explain to us why you regard the information as confidential. As explained in our privacy notice, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

Please explain to us why you regard the information as confidential:

Consultation questions

Consultation Question 1: 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?

Agree

Please share your views below.:

There are too many potential exceptions and Rules and the Courts are best left to provide for or develop this

Consultation Question 2: We provisionally conclude that the Arbitration Act 1996 should not impose a duty of independence on arbitrators. Do you agree?

Agree

Please share your views below.:

I don't think anything has changed since the DAC decided against this. Impartiality implies sufficient independence in any event

Consultation Question 3: 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. Do you agree?

Agree

Please share your views below.:

This seems sensible in light of Halliburton. Important that the duty should be clearly stated to be continuing

Consultation Question 4: Should the Arbitration Act 1996 specify the state of knowledge required of an arbitrator's duty of disclosure, and why?

Yes

Please share your views below.:

see Q5

Consultation Question 5: 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?

What they ought to know

Please share your views below.:

I think it should be based on what they ought to know after reasonable enquiry. For example, actual knowledge would potentially protect an arbitrator who didn't bother to check that a potential party was the subsidiary of a client.

Consultation Question 6:

Only if necessary

Please share your views below.:

this should be as limited as possible

Consultation Question 7:

Agree

Please share your views below.:

This seems a proportionate way of dealing with this issue

Consultation Question 8: Should arbitrators incur liability for resignation at all, and why?

Other

Please share your views below.:

Clause 25 as presently drafted rather assumes liability and 25(4) puts the onus on the arbitrator to apply to the court and prove the resignation was reasonable. This is costly. It should be the other way round, and the presumption be that the resignation was reasonable unless proven not to be.

Consultation Question 9: Should arbitrators incur liability for resignation only if the resignation is proved to be unreasonable?

Yes

Please share your views below.:

See above

Consultation Question 10: 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. Do you agree?

Agree

Please share your views below.:

Yes. It is impossible to insure against this risk.

Consultation Question 11: 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. Do you agree?

Other

Please share your views below.:

Basically, I think this is a good idea to get over some of existing hesitancy. But I think this might be dealt with by amendment to s.68 rather than to s.34 - i.e. it would not, without more, be a ground of complaint under s.68 that the tribunal had adopted a summary procedure. Somewhere, in all events, "summary procedure" would need definition - and I think it would need to be made clear it led to an award (not an order).

Consultation Question 12: 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. Do you agree?

Other

Please share your views below.:

I think my suggestion in answer to Q11 above might get around some of the potential difficulties that might arise from the parties disagreeing on the procedure and the tribunal having to impose one.

Consultation Question 13: We provisionally propose that the Arbitration Act 1996 should stipulate the threshold for success in any summary procedure. Do you agree?

Agree

Please share your views below.:

No real prospect of success much the better proposal - as known to most users.

Consultation Question 14: 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. Do you agree?

Agree

Please share your views below.:

See above

Consultation Question 15: 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. Do you agree?

Agree

Please share your views below.:

Yes, this is just tidying up

Consultation Question 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?

Yes

Please share your views below.:

this would again tidy up an area which is not satisfactory as it stands

Consultation Question 17: 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. Do you agree?

Agree

Please share your views below.:

this would be fair

Consultation Question 18: We provisionally conclude that the provisions of the Arbitration Act 1996 should not apply generally to emergency arbitrators. Do you agree?

Agree

Please share your views below.:

This can be left to Rules

Consultation Question 19: 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?

Agree

Please share your views below.:

As above, this can be left to the various sets of Rules that provide for Emergency Arbitrators

Consultation Question 20: Do you think that section 44(5) of the Arbitration Act 1996 should be repealed, and why?

Other

Please share your views below.:

Deletion or amendment to take account of problems arising from Gerald Metals

Consultation Question 21:

Peremptory order

Please share your views below.:

I think this would be the simpler route, albeit the timescales would need to be quick

Consultation Question 22:

Agree

Please share your views below.:

It would speed the process and avoid the introduction of new evidence etc

Consultation Question 23: 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?

Yes

Please share your views below.:

Consistency

Consultation Question 24: We provisionally conclude that our proposed change to section 67 of the Arbitration Act 1996 would not require any similar change to section 103. Do you agree?

Agree

Please share your views below.:

I cannot see that the proposed change would impact on s.103 at all

Consultation Question 25: 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. Do you agree?

Agree

Please share your views below.:

Consistency

Consultation Question 26: 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?

Agree

Please share your views below.:

I think this must already be the case, but as part of the tidying up exercise, this would appear sensible.

Consultation Question 27: 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?

Agree

Please share your views below.:

The existing law is fine.

Consultation Question 28: Do you think that section 7 of the Arbitration Act 1996 (separability of arbitration agreement) should be mandatory, and why?

Yes

Please share your views below.:

Tidying up an important aspect of the arbitral regime

Consultation Question 29: 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?

Agree

Please share your views below.:

Again this would be tidying up

Consultation Question 30: 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?

No

Please share your views below.:

I have no experience to suggest the system does not work adequately as it is

Consultation Question 31: 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?

Yes

Please share your views below.:

Remote hearings, in particular. This would avoid argument that such hearings are a denial of justice etc.

Consultation Question 32: Do you think that section 39 of the Arbitration Act 1996 should be amended to refer to "orders" (rather than "awards"), and why?

Yes

Please share your views below.:

There is without doubt confusion at present, and tribunals take either course. s.39 would be best clarified to ensure it leads to an Order to avoid court applications based on awards.

Consultation Question 33: Do you think that section 39(1) of the Arbitration Act 1996 should be amended to refer to "remedies" (rather than "relief"), and why?

No

Please share your views below.:

Existing is adequate

Consultation Question 34: 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?

Agree

Please share your views below.:

Difficulty can arise here at the moment where the s.57 application is turned down. So this makes sense.

Consultation Question 35: 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?

Agree

Please share your views below.:

Consultation Question 36: We provisionally propose that sections 85 to 87 of the Arbitration Act 1996 (on domestic arbitration agreements) should be repealed. Do you agree?

Disagree

Please share your views below.:

Not necessary as never brought into force

Consultation Question 37: Do you think that any of the suggestions discussed in Chapter 11 needs revisiting in full, and if so, why?

Please share your views below.:

No

Consultation Question 38: 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?

Please share your views below.:

s. 60 In my experience some contracts, particularly involving USA businesses, will provide that both parties pay their own costs of arbitration. At present this is outlawed by s.60, unless entered into again after the dispute has arisen, at which point one party thinks it will win and won't agree. The arrangement is not an unfair one, and it seems to me that our law might well allow it.

Review of the Arbitration Act 1996

Consultation Response of the Property Bar Association

Introduction

1. The Property Bar Association is the professional body for barristers in England, Wales and Northern Ireland, and for advocates in Scotland, who specialise in property and property-related legal work. It has almost 500 members and is recognised by the General Council of the Bar for England and Wales as one of the Bar's specialist bar associations.
2. As well as representing the interests of its members, the Property Bar Association strives to ensure its members are represented in connection with proposals for law reform that concern property law and practice. It is a non-political organisation and seeks only to promote law reform that makes property law more rational, transparent and effective.

Consultation Response

Q1: 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?

3. Yes, we agree.

Q2: We provisionally conclude that the Arbitration Act 1996 should not impose a duty of independence on arbitrators. Do you agree?

4. Yes, we agree.

Q3: 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. Do you agree?

5. Yes, we agree.

Q4: Should the Arbitration Act 1996 specify the state of knowledge required of an arbitrator's duty of disclosure, and why?

6. No, we do not think that it should. There will be an infinite variety of circumstances in which reasonable doubts as to an arbitrator's impartiality might arise. We think the approach to be taken in any given case should be left to the arbitrator's good sense, and the law can develop incrementally in the courts in response to difficult cases.

Q5: 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?

7. There is something to be said for each, but each has its disadvantages as well. For this reason, we think the Act should not attempt to set out the required state of knowledge.

Q6: 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 by the House of Lords)?

8. The Property Bar Association is against discrimination in all its forms and supports legislation aimed at eliminating it. Nonetheless, we prefer the test as set out in paragraph [70] of Lord Clarke's judgment in *Hashwani*.

Q7: We provisionally propose that: (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. Do you agree?

9. We wholeheartedly support the proposal that the law of England and Wales take a stand against discrimination. We cautiously support this proposal but we do so on the footing that its effect would replicate that of our answer to Q5 above.

Q8: Should arbitrators incur liability for resignation at all, and why?

10. No, we feel that the balance favours arbitrators not being liable for resigning. The potential harm that might be caused by arbitrators failing to resign when they should do so but are afraid of incurring liability is surely greater than the converse risk. Arbitrators' immunity when resigning is not wrong in principle, given their quasi-judicial role.

Q9: Should arbitrators incur liability for resignation only if the resignation is proved to be unreasonable?

11. No, simply reversing the starting position does not address the imbalance of risk of harm above.

Q10: 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. Do you agree?

12. Yes, we agree.

Q11: 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. Do you agree?

13. Yes, we agree.

Q12: 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. Do you agree?

14. Yes, we agree.

Q13: We provisionally propose that the Arbitration Act 1996 should stipulate the threshold for success in any summary procedure. Do you agree?

15. Yes, we agree.

Q14: 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. Do you agree?

16. Yes, we agree.

Q15: 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. Do you agree?

17. Yes, we agree.

Q16: 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?

18. Yes, we agree.

Q17: 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. Do you agree?

19. Yes, we agree.

Q18: We provisionally conclude that the provisions of the Arbitration Act 1996 should not apply generally to emergency arbitrators. Do you agree?

20. Yes, we agree.

Q19: 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?

21. Yes, we agree.

Q20: Do you think that section 44(5) of the Arbitration Act 1996 should be repealed, and why?

22. We agree, for reasons given in the Consultation Paper.

Q21: 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.

23. We prefer (2), as it is more straightforward.

Q22: We provisionally propose that: (1) where a party has participated in arbitral proceedings, and has objected to the jurisdiction of the arbitral tribunal; and (2) 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. Do you agree?

24. Yes, we agree. In particular, we agree that the arguments against reform are more concerned with theory than practical fairness. The proposal is desirable having regard to the need to avoid waste and to promote finality in litigation.

Q23: 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?

25. Yes, for consistency.

Q24: We provisionally conclude that our proposed change to section 67 of the Arbitration Act 1996 would not require any similar change to section 103. Do you agree?

26. Yes, we agree.

Q25: 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. Do you agree?

27. Yes, we agree.

Q26: 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?

28. Yes, we agree.

Q27: 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?

29. Yes, we agree.

Q28: Do you think that section 7 of the Arbitration Act 1996 (separability of arbitration agreement) should be mandatory, and why?

30. Yes, we think it should be mandatory. While acknowledging that, as a general principle, the parties should be free to choose the terms of their agreement, we see no reason why they would not want the arbitration agreement to be separable. Given the obvious risk of them inadvertently ending up with an inseparable arbitration agreement when foreign law is chosen, we think it is desirable that it be mandatory.

Q29: 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?

31. Yes.

Q30: 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?

32. Yes, for the reasons given in the consultation paper.

Q31: 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?

33. Yes, it is desirable to put the matter beyond doubt and to prompt the increased use of remote hearings and electronic documentation in appropriate cases. The practical benefits, and the need to reduce the environmental impact of litigation, speak for themselves.

Q32: Do you think that section 39 of the Arbitration Act 1996 should be amended to refer to “orders” (rather than “awards”), and why?

34. Yes. The current wording of the section and its heading is confusing and should be changed. We think that rulings under section 39 should be treated as orders and enforceable as such by means of sections 41 and 42: we agree that it is not desirable to subject a ruling under section 39 to the full range of challenges available against awards, as it could introduce unnecessary complexity, expense and delay into the interim stage of the proceedings.

Q33: Do you think that section 39(1) of the Arbitration Act 1996 should be amended to refer to “remedies” (rather than “relief”), and why?

35. Yes, but only for consistency. We see no practical difference between the words in their context.

Q34: 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?

36. Yes.

Q35: 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?

37. Yes.

Q36: We provisionally propose that sections 85 to 87 of the Arbitration Act 1996 (on domestic arbitration agreements) should be repealed. Do you agree?

38. Yes.

Q37: Do you think that any of the suggestions discussed in Chapter 11 needs revisiting in full, and if so, why?

39. No.

Q38: 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?

40. No.

Property Bar Association

Law Reform Committee



11 December 2022

Response ID ANON-PT57-RURN-Q

Submitted to Law Commission Consultation: Review of the Arbitration Act 1996
Submitted on 2022-12-08 22:08:24

About you

What is your name?

Name:
Nigel Puddicombe

What is the name of your organisation?

Enter the name of your organisation:

I am a self employed Chartered Domestic Arbitrator

Are you responding to this consultation in a personal capacity or on behalf of your organisation?

Personal response

If other, please state::

What is your email address?

Email:
[REDACTED]

What is your telephone number?

Telephone number:
[REDACTED]

If you want the information that you provide in response to this consultation to be treated as confidential, please explain to us why you regard the information as confidential. As explained in our privacy notice, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

Please explain to us why you regard the information as confidential:

Consultation questions

Consultation Question 1: 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?

Other

Please share your views below.:

It should be addressed in an arbitrator's or a Tribunal's Terms of Engagement with the parties and enforced, so far as may be necessary, by the courts.

Consultation Question 2: We provisionally conclude that the Arbitration Act 1996 should not impose a duty of independence on arbitrators. Do you agree?

Agree

Please share your views below.:

None other.

Consultation Question 3: 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. Do you agree?

Agree

Please share your views below.:

Adequate continuing disclosure may enable an arbitrator to avoid any order for costs in any application for removal (subject to the outcome of other matters within this consultation) and does enhance both the necessary integrity of the Tribunal and the perception of absence of bias, subconscious or otherwise.

Consultation Question 4: Should the Arbitration Act 1996 specify the state of knowledge required of an arbitrator's duty of disclosure, and why?

No

Please share your views below.:

None other.

Consultation Question 5: 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?

Actual knowledge

Please share your views below.:

It should be for the parties to make such enquiries of surrounding circumstances.

Consultation Question 6:

More broadly justified

Please share your views below.:

None other

Consultation Question 7:

Agree

Please share your views below.:

None other.

Consultation Question 8: Should arbitrators incur liability for resignation at all, and why?

No liability for resignation

Please share your views below.:

Due to the provisions of s.29(3) of the 1996 Act disapplying the general immunity of an arbitrator established by s.29(1) of that act where an arbitrator resigns, it is necessary that an arbitrator should not be liable should he or she resign. Resignation may be the only way to avoid a perception of actual or potential bias (and any related appeal) and where one party wishes an arbitrator to resign while the other party does not, an arbitrator may be placed in an invidious position and effectively "trapped into" the arbitration by the potential for a costs order against the arbitrator. This is likely to undermine the effectiveness of the arbitrator and lead to delay and additional cost, neither of which should be in any party's best interests.

Consultation Question 9: Should arbitrators incur liability for resignation only if the resignation is proved to be unreasonable?

Yes

Please share your views below.:

Although the test for unreasonableness should be clearly laid out. It may also be open to an arbitrator to provide for resignation in his or her Terms of Engagement, thus making it a contractual matter.

Consultation Question 10: 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. Do you agree?

Agree

Please share your views below.:

For all the reasons set out above.

Consultation Question 11: 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. Do you agree?

Agree

Please share your views below.:

Although it must be appreciated that the parties may not agree this. In my experience in some cases the parties legal representatives can be disinclined to agree to a summary procedure, when one is suggested, perhaps for fear that this may mean that their client's position is not presented fully, with the possibility of a claim in negligence to follow, or out of self interest that a shorter procedure would reduce their fees.

Consultation Question 12: 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. Do you agree?

Agree

Please share your views below.:

None other.

Consultation Question 13: We provisionally propose that the Arbitration Act 1996 should stipulate the threshold for success in any summary procedure. Do you agree?

Agree

Please share your views below.:

The greatest possible clarity is needed.

Consultation Question 14: 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. Do you agree?

Agree

Please share your views below.:

See my comments above.

Consultation Question 15: 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. Do you agree?

Agree

Please share your views below.:

None other.

Consultation Question 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?

Yes

Please share your views below.:

To enable the arbitration to be effective.

Consultation Question 17: 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. Do you agree?

Agree

Please share your views below.:

None other.

Consultation Question 18: We provisionally conclude that the provisions of the Arbitration Act 1996 should not apply generally to emergency arbitrators. Do you agree?

Agree

Please share your views below.:

None other.

Consultation Question 19: 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?

Agree

Please share your views below.:

None other.

Consultation Question 20: Do you think that section 44(5) of the Arbitration Act 1996 should be repealed, and why?

Yes

Please share your views below.:

It provides no practical assistance to the situation.

Consultation Question 21:

Peremptory order

Please share your views below.:

This option should be quicker.

Consultation Question 22:

Agree

Please share your views below.:

None other.

Consultation Question 23: 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?

Yes

Please share your views below.:

For consistency.

Consultation Question 24: We provisionally conclude that our proposed change to section 67 of the Arbitration Act 1996 would not require any similar change to section 103. Do you agree?

Agree

Please share your views below.:

None other.

Consultation Question 25: 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. Do you agree?

Agree

Please share your views below.:

None other.

Consultation Question 26: 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?

Agree

Please share your views below.:

That would mirror other awards of costs on merit.

Consultation Question 27: 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?

Agree

Please share your views below.:

None other.

Consultation Question 28: Do you think that section 7 of the Arbitration Act 1996 (separability of arbitration agreement) should be mandatory, and why?

No

Please share your views below.:

Leave it to the parties to agree.

Consultation Question 29: 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?

Agree

Please share your views below.:

None other.

Consultation Question 30: 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?

No

Please share your views below.:

Retain the present position. That sets out 3 working tests in s.32(2)(b) that the parties can apply when considering whether to agree under s.32((2)(a).

Consultation Question 31: 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?

Yes

Please share your views below.:

To enhance clarity.

Consultation Question 32: Do you think that section 39 of the Arbitration Act 1996 should be amended to refer to "orders" (rather than "awards"), and why?

Yes

Please share your views below.:

None other.

Consultation Question 33: Do you think that section 39(1) of the Arbitration Act 1996 should be amended to refer to "remedies" (rather than "relief"), and why?

Yes

Please share your views below.:

None other.

Consultation Question 34: 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 appellants was notified of the result of that request. Do you agree?

Agree

Please share your views below.:

This promotes clarity and fairness.

Consultation Question 35: 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?

Agree

Please share your views below.:

None other.

Consultation Question 36: We provisionally propose that sections 85 to 87 of the Arbitration Act 1996 (on domestic arbitration agreements) should be repealed. Do you agree?

Agree

Please share your views below.:

That would promote consistency.

Consultation Question 37: Do you think that any of the suggestions discussed in Chapter 11 needs revisiting in full, and if so, why?

Please share your views below.:

S.35 - Arbitrators should be given greater powers to consolidate arbitrations, where the parties cannot agree, in order to save cost, duplication and delay.

S.40 - should not be repealed but the arbitrator's powers under s.41 should be explicitly mentioned within s.40. It is often useful to an arbitrator faced with a reluctant party to be able to cite s.40.

S.44 - I agree the suggestion.

Consultation Question 38: 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?

Please share your views below.:

No.

Response to the Law Commission Review of the Arbitration Act 1996 consultation paper

Introduction

1. This response to the Law Commission consultation paper entitled *Review of the Arbitration Act 1996*¹ has been prepared by John Pugh-Smith FCI Arb, a member of 39 Essex Chambers, a practising arbitrator and mediator as well as retained counsel, specialising in the fields of Planning, Environment and Property (PEP) law. He is a member of the RICS President's Panel (for non-rent review matters) and receives regular dispute appointments, including in respect of arbitrations within the UK.
2. 39 Essex Chambers is a multi-specialist set of barristers with offices in London, Manchester, Singapore and Kuala Lumpur. Its current membership of around 150 practitioners includes many international arbitrators (both counsel and retired members of the judiciary) as well as younger members extensively involved in commercial and construction as well as PEP matters.
3. John has been a long-time promoter of the greater use of alternative dispute resolution ('ADR') methods particularly within his own specialist fields and has been a long-standing member of the Bar Council ADR Panel, the Compulsory Purchase Association's ADR Sub-Committee and a former committee member (now co-ordinator) of the Planning and Environment Bar Associations' s ADR Sub-Committee.
4. John is also one of the two specialist advisers to the All Party Parliamentary Group for Alternative Dispute Resolution ('APPG ADR') and helped organise the public session on 15th November 2022 ("the APPG November Session") at which the Commission's consultation paper was discussed. The Session was specifically convened to enable practitioner views to be heard in a Parliamentary context. They included the application of the amended 1996 Act provisions to domestic arbitrations, which was raised by Professor Graham Chase on behalf of the RICS, a former president and leading arbitrator.
5. Accordingly, because of John's particular work focus this response has been prepared specifically with the encouragement of the Commission's Nathan Tamblyn with a principal focus on UK domestic arbitrations. It should also read, hopefully, as a complementary submission to those by the RICS and the Bar Council.

¹ <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2022/09/Arbitration-Consultation-Paper.pdf>

Overview

6. As a starting point, it can be fairly stated that, for practitioners, the 1996 Act remains a clearly drafted piece of legislation which has operated successfully for many years. Like other practitioners. Accordingly, there is a strong case in favour of taking a minimal approach to making any changes to the 1996 Act because it has stood the test of time, has been the subject of a large and internationally understood and respected body of case law, and, remains a cornerstone of the UK arbitral system.

7. Nevertheless, the Act is a product of its time, since when ADR as a process has become a lot more sophisticated and nuanced including the greater use of mediation and its related facilitatory techniques. These should now be reflected if the 1996 Act is to be amended.²

Specific Responses

Q1. 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?

8. Agreed. The issue of “confidentiality” should continue to be developed by the Courts, and, by the parties through their adopted arbitration rules or as part of the arbitral procedure.

Q2. We provisionally conclude that the Arbitration Act 1996 should not impose a duty of independence on arbitrators. Do you agree?

9. Agreed, not only because it is unnecessary (in view of the way that the traditional doctrine of impartiality in the common law has been developed by the judiciary) but it would be counter-productive in specialist arbitral areas (like real estate and planning) where arbitrator appointments are made on the basis of specialist “industry” knowledge and reputation as practitioners (especially rent reviews). In short, it would not help achieve better dispute resolution and could well prove to be counter-productive.

Q3. 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. Do you agree?

10. Agreed.

Q4. Should the Arbitration Act 1996 specify the state of knowledge required of an arbitrator’s duty of disclosure, and why?

² See e.g. the answers below to Q14 and Q38

11. No.

Q5. 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?

12. No.

Q6. 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 by the House of Lords)?

13. While welcoming the Commission's desire to stamp out discrimination, the requirement of a protected characteristic in an arbitrator should be enforceable only if absolutely necessary.

Q7. We provisionally propose that:

(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.

Do you agree?

14. As the requirement of a protected characteristic in an arbitrator should be enforceable only if absolutely necessary, the draft proposal set out in (1) and (2) is not accepted as it is too prescriptive.

Q8. Should arbitrators incur liability for resignation at all, and why?

15. No. They act in a quasi-judicial capacity. There may be circumstances in which the arbitrator may have little option but to resign and should be able to do so without the fear of incurring liability for resigning.

Q9. Should arbitrators incur liability for resignation only if the resignation is proved to be unreasonable?

16. No, in view of the answer to Question 8. Further, it would not be in the public interest as such a provision could lead to protracted disputes and potential further litigation on whether an arbitrator's resignation was unreasonable.

Q10. 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. Do you agree?

17. We agree that arbitrator immunity should extend to the costs of court proceedings arising out of the arbitration.

Q11. 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. Do you agree?

18. We agree with this proposal. We favour the Arbitration Act being amended to provide that an arbitral tribunal may adopt a summary procedure unless the parties agree otherwise.

19. Providing expressly for summary procedure in the Act may encourage some arbitrators to take this approach more readily. Provided the arbitral tribunal acts fairly when conducting the summary procedure and the threshold test is met (as set out under Question 14 below), we do not anticipate that adopting such a procedure should fall foul of the recognition and enforcement provisions of the New York Convention on the basis of a contention that a party was not given a reasonable opportunity to present their case.

Q12. 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. Do you agree?

20. We agree.

Q13. We provisionally propose that the Arbitration Act 1996 should stipulate the threshold for success in any summary procedure. Do you agree?

21. We agree. It would be desirable for there to be a set threshold for success as that would promote consistency.

Q14. 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. Do you agree?

22. We agree with this test being adopted as it has been tried and tested by the courts for some time and there is useful guidance from the case law that has developed.

Q15. 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. Do you agree?

23. Agreed.

Q16. 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?

24. Agreed, for the sake of clarity.

Q17. 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. Do you agree?

25. Agreed.

Q18. We provisionally conclude that the provisions of the Arbitration Act 1996 should not apply generally to emergency arbitrators. Do you agree?

26. Agreed. There is no universally accepted definition of the term "emergency arbitrator."

Q19. 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?

27. Agreed.

Q20 . Do you think that section 44(5) of the Arbitration Act 1996 should be repealed, and why?

28. Agreed.

Q21. 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.

29. The second option because it is simpler and neater.

Q22. We provisionally propose that:

(1) where a party has participated in arbitral proceedings, and has objected to the jurisdiction of the arbitral tribunal; and

(2) 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.

Do you agree?

30. Agreed; but as exemplified at the APPG November Session, there are competing considerations implicated in the proposed reform of section 67.

31. On the one hand, there are arguments against the proposed reform. For a start, arbitration is a consensual process. The right to challenge an arbitral award by way of a full rehearing offers an important safeguard to a party that maintains that it did not consent to that process in the first place. Further, empirical data and experience suggest that section 67 applications tend to be rare, and they are mainly decided without hearing witnesses. The Commission points to only four reported section 67 cases annually, with most of those cases being decided on the basis of documentary evidence that was submitted in the arbitration.³

32. On the other hand, there are arguments supporting the proposed reform. Under the current law, a party can participate in the arbitration proceedings and challenge the arbitral tribunal's jurisdiction at a full hearing which can include witnesses, documentary evidence and expert opinions. If that party is successful in its challenge before the tribunal, it will obtain a favourable award and foreclose arbitration. However, if that party is unsuccessful in its challenge before the tribunal, it can have another bite of the cherry: it can challenge the arbitral award before the English courts under section 67 and benefit from a full rehearing which may include fresh witnesses, documents and expert opinions.

33. In our view, it is an important principle of fairness that a party should not have twice the right to a full hearing in challenging the jurisdiction of the same arbitral tribunal. We agree with the point made by the Law Commission that a party who challenges the jurisdiction before the arbitral tribunal is, on the current law, entitled to treat it as a 'dress rehearsal', in which the award becomes a sort of 'coaching' tool for that party in its subsequent challenge before the courts of law.⁴ In our view, this should not be the case.

34. Furthermore, the proposed reform of section 67 is supported by considerations of finality of an arbitral tribunal's decision which is an important public policy in English law. As is observed, in litigation, it is common for issues in a case, including dispositive

³ Although note that other commentators point to a higher number of section 67 cases. See for example Louis Flannery, listing fifteen section 67 cases in 2021: 88(4) *International Journal of Arbitration, Mediation and Dispute Management*.

⁴ See paragraph 8.31.

issues, to be subject to challenge by way of an appeal only. It is not clear that there is a principled basis for adopting a different approach in relation to arbitration.⁵

35. Even further, there are good practical considerations supporting the proposed reform of section 67. Hearing the same jurisdictional issue twice, before the arbitral tribunal and the courts of law, will significantly impact on the length of the proceedings and the costs of resolving the dispute. This is especially the case where the tribunal decides on the jurisdictional challenge in the same award with the merits and the unsuccessful party subsequently challenges the award before the court. If the court decides to set the award aside, the time and costs that the parties have spent arbitrating the merits of the dispute will be wasted.

36. Finally, it must be noted that the proposed reform rightly maintains an important safeguard for non-participating parties. Specifically, under section 72 (which the Commission does not propose to amend), if a party does not participate in the arbitral process, it will still be entitled to challenge the arbitral award by way of a full hearing.

37. On balance, and subject to considering amending sections 32 and 103 too (see below), the proposed reform of section 67 would be in the public interest both on the basis of fairness and finality, and, practical considerations.

Q23. 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?

38. Here, it needs to be borne in mind that there are two distinguishing scenarios: (1) where a party applies to the court before the arbitral tribunal has ruled on its jurisdiction and (2) where a party applies to the court after the tribunal has ruled on its jurisdiction. While there are different considerations implicated in these cases, they are currently treated identically under section 32.

39. Accordingly, if section 32 is to be amended, then the new provision will need to distinguish between these scenarios. Specifically, where a party applies to the court after the tribunal has ruled on its jurisdiction, the same considerations apply as in respect of the case where a party applies to the court to challenge the jurisdiction of the tribunal under section 67. Clearly, therefore, if section 67 is amended, then section 32 should also be amended so that a party who applies to the court after the tribunal has ruled on its jurisdiction will not be entitled to a rehearing.

40. However, where a party applies to the court before the tribunal has ruled on its jurisdiction the procedure should be treated differently. Asking a court to decide a jurisdictional question as a preliminary matter can save time and costs and reduce uncertainty. If the court decides that the tribunal has jurisdiction, the route to challenging the tribunal's jurisdiction under section 67 will be foreclosed. If the court decides that the tribunal lacks jurisdiction, the parties will no longer need to spend time and costs in arbitration. In either way, parties will know where to stand. Therefore, when a party

⁵ Ali Malek, Christopher Harris and Paul Bonner Hughes: 88(4) *International Journal of Arbitration, Mediation and Dispute Management*.

applies to the court before the tribunal has ruled on its jurisdiction, there are sound policy considerations for a law reform to incentivise the use of section 32 over the use of section 67, especially given the typically quick fashion in which preliminary applications are dealt with by English courts.

41. Thus, when a party applies to the court before the tribunal has ruled on its jurisdiction, the Law Commission should consider relaxing the current stringent procedural requirements set out in section 32, including the requirement that an application be made with the agreement in writing of all the other parties to the proceedings or permission of the tribunal. In practice, it is very rare that a party will obtain the other parties' agreement or the tribunal's permission to apply to the court. Section 32 can be amended to allow party to bypass the other parties and the tribunal and be allowed to directly ask the court for leave to apply. In deciding whether to grant leave for a preliminary determination of the tribunal's jurisdiction, the court will of course ensure that section 32 is not abused.

Q24. We provisionally conclude that our proposed change to section 67 of the Arbitration Act 1996 would not require any similar change to section 103. Do you agree?

42. Not agreed.

43. Any amendment of section 67 should not disturb the delicate balance between the scope of review when an award is challenged and when a foreign award is enforced in England and Wales. Currently, a party resisting the enforcement of a foreign award (in England and Wales) can challenge the tribunal's jurisdiction under section 103 and benefit from a full rehearing, even if the jurisdictional question was raised and decided in the arbitration in the first place.

44. In the interests of consistency, if the right of rehearing is abolished for jurisdictional challenges in the context of section 67, the right to rehearing should also be abolished for jurisdictional challenges in the context of section 103 too. There are neither practical considerations nor principled basis to distinguish between these two circumstances. This is particularly the case since section 103 of the 1996 Act covers *foreign* arbitral awards, which enjoy the benefit of the New York Convention on Enforcement of Foreign Arbitral Awards, presumably in accordance with the presumption of enforceability under Article V of the New York Convention ("*Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that*" (emphasis added)).

45. Therefore, section 103 should also be amended along the lines of the proposed amendment of section 67 so that where a party participated in the arbitral process and objected to the substantive jurisdiction of the arbitral tribunal, any challenge to the tribunal's ruling on jurisdiction in the context of section 103 should be by way of an appeal and not a rehearing.

Q25. 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. Do you agree?

46. Agreed for the reasons provided by the Consultation Paper in paragraphs 8.58 – 8.63

Q26. 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?

47. Agreed. Where the tribunal has ruled that it has substantive jurisdiction it should have the power to make an award of costs as it saves parties from having to apply to the court after the award and spend additional time and expense.

Q27. 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?

48. Agreed.

Q28. Do you think that section 7 of the Arbitration Act 1996 (separability of arbitration agreement) should be mandatory, and why?

49. Agreed. While acknowledging that, as a general principle, the parties should be free to choose the terms of their agreement, there is no reason why they would not want the arbitration agreement to be separable. Given the obvious risk of them inadvertently ending up with an inseparable arbitration agreement when foreign law is chosen, it is desirable that it be mandatory.

Q29. 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?

50. Agreed.

Q30. 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?

51. Agreed, for the reasons given in the Consultation Paper.

Q31. 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?

52. No. Arbitral tribunals have wide procedural powers and have used remote hearings and electronic documentation in practice. If there is to be any such express reference, then its wording would need to be "future proofed" as far as possible to cover future technological developments. Therefore, it is easier not to make it an express provision of the Act (as amended).

Q32. Do you think that section 39 of the Arbitration Act 1996 should be amended to refer to "orders" (rather than "awards"), and why?

53. Agreed. The current wording of the section and its heading is confusing and should be changed. Rulings under section 39 should be treated as orders and enforceable as such by means of sections 41 and 42. Further, it is not desirable to subject a ruling under section 39 to the full range of challenges available against awards, as it could introduce unnecessary complexity, expense and delay into the interim stage of the proceedings.

Q33. Do you think that section 39(1) of the Arbitration Act 1996 should be amended to refer to "remedies" (rather than "relief"), and why?

54. Agreed but only for consistency as there is no practical difference between the words in their context.

Q34. 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?

55. Agreed.

Q35. 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?

56. Agreed.

Q36. We provisionally propose that sections 85 to 87 of the Arbitration Act 1996 (on domestic arbitration agreements) should be repealed. Do you agree?

57. Agreed.

Q37. Do you think that any of the suggestions discussed in Chapter 11 needs revisiting in full, and if so, why?

58. No.

Q38. 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?

59. Yes.

60. First, as alluded to earlier, with the increasing use of mediation and its related techniques by the Business & Property⁶ and Technology & Construction Courts it would be beneficial for there now to be express provision for the tribunal to grant a stay of the arbitral proceedings, either on a party application or of its own motion, to allow an alternative, more facilitative process to be engaged. While it could be contended that this can happen already the practice of seeking party agreement as well as the current outworkings of section 33 the experience of having one or more uncooperative party can constrain, even frustrate, the sensible outworkings of section 33 and 34.

61. If such a proposal were to be included then section 43 etc. may well need amending too in order to ensure a more consistent and mirroring approach to the Courts.

62. Likewise, where a power of appeal is to be exercised by way of arbitration⁷ then, so that the arbitral process can be fairly administered by the tribunal and not hamstrung by the (appealed) respondent/defendant there should be a commensurate ability to award security for costs under section 38(3) from both parties, not just the claimant/appellant. Not only is this in the public interest but there are sound policy considerations for the Act to be amended to avoid unfair tactical "game playing".

JOHN PUGH-SMITH

12.12.22

⁶ "Negotiated Dispute Resolution" and neutral evaluations

⁷ See recent transfer by Welwyn & Hatfield DC of the operation of its Estate Management Appeals process: <https://www.wgc-ems.org/applications/refusal-appeal-process/> and as proposed for the outworking of Clause 73 of the Levelling-Up and Regeneration Bill (the application of proceeds from double council tax charged on second homes)

Response to Law Commission's Consultation Paper on the Arbitration Act 1996

Comments on ss. 67, 32 and 103 (Questions 22-24)

Thomas Raphael KC

1. This response addresses only the Law Commission's proposals as to s. 67, s. 32, and s. 103.

Section 67 – Question 22

Analysis of existing law

2. A couple of points are worth making on the analysis of existing law in the Consultation Paper.
3. Cannot use s. 32 after jurisdiction award. First, the Law Commission conclude at §8.13 that a party can use s. 32 to challenge the jurisdiction of the tribunal after the tribunal has decided its own jurisdiction under s. 30. This is wrong:
 - a. It is clear from the drafting of the Act that s. 32 is intended to substitute for a tribunal's determination of its own jurisdiction. That is why s. 32(2)(b)(ii) refers to "produce a substantial saving in costs". Appeal on jurisdiction is solely under s. 67 and subject to the time limits in s. 70. Further, s. 30(2) makes clear that challenges to a jurisdiction determination under s. 30(1) can only be made by processes of appeal or review under the act – i.e. ss. 67 or 68, which does not include s. 32. And using s. 32 route post a jurisdiction award would evade s. 70 which is wrong and not intended.
 - b. The DAC clearly intended that s. 32 would work as a substitute only. See DAC report, §141. The Act should be interpreted accordingly
 - c. Indeed, once a decision is reached on jurisdiction under s. 30 by the Tribunal that decision has *res judicata* effect unless challenged under the provisions of the Act: see s. 30(2), s 73, and *Emirates v Fomento* [2015] EWHC 1452 (Comm). So unless there is a s. 67 appeal, a s. 32 application post the Tribunal's determination would be necessarily hopeless, which shows it cannot be what is intended.
 - d. That s. 32 is only a substitute for the Tribunal's jurisdictional determination and not an appeal was the understanding of Rix J in *Azov v Baltic* [1999] 1 Lloyds Rep 68, 69; Clarke J in *ABB Lummus v Keppel Fels* [1999] 2 Lloyds Rep 24, 30; Thomas J in *Vale do Rio* [2000] 2 Lloyds Rep 1 at [54], and many others. In *Five Oceans v Wenzhou* [2012] 1 Lloyds Rep 289, it was held that an arbitrator was *functus* on jurisdiction after issuing his final award and so could not grant permission under s. 32.

- e. Russell on Arbitration also understands that after a determination, the relevant route is s. 67: see §7-160, & fn 645. This is also the understanding of Flannery & Merkin, pp. 346, 359 and (implicitly but clearly) Merkin, *Arbitration Law Looseleaf*, §9.3, 9.18, 9.24, 9.26, 9.27.
 - f. Indeed, this is the understanding of the profession in practice. Apart from the odd *Film Finance v RBS* case, I have never heard of anyone trying to use s. 32 post jurisdiction award.
 - g. The issue was not addressed in argument in *Film Finance v RBS* (see [3]) so that cannot be regarded as authority. The decision must be regarded as confused in that respect. It is not cited as authority in the textbooks. Flannery & Merkin cite it at p. 359 fn 271 but regard it as doubtful.
 - h. *Film Finance v RBS* was in fact an odd situation where a claimant was trying to get a confirmation of jurisdiction, which is why the Tribunal gave permission. There was a right way to do this, but it wasn't s. 32, instead the Tribunal should have confirmed jurisdiction by declaratory award which could have been enforced by s. 66 (cf *The Prestige No 2*). Perhaps the respondent didn't challenge the route because there was not much to be gained.
 - i. The Law Commission could helpfully clarify the point, that s. 32 cannot on its true interpretation apply post jurisdiction decision under s. 30, by appropriate text in any final report. But it is not believed that statutory reform to effect the clarification would be necessary. It can be dealt with in case law and the answer the courts would give if the point was argued is pretty clear.
4. Non-participation and role of s. 72. At §§8.16-8.18 the Paper suggests that a party cannot be compelled to participate in arbitration proceedings where it denies jurisdiction, and can just apply to the court under s. 72 to get jurisdiction determined by the Court. This is an important part of the Paper's argument later that the challenging respondent who does choose to participate should not have "*two bites of the cherry*". However, this is unrealistic:
- a. A party against whom an arbitration is commenced and challenges jurisdiction who chooses not to participate, relying on the idea of using s. 72, faces a huge risk, that (A) the arbitration panel proceeds with the arbitration in the meanwhile and (B) decides on the merits in the respondent's absence even if the respondent has a good defence and (C) the Court then upholds jurisdiction under s. 72; (D) the award is then binding although the respondent had no say about it. Practitioners confirm this is a very real issue in practice.
 - b. The case law makes clear that arbitrators are not obliged to stay arbitrations during the currency of a s. 72. They can also decide jurisdiction together with the merits (s. 31(4)). So it is not the case that the existence of a s. 72 challenge protects the unwilling respondent from a default award
 - c. Further, using s. 72 annoys arbitrators. So that is another pressure to challenge under s. 30.
 - d. The reality is that there is strong pressure to use s. 30. The idea, therefore, that an unwilling respondent against whom an arbitration is commenced and who adamantly denies jurisdiction has any sort of free choice to participate and challenge under s. 30, or not to do so, is unsound.

5. International position. The Law Commission discusses the international position at §§8.25-8.28. However, it does not reach an overall conclusion. In fact, the overall international consensus is overwhelmingly in favour of a *de novo* rehearing before the court. Moving to some form of “appeal” restriction would take England out of line. In particular, and importantly, it would take England out of line with key comparators and competitors. See the French law position discussed in *Dallah*.
6. The only contrary examples given are:
 - a. The USA: but this is a non-example as the point made is only that a specific agreement to exclude a re-hearing will be given effect. That does not meaningfully qualify the general position that challenge is *de novo*.
 - b. Singapore, but:
 - i. The Law Commission refers to *Lao v Sanum* at first instance [2015] SGJC 15 [43]-[44]. In that judgment it was held that the hearing was a *de novo* review but it was held that new evidence could only be submitted in limited circumstances akin to *Ladd v Marshall*. This, however, is a very different position to the Law Commission’s proposal. The English courts already in the context of their rehearing give themselves the power to restrict evidence, cf *The Kalisti* although it is rarely exercised. But the difference between the *Lao* (first instance) restrictions and the English approach in *The Kalisti* is one of pragmatic rules rather than principle; both contrast to the Law Commission’s approach. Further, it is unclear that the application of the *Ladd v Marshall* principles was actually debated, and the new evidence was actually admitted.
 - ii. In any event on appeal *Lao v Sanum* [2016] SGCA 57 the SGCA said that the appeal was *de novo*: at [40]; and while the modified *Ladd v Marshall* principles were again used their appropriateness was not debated. So, this does allow for the possibility of procedural limitation on evidence but that is consistent with the English law position in *The Kalisti* (below) yet the particular boundaries set are not strongly supported by authority.
 - iii. A proper reading of *Leo v Sanum* in the SGCA is contrary to the philosophy of the Law Commission’s proposal as it strongly supports the conclusion that a *de novo* review is right in principle: see [44].
 - iv. The more recent decision of *CLQ v CLR* [2021] SGHC(l) 15, [28] says that the challenge is *de novo* and there is no restriction on new evidence at all – the proposition that the *Ladd v Marshall* principles should be used was not suggested.
 - v. It is thus not clear that even *Lao v Sanum* is the law in Singapore – time has not permitted a review of the Singapore case law fully.
 - c. Switzerland: I am not in a position to comment on this (and have not had time to verify the citations) but it seems to be the only real example given by the Paper. However, I am aware that Combar say this: “*However, it is our understanding that Switzerland adopts a totally different procedure to that proposed by the Law Commission: namely, by means of paper-only appeals in which the Swiss Supreme Court cannot (save very exceptionally) review the facts, but is not restricted in its consideration of the applicable legal principles.*”

The proposed reform is contrary to principle

7. The Law Commission describes the argument of principle against the proposed reform as “theoretical”. It is not.
8. The Paper does not define what challenge by way of appeal only means, but it must mean that in some way or other the right to challenge conclusions is limited. If the model of the English Court of Appeal’s jurisprudence is adopted that might mean (a) some restriction of permission to appeal; but more relevantly (b) limited ability to challenge fact and (c) limited ability to challenge discretion. This is not just a restriction on new evidence but a restriction on the appellate right to intervene, it is a restriction on decision making power.
9. It is to be borne in mind also that so far as concerns the *fairness* of the arbitrator’s decision this is extremely hard to challenge under s. 68 as currently phrased and interpreted.
10. Thus, adopting some form of “appeal restriction” means there will be situations where (A) the arbitrator gets it wrong and assumes jurisdiction and (B) this cannot be challenged. This could include wrongly stating as a matter of fact that an arbitration clause exists. It could also include deciding as a matter of discretion that a jurisdiction challenge cannot be made at all – for example if the arbitrator concludes that it was too late (which is a real issue given the fluidity and discretionary nature of the provisions on time for challenge).
11. An arbitrator is a person who only has contractual jurisdiction. This is in contrast to courts who have basic jurisdiction as part of the rule of law. The reason why appeals from arbitrators are restricted under s. 68 and s. 69 is because they are appeals from persons to whom jurisdiction has been given. In contrast if the arbitrator does not have jurisdiction then her decision has no presumptive value so a decision on jurisdiction itself should not be given presumptive value.
12. It is therefore wrong in principle to give arbitrators a power to decide their own decision, potentially wrongly, in a way that has presumptive value in a way to which challenge is restricted by some form of appeal restriction.
13. Nor is this theoretical only as a concern. It could lead to jurisdiction being adopted and upheld wrongly in ways that the courts could not effectively review, especially where the arbitrator’s decision was one of fact or discretion. This is particularly wrong where the person to whom that power is given has a financial interest in the outcome. In reality arbitrators have a tendency towards assuming jurisdiction. And the reform creates possibilities of significant abuse, for example by discretionary decisions to shut out jurisdiction challenges.
14. In my experience, parties can be surprised by, and find unjust, even the current position – that arbitrators can confer jurisdiction on themselves even in the limited sense that s. 30 currently allows subject to full challenge before the court. They would find the proposed reform even more unjust.
15. The DAC was right, reflecting centuries of experience, to conclude that anything less than a full challenge would be wrong.
16. As to the Law Commission’s points to the contrary:
 - a. §8.39 suggests the court remains the “final arbiter”. But it does not. If the Paper’s proposal is adopted role is restricted and there will be situations where

the appeal restriction means that a wrongful assumption of jurisdiction cannot be reviewed.

- b. §8.40 says that “*we can acknowledge that the court should have the final say, and that questions of jurisdiction might involve both fact and law. Still, it does not necessarily follow that the Court should hear the evidence afresh ...*”. This misstates the nature of the Paper’s own proposal. An appeal restriction does not simply mean a restriction on rehearing of evidence. If it means anything like what “appeal” means normally in English law, it means a restriction on decision making power. A mere restriction on re-hearing evidence would be a different thing and much less restrictive. It is considered separately below and the answer is that this can be dealt with, and indeed is already adequately dealt with, by the Court’s procedural powers, and does not require legislative reform.
- c. §8.41 suggests that by asking the Tribunal to rule on its jurisdiction the parties are conferring on the tribunal a collateral jurisdiction to decide on its own jurisdiction. This is incorrect. It is true that the parties can agree to confer a collateral jurisdiction to decide on jurisdiction to the tribunal by a separate agreement. But that is a very specific situation and very rare. It requires a separate and unchallenged agreement, an actual agreement on the specific point. Absent such an agreement, and where the respondent challenges jurisdiction under s. 30 – for example and in particular where the respondent denies that the tribunal has any jurisdiction at all – the respondent is absolutely *not* agreeing to confer on the jurisdiction any collateral jurisdiction to decide on its own jurisdiction. Instead, the respondent is saying – “*I do not accept you have any power over me at all. I do not accept there is any agreement conferring jurisdiction on you at all. You do not have power to decide on your own jurisdiction. But given the procedural situation the only realistic stance I have is to challenge jurisdiction in front of you – on the very basis that I then get a re-run on jurisdiction in front of the Court.*” The argument here, therefore, question-beggingly assumes jurisdiction and assumes the proposition that needs to be proven.
- d. §8.42 suggests that it is wrong for a party to “*ask the Tribunal to issue an award*” and then to re-run the issues on a jurisdiction appeal, so that it is said it is not fair to “*ignore what has gone on before the Tribunal*”. This misses the point that an unwilling respondent does not have a free choice, and in reality is compelled to use s. 30. Thus, it does not follow that the fact of a challenge under s. 30 justifies imposing an appeal restriction; the Respondent can justifiably say – I did not want to be there at all. In addition, having a proper rehearing does not necessarily mean that the Court has to “*Ignore*” what has gone on before the Tribunal. The Court can still use its procedural powers to reflect aspects of what has happened before the arbitrators, and can control for example fresh cross-examination – see *The Kalisti* and below. Lord Mance in *Dallah* made clear the Court would find what the arbitrators said very interesting, and this is the practice. So there is no question of the Tribunal being “*ignored*”.
- e. It is also to be borne in mind that s. 69 is not free to consider wholly new points in one important respect as per s. 73 the s. 67 can only address objections made in due time to the Tribunal.
- f. §8.44 suggest that a party who wants the court to make the full inquiry on jurisdiction could use s. 32 or s. 72. This is unrealistic. As noted s. 72 is not a safe route for respondents. As to s. 32, this only works with agreement or with the tribunal’s permission. In reality it is very difficult for a respondent to get a

tribunal's permission, and this is a discretionary decision for a tribunal. So a respondent does not have a free ability to use s. 32.

- g. It has been suggested by some with whom I have discussed this that the position might be different, if a claimant was willing to use s. 32 and a respondent refused. Perhaps in that case, and that case alone, the justification for some form of presumptive validity for s 30 would be stronger. But:
 - i. This is a very hypothetical situation and any (very specific) reform along these lines would be complicated and might have unforeseen consequences.
 - ii. It could undermine the current policy of encouraging s. 30 as the first port of call. That policy appears to me to be a wise one. The DAC proposed it and it has stood the test of time. There is no real evidence of significant problems in practice with "re-runs" (see below).
 - iii. Indeed, the proposal does not change the basic fundamental objection to the Tribunal conferring jurisdiction on itself.
 - iv. What it does, however, illustrate is how wrong it would be for a claimant who *refused* to use s. 32 to confer on the tribunal a presumptive jurisdiction by forcing the respondent into a s. 30 challenge before the tribunal. But that is what the Paper's proposal creates.

Pragmatic management

17. It is important to distinguish between (A) the question of re-hearing in principle – which is necessary in both principle and practice for the reasons already given; and (B) the separate question of whether the re-running of evidential points on appeal, or the advancing of new points, can be problematic.
18. If and to the extent there is a concern about (B), it is entirely possible to deal with (B) without compromising on (A). The Courts have extensive powers to control new points or the inappropriate re-running of evidential points. They can do so by (i) the doctrine of abuse of process eg as to the abusive use of new points; (ii) procedural controls on fresh cross-examination or the admission of new documents or on evidence generally (see *The Kalisti* at [29]); (iii) costs orders against the inappropriate running of points. Indeed, perhaps the strongest protection here is of common sense and forensic realism. A wise party will know that the court will be sceptical of new wholly points and dubious manoeuvring.
19. All this is well known and well recognised, subject to one point. In addition there are powers to strike out a s. 67 without a hearing. The Law Commission refer to some of these powers (§§8.34-8.36). Importantly, however, the Paper does not provide any reasons why those powers are not sufficient.
20. It is possible that some of those powers could be used more vigorously. In particular, the use of abuse of process as a power might benefit from more consideration.
21. But that is a matter for case law development and does not require statutory reform.
22. I can envisage that if it was thought that the Courts had got the wrong balance here, a statutory nudge might in abstract be thought to be helpful. But the paper does not show either (a) a real problem in practice see §8.33 which identifies none or (b) any specific reason why *The Kalisti* strikes the wrong balance; or (c) why this cannot be left to case law development.

23. It seems to me that the wisdom of the Courts addressing particular factual situations, and considering how to use their powers (but bearing in mind that the right starting in principle is a full rehearing) is the soundest basis for development here.

Arguments in favour of reform

24. The key argument for reform is that re-hearing is wrong because it leads to re-runs. I would suggest, however, that re-runs are not wrong in principle. Some form of re-run is an inherent consequence of the fact that (A) arbitrators are given a general first go under s. 30 but (B) it is wrong to give them a presumptive power to determine their own jurisdiction.
25. It is to be borne in mind that the very idea of restrictions on appeal even in court proceedings is not universal. In some other jurisdictions, appeals can be full rehearings even in ordinary court litigation. The idea, therefore, that a full re-run on appeal is somehow inherently problematic is parochial. Even in England and Wales within the court system, the restrictions are discretionary: the Court of Appeal always has the power to make an appeal a re-hearing (52.21); new points can be permitted if they do not cause unfair prejudice, and new evidence can be permitted in discretion. Further, there are examples in arbitration of complete re-runs on appeal being normal: this is what happens in GAFTA arbitration. No-one sees any problem with that, or thinks there are problems with the first hearing just being a dress rehearsal.
26. Nor on analysis is this actually a point of principle. It is a practical and pragmatic point, mostly about cost and efficiency within a legal system. But its force in that regard depends heavily on the assumption that the “primary” jurisdiction has uncontested presumptive jurisdiction, which has force in relation to first instance courts, but not in respect of challenges to an arbitrator’s jurisdiction, as already explained.
27. Indeed, if there is a major problem with re-runs in principle, the logic would lead to dispensing with s. 30, and going straight to court. That however would lose the useful function of using the arbitrators as first port of call. Often, there is no s. 67 appeal.
28. If there were a major problem in practice with re-runs that could lead to some concern but the evidence does not show this, as the Law Commission acknowledge (§8.33). The Law Commission refer to criticisms by one textbook (Merkin and Flannery) but those are out of line with the general view and the bulk of opinion is content with s. 67: see Russell at §8-069. Merkin, Looseleaf, §9.18 is also content.
29. Two cases are cited where the Paper’s proposals were in effect supported (*Tajik* and *Ranko*) but these are not representative. Further:
- a. *Tajik* is out of line with subsequent case law. Further, one of the reasons for Morison J’s approach in *Tajik* was he thought the existing position meant there could be no control of evidence at all and there was no “half-way house” [44]. That is not the law which makes clear that there is a possibility of control of evidence: see *The Kalisti*. Further, the case law could be developed to allow a greater control of evidence were this required, as noted above.
 - b. *Ranko* is an early decision inconsistent with subsequent case law and not since followed. See *Peterson Farms v C& M Farming* [2004] EWHC 121 at [20]. It is no longer regarded as good law.
30. An important point which does not come out of the Paper is that in reality the judiciary are overwhelmingly content with the existing position as the bulk of the decisions show.

For example, the Supreme Court in *Dallah* was entirely content with the principled nature of the existing position: at [24], [26], [96] (“plainly right”). The Law Commission’s reasoning is inconsistent with the reasoning in *Dallah*. (And they do not consider what might be the implications of their reform for *Dallah* itself). See also the reasoned conclusions in favour of the existing position in *Azov v Baltic* at 70 and *Peterson Farms* at [19]-[20] and then in *The Kalisti* at [9]-[29]. It is suggested this consistent reasoning deserves fuller consideration than the Paper gives it.

31. The Law Commission suggests “basic fairness” is challenged by re-hearing (§8.31), and in this regard, the Law Commission raises the problems of new evidence, new arguments, and the idea of the challenge before the arbitrators becoming “dress rehearsal. But it is difficult to see why this is intrinsically a matter of “basic fairness”: (I) In many cases new evidence and new arguments will not be unfair at all even within court systems, there is no reason why they are necessarily unfair. And (II) the argument throughout assumes that the arbitrators have a presumptive jurisdiction so that there is something wrong about a re-run, which is question-begging. Instead, the points made are in truth pragmatic ones.
32. It is possible to conceive of certain practical problems and abusive conduct but there is no reason why those cannot be dealt with by deft use of the court’s procedural and evidential powers, as discussed above. As to the dress rehearsal point, this is unlikely – a party would be ill advised to do things that way, and usually a respondent will give it their best shot before the tribunal.

Conclusion on s. 67 and Question 22

33. Consequently I disagree with Question 22. No good reasons have been advanced to depart from the wise solution adopted by the experts who made up the DAC.

Section 32 – Question 23

34. This question proceeds on a false basis as it assumes s. 32 can be used post a decision by the Tribunal on jurisdiction. That is not the right reading as explained above.
35. If anything should be done, it is at most to clarify that s. 32 cannot be used post jurisdiction award. There is no good policy reason why s. 32 should be available post a jurisdiction award, and indeed this would undermine the structure of the Act: see above.
36. However, that is in any event pretty clearly the right understanding of s. 32. Thus, I suspect that statutory reform is not necessary. The Law Commission has not cited anyone who has relied on *Film Finance v Scotland* in a problematic way.
37. At most, therefore the appropriate course seems to be for the Law Commission to clarify the true reading of s. 32 in their report, given the possibility of confusion caused *Film Finance v Scotland*.

Section 103 – Questions 24

38. I agree with the proposal at §8.57. S. 103 should not be changed, even if s. 67 should be (*contra* to the above).
39. To begin with, there is no case for reform of s. 67 for the reasons given above and the same considerations apply to s. 103, with even more force.

40. Further, as the Law Commission say, even if s. 67 is changed as the Paper proposes the same does not apply to s. 103. I agree with what is said under §§8.52-8.56.
41. However, more can be said. Even if s. 67 should be reformed it would be wrong to change s. 103 in the same way.
- a. First, this would be inconsistent with the New York Convention which assumes a full review of jurisdiction by the enforcing court. It would be inconsistent with *Dallah*.
 - b. Second, would disarm the English courts in the face of international awards in a way that no other system of which I am aware has ever contemplated. The position that resulted would be quite extraordinary:
 - i. An arbitrator in a foreign seated arbitration with objectively no jurisdiction reaches a decision she has jurisdiction, in a process over which the English court has no direct control by way of fairness,
 - ii. and then the English court cannot refuse enforcement even if it would conclude that there was no jurisdiction were the true position investigated;
 - iii. because of restrictions in factual challenge or challenge to discretion imposed by some form of appeal restriction.
 - c. It is suggested any such result cannot be right, and is potentially dangerous.
42. Consequently, no “appeal” restrictions on challenges to awards under s. 103 should be envisaged. However, that result also indicates another reason why it would be unsatisfactory to create a different position to this for challenges to English seated awards.

Thomas Raphael KC

Twenty Essex

15 December 2022

Submitted to Law Commission Consultation: Review of the Arbitration Act 1996
Submitted on 2022-12-15 13:30:31

About you

What is your name?

Name:

[REDACTED]

What is the name of your organisation?

Enter the name of your organisation:

Reed Smith LLP

Are you responding to this consultation in a personal capacity or on behalf of your organisation?

Response on behalf of organisation

If other, please state::

What is your email address?

Email:

[REDACTED]

What is your telephone number?

Telephone number:

[REDACTED]

If you want the information that you provide in response to this consultation to be treated as confidential, please explain to us why you regard the information as confidential. As explained in our privacy notice, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

Please explain to us why you regard the information as confidential:

Consultation questions

Consultation Question 1: 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?

Other

Please share your views below.:

Ultimately, we believe this point is finely poised and are therefore unable to firmly support or oppose the proposal. We set out the opposing views below to the extent that it is helpful to the Commission to understand why at the present status of the debate, we were unable to reach a clear decision either way.

Broadly there are two schools of thought.

Pro inclusion – aid to transparency and consistency

Express confidentiality provisions improve transparency and therefore ultimately aid user access.

A purpose of the Arbitration Act 1996 (Act) was to restate the law of arbitration. When discussing other matters, the Consultation Report records that "It is a virtue of the Act that it recites, in one place, and easily accessible to users, the governing principles of arbitration" (see paragraph 3.46).

In the leading case of *Emmott v Wilson & Partners* [2008] EWCA Civ 184; Lawrence Collins LJ described the fundamental characteristics of privacy and confidentiality in an agreement to arbitrate under English law as being: "really a rule of substantive law masquerading as an implied term".

If the purpose of the Act is to act as a single source then there is no good reason to continue the masquerade. The precise ambit of confidentiality might be left to the Courts but the basic obligation of confidentiality should not be openly stated in the Act, subject to contrary agreement. Well accepted exceptions could be clearly stated: (i) where interests of justice require; (ii) where required by a legal duty; and (iii) to protect or pursue a legal right or in relation to legal proceedings before a court or other competent authority (including another arbitral tribunal).

This would continue the trend seen in arbitration generally towards greater transparency. Practitioners also noted practical considerations:

- Inclusion within the Act makes confidentiality obvious to foreign users of English arbitration rather than the duty being hidden away in case law.
- Practitioners have experienced matters where confidentiality has been a real difficulty in circumstances where awards and information have been disclosed between arbitrations in an ad hoc fashion, with differing tribunals in related cases taking varying approaches and attitudes. Who has jurisdiction to decide such issues? What if Tribunals disagree (as was the case in the referred to matters), placing at least one party in an impossible position. The unsatisfactory state of the law in this area compounded the difficulties encountered, and was far from satisfactory. It generated considerable costs to resolve.

Against inclusion – flexibility is important and codification difficult

Practitioners opposing inclusion noted that parties are already able to (and frequently do) include a provision on confidentiality in their contract and/or to choose arbitration rules/law applicable to the arbitration with reference to confidentiality. Those practitioners take the view that it should remain a matter of party choice.

Although there is a trend towards transparency in international arbitration, the codification of confidentiality has proven difficult to implement, particularly in the context of investment treaty arbitration. The Mauritius Convention on Transparency (2014), designed for investment arbitration, has entered into force in less than 10 States. One of the objectives of the amendments to the ICSID rules was to codify this trend towards more transparency, but there has been no consensus amongst ICSID stakeholders. The lack of consensus can be explained by divergent interests that a State may have in promoting the concept of transparency while protecting in the meantime its private investors.

French qualified practitioners provided an international contrast, noting that under French arbitration law, international arbitration is not confidential per se. It is viewed that such a degree of flexibility is profitable to the arbitration process as a whole given that ultimately it is the parties who know best what they need from the procedure. In practice, the question of confidentiality in international arbitration did not give rise to particular difficulty before French courts.

Consultation Question 2: We provisionally conclude that the Arbitration Act 1996 should not impose a duty of independence on arbitrators. Do you agree?

Agree

Please share your views below.:

We agree that the Act should not impose a duty of independence on arbitrators, for the reasons given in the Consultation Report.

We note in particular that introduction of a duty of independence may impact on trade and shipping arbitration. These arbitrations would potentially be fraught with difficulty in their current form, if there was a statutory requirement for independence.

We agree that impartiality is the true question and this should be the focus of the Arbitrator's duty.

We note that the Commission has considered the question of independence in the context of certain foreign arbitral statutes and institutional rules (paragraphs 3.38 and 3.39 of the Consultation Report). We agree that in international arbitration the approach in one jurisdiction may influence the other. To that end we note a perspective from French law where our analysis is that the trend is towards a focus on impartiality and away from the application of a distinct duty of independence.

Consultation Question 3: 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. Do you agree?

Agree

Please share your views below.:

Overall, we agree with this proposal. As the Consultation Report notes, this obligation is important in providing users with transparency about their prospective or sitting Tribunal members. Stating the duty in the Act would also be welcome in encouraging transparency for the arbitrators, and will hopefully inject better uniformity in how arbitrators behave in this area.

That said we note a risk that imposing a single general statutory duty may create difficulties in commodities/shipping/trade arbitrations. This is because overlapping/multiple appointments are common in these arbitration sectors. The common law has adapted to this, recognising the specificity of such arbitrations (see paragraph 137 – Haliburton Company (Appellant) v Chubb Bermuda Insurance Ltd ([2020] UKSC 48)). The Commission may therefore wish to consider whether a specific exception or softening of the duty in the statute – making it dependent on the custom and practice in relation to specific types of arbitration – may be appropriate.

Consultation Question 4: Should the Arbitration Act 1996 specify the state of knowledge required of an arbitrator's duty of disclosure, and why?

Yes

Please share your views below.:

We agree with this proposal. We consider that it would assist in providing clarity on the matter and avoiding disputes.

Consultation Question 5: 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?

What they ought to know

Please share your views below.:

Our view (albeit not without reservation) is that the arbitrator's duty of disclosure should be based on what they ought to know after making reasonable inquiries. This better reflects the spirit of the overall disclosure test which examines circumstances which might reasonably give rise to justifiable doubts as to impartiality. The need to make inquiries is an extension of the notion of "justifiable doubts". That said we are cognisant that a duty to make inquiries could result in a hard edged decision in circumstances where an arbitrator genuinely has no recollection of the circumstances in issue. However, we would accept that this view may, in practical terms, be difficult to defend. In the end in a test based on actual knowledge is probably impractical.

It may be beneficial for the commission to consider the French law position in relation to this issue. French law has long included a codified disclosure duty (see article 1456, French Civil Procedure Code). Whilst the French Civil Procedure Code was largely silent as to the exact content and scope of the duty of disclosure owed by arbitrators, French law has had the benefit of time to build the regime of the duty to disclose. French case law has stipulated that it is only circumstances that will provoke a reasonable doubt in the minds of the Parties that are concerned by the duty to disclose [Ref: Paris Court of Appeal, 23 Feb. 2021, LERCO c/ National Oil Corporation, No. 18/03068]. This reasonable doubt can refer to a potential conflict of interest that is either: (i) direct, i.e. regarding a party of its counsel; or (ii) indirect, i.e. regarding another arbitrators or an interested third party. Appreciation of the reasonable doubt will depend on the intensity and the closeness of the link.

This is a similar approach to that of the English Supreme Court in *Haliburton Company (Appellant) v Chubb Bermuda Insurance Ltd* ([2020] UKSC 48) and from an international arbitration perspective, it is worth mentioning that French courts have also made it clear that various soft law instruments may be referred to by arbitrators when examining their duty to disclose (such as the IBA Guidelines on conflict of interest in international arbitration).

In addition we note that under Article 1466 of the French Civil Procedure Code, parties must take into account any "notorious" or "publicly available" information of which they are aware that they feel may affect the independence or impartiality of one of the arbitrators. A failure to do so in good time will constitute a waiver of the right to raise this information going forward. This constitutes an exception to the duty to disclose, and the parties have a duty of "curiosity" to seek out such "publicly available" information. The arbitrator's duty of disclosure is partially offset by the parties' "duty of curiosity". These notions have been rigorously examined by French courts. A few limited examples of this concept are that information provided on GAR was considered to be publicly available despite it being placed behind a paywall. [Ref: Paris Court of Appeal, 26 Jan. 2021, Vidatel, No. 19/10666, Dalloz actualité, 22 Feb. 2021, commentary J. Jourdan Marques.] Similarly, information provided on the ICSID site and specialist arbitration publications were also considered to be publicly available despite the fact that you have to pay to access it [Ref: Paris Court of Appeal, 23 Feb. 2021, LERCO c/ National Oil Corporation, No. 18/03068].

Consultation Question 6:

Not Answered

Please share your views below.:

Consultation Question 7:

Not Answered

Please share your views below.:

Consultation Question 8: Should arbitrators incur liability for resignation at all, and why?

Other

Please share your views below.:

Overall we agree that an arbitrator should have the widest possible immunity. We would therefore have answered "no liability for resignation". However, selection of this option would seemingly also mean no liability, even if the resignation is unreasonable.

Whilst we agree with a wide scope of immunity, we do consider that some liability for an arbitration on resignation is appropriate to incentivise fulfilment of the terms of the appointment. A resignation can lead to considerable wasted time and cost and has the potential to be particularly damaging in the case of a sole arbitrator. If the arbitrator has resigned without good reason, it seems to us that it would be helpful for there to be provision in the Act to find an arbitrator liable if circumstances merit it. We would suggest that any such circumstances ought to be exceptional, and what constitutes such exceptional circumstances ought best to be developed through case law. Arbitrators should feel otherwise unconditionally secure in their remit. They should have equivalent (or similar level of) immunity to a judge, given the quasi-judicial function they perform, often in disputes of very high value.

Other than this specific point we agree with the approach of the Consultation Report towards immunity (including for court costs). We note that in this regard, England and Wales is already a standout jurisdiction in this area. There are many jurisdictions where serving as an arbitrator can be perilous. The protection afforded by the Act cannot be over stated in terms of attracting the best and most independent and impartial arbitrators to sit in London, free from coercion and undue influence.

Loss of entitlement to fees and expenses should remain in deserving cases, but arbitrators should feel otherwise unconditionally secure in their remit. In modern arbitration, very large amounts can be at stake. Judges have absolute immunity. In our view, arbitrators sitting in London should have equivalent immunity or at least a similar level immunity. This can only serve to underpin London's position as one of the preeminent jurisdictions for arbitration.

Consultation Question 9: Should arbitrators incur liability for resignation only if the resignation is proved to be unreasonable?

Yes

Please share your views below.:

We would tend to side with keeping a threshold test of reasonableness, but then limiting the arbitrator's liability to their fees and expenses. This should sufficiently dissuade resignations "at will" but not "force" arbitrators to continue sitting for fear of financial consequences, where the parties would be best served by a resignation.

As a footnote to this, we would add that making the liability of an arbitrator clear on the face of the Act should assist in encouraging new younger and diverse candidates to the task of arbitrator in England and Wales, particularly if the current situation is that the liability exposure of an arbitrator is not insurable (as the Consultation Report states at paragraph 5.42).

Consultation Question 10: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 11: 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. Do you agree?

Agree

Please share your views below.:

There is a concern among parties and tribunals that in the absence of statutory underpinning, awards made by adopting summary procedures could be challenged on due process grounds. We therefore support express legislative provision for a summary procedure to decide a claim or an issue, subject to contrary agreement – in other words, we propose that the provision be non-mandatory. We consider the preferable approach is for an amendment to permit the use of summary procedures subject to express opt-out by parties.

If the Act were amended to provide express support for such summary procedures, it would prove attractive to parties when choosing where to arbitrate. Other popular seats such as Singapore and Hong Kong do not have equivalent provision in their arbitration legislation. Some institutional rules of arbitration have developed fast track or so-called 'early dismissal' procedures to provide summary processes. However, these have been crafted in such a way as to cater to due process concerns by being couched in language that the merits of a case are still determined – for example, providing for expedited timeframes or introducing a test such as where a claim or defence is manifestly without merit. Legislative support for summary procedures would provide tribunals with a sure footing to determine cases according to such procedures in appropriate cases and also, potentially, would allow institutions to introduce other summary procedures into their rules.

Consultation Question 12: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 13: We provisionally propose that the Arbitration Act 1996 should stipulate the threshold for success in any summary procedure. Do you agree?

Agree

Please share your views below.:

Consultation Question 14: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 15: 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. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 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?

Not Answered

Please share your views below.:

Consultation Question 17: 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. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 18: We provisionally conclude that the provisions of the Arbitration Act 1996 should not apply generally to emergency arbitrators. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 19: 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?

Not Answered

Please share your views below.:

Consultation Question 20: Do you think that section 44(5) of the Arbitration Act 1996 should be repealed, and why?

Not Answered

Please share your views below.:

Consultation Question 21:

Not Answered

Please share your views below.:

Consultation Question 22:

Not Answered

Please share your views below.:

Consultation Question 23: 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?

Not Answered

Please share your views below.:

Consultation Question 24: We provisionally conclude that our proposed change to section 67 of the Arbitration Act 1996 would not require any similar change to section 103. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 25: 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. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 26: 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?

Not Answered

Please share your views below.:

Consultation Question 27: 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?

Other

Please share your views below.:

We agree that section 69 of the Act serves an important purpose. The right to appeal on a point of law sets England and Wales apart from many major arbitral jurisdictions (in particular outside ex commonwealth nations), including those that have adopted the UNCITRAL Model Law on International Commercial Arbitration. It is a good feature and has served the arbitral community well, in our view. Appeals on points of law can be excluded by agreement, as they often are by institutional rules. It therefore remains the choice of the parties whether they wish to provide for a carefully circumscribed avenue of appeal.

Whilst we appreciate the considerations referred to in paragraphs 9.40 – 9.47 of the Consultation Report, we did receive feedback from practitioners in the transportation and commodities sector that the section 69 process could be improved by providing a route for parties to seek permission to appeal from the Court of Appeal.

Consultation Question 28: Do you think that section 7 of the Arbitration Act 1996 (separability of arbitration agreement) should be mandatory, and why?

Not Answered

Please share your views below.:

Consultation Question 29: 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?

Not Answered

Please share your views below.:

Consultation Question 30: 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?

Not Answered

Please share your views below.:

Consultation Question 31: 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?

Not Answered

Please share your views below.:

Consultation Question 32: Do you think that section 39 of the Arbitration Act 1996 should be amended to refer to “orders” (rather than “awards”), and why?

Not Answered

Please share your views below.:

Consultation Question 33: Do you think that section 39(1) of the Arbitration Act 1996 should be amended to refer to “remedies” (rather than “relief”), and why?

Not Answered

Please share your views below.:

Consultation Question 34: 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?

Not Answered

Please share your views below.:

Consultation Question 35: 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?

Not Answered

Please share your views below.:

Consultation Question 36: We provisionally propose that sections 85 to 87 of the Arbitration Act 1996 (on domestic arbitration agreements) should be repealed. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 37: Do you think that any of the suggestions discussed in Chapter 11 needs revisiting in full, and if so, why?

Please share your views below.:

Consultation Question 38: 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?

Please share your views below.:

[Extracted from email correspondence]

My reason for writing is twofold: (a) to add my voice to one of the issues raised at the recent Chambers conference on the review of the Arbitration Act; and (b) suggest a minor, but important, modification which is not on the current radar but I believe would bring England up to best international standards.

As to the first point, I was not at the Chambers event as I was away on a case at the time, but have spoken with [REDACTED] in the interim. The issue of importance is the applicable law to the arbitration agreement. The current state of the law in the aftermath of Enka will likely catch many parties unawares, and also has the potential to increase costs (both before a tribunal, and most particularly in any subsequent matters before the local courts in England). This risk also is heightened by the likelihood that London may well be viewed, as of now in the post-Brexit era, far more favourably for commercial or treaty arbitration than any EU venue. By that I mean that if foreign parties see the advantage of London in the post-Brexit era and choose it as a venue for their arbitration, then local laws should not case that choice to be undermined. Specifically, if parties choose London as a seat, but have their contract governed by French, German or Italian law for the substantive obligations, as the law in England now stands the validity of the agreement to arbitrate also gets measured by that “foreign” law, which may well then run the risk of unintended adverse consequences being argued for in the future which derive from the drift of the attitude to arbitration held by the CJEU. Of course if parties which to choose such laws to govern both their substantive obligations and their arbitration agreement, but still venue their dispute in London, they could do so. It is the default position as it currently stands which poses difficulties and risks. Thus, and not needing to recall all the various points made during the Chambers event, I hope that a remedy to Enka might be proposed by the Law Commission.

My second point, and something I feel so far is rather a missed opportunity so far, is to propose that England adopts the same gold standard approach to the number of opportunities of “appeal” or “recourse” to the local courts to “one shot” as is known in Switzerland. As the law currently stands, any Arbitration Act application to the High Court runs the potential risk of trundling its way up to the Supreme Court. That means anyone who chooses London as a venue buys into the risk that there could be three levels of court proceedings after the case is over before the tribunal. I know, from discussions over many years with the locals, that this is not seen by them as a bad thing as it ensure the “right” result. However, that might be attractive to the domestic perfectionist or overly punctilious, but it is not what arbitration is really about. One chooses to go to arbitration and gets a result; finality is important and a narrow range of options afterwards both as their potential duration and their substance should be London’s offering. As of now, the latter is part of London’s offering, the former is not. In specific terms I suggest the Law Commission examines whether all Arbitration Act applications to the High Court be confined to that court with no further appeal permitted; or, if that is considered to be too unfamiliar, restrict any further appeal to a point of law of considerable importance to be heard by the Supreme Court so that the practical options are significantly limited. Switzerland confines all international arbitration court issues to its Federal Tribunal in a “one shot” system. Indeed

Ireland does the same and currently [REDACTED] is the judge who hears all such applications and they stop with him and do not proceed upwards. Decision makers in commercial life internationally (as opposed to lawyers who think themselves to be the decision influencers, when they are not) are not quite as interested in perfection of outcome as they are in predictability – predictability of duration, which needs to be as short as is reasonably possible, is a major factor. London is not best-in-class in that regard.

The other points which were explored at the Chambers event are, to my mind, easily addressed by case management within the High Court.

Perhaps a minor other point – s.60 is a local curiosity which displaces a prior-to-dispute agreement on the allocation of costs (e.g. the US approach to costs which one often sees in NY law contracts). I would not die in a ditch for that issue, but perhaps it is a curiosity which could be put out to pasture.

Response ID ANON-PT57-RUR2-U

Submitted to Law Commission Consultation: Review of the Arbitration Act 1996
Submitted on 2022-12-06 17:47:22

About you

What is your name?

Name:
Dr. Michael Reynolds

What is the name of your organisation?

Enter the name of your organisation:

Chartered Arbitrator, Solicitor. (Module Leader at BPP University College in International Dispute Resolution and Arbitration and Visiting Senior Fellow at the London School of Economics).

Are you responding to this consultation in a personal capacity or on behalf of your organisation?

Personal response

If other, please state::

What is your email address?

Email:
[REDACTED]

What is your telephone number?

Telephone number:
[REDACTED]

If you want the information that you provide in response to this consultation to be treated as confidential, please explain to us why you regard the information as confidential. As explained in our privacy notice, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

Please explain to us why you regard the information as confidential:

Consultation questions

Consultation Question 1: 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?

Disagree

Please share your views below.:

Arbitration proceedings are confidential, and this may be agreed expressly in the arbitration agreement or clause but sometimes not. Practice requires that it is confidential. In my view as a practicing arbitrator undertaking both domestic and international cases over the last 40 years and acting as solicitor in many commercial and construction matters, whilst there has never been a misunderstanding about the need for confidentiality. Whilst that is my experience, nevertheless I think it may be preferable that it be expressly stated in statutory terms so there is no doubt.

International parties come to London because of the credibility of our system and the integrity of our judges, arbitrators and the legal profession. I think this may possibly underpin that perception.

Consultation Question 2: We provisionally conclude that the Arbitration Act 1996 should not impose a duty of independence on arbitrators. Do you agree?

Disagree

Please share your views below.:

There have been a number of cases regarding a lack of independence and whilst there is awareness of this by those practicing arbitration it would simply clarify what everyone already understands. I do think in a minority of cases it might deter those who would abuse the system.

Consultation Question 3: 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. Do you agree?

Agree

Please share your views below.:

Most certainly. This is important where we are competing with other popular institutions around the world and for London to maintain its lead this would undermine the importance; we attach to independence and impartiality.

Consultation Question 4: Should the Arbitration Act 1996 specify the state of knowledge required of an arbitrator's duty of disclosure, and why?

Yes

Please share your views below.:

It may be very helpful to do so to spell out what circumstances give rise to the duty where the Arbitrator ought reasonably to know or knew of any conflict of interest/relationship etc. that might give rise to the duty.

Consultation Question 5: 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?

What they ought to know

Please share your views below.:

What they ought to know or reasonably ought to know after making reasonable enquiry because to do otherwise would expose them to a perception of possible bias. Non-disclosure of interest may lead to removal of the arbitrator as in the case e.g. of Coffley v Bingham.

Consultation Question 6:

Only if necessary

Please share your views below.:

Although I think the point Their Lordships made regarding the application of a process that the parties have confidence in, and likely to lead to conclusions of fact in which they could have particular confidence, a good one.

Consultation Question 7:

Agree

Please share your views below.:

I think the proviso covers the point I made above, and the provision may avoid such cases as you cited.

Consultation Question 8: Should arbitrators incur liability for resignation at all, and why?

No liability for resignation

Please share your views below.:

The arbitrator's duty is to resolve the dispute save if he or she becomes incapable through illness or some incapacity which is unforeseen at the time of appointment.

Arbitrators should have insurance and it maybe that this should be covered. I doubt if this would be popular with colleagues.

Consultation Question 9: Should arbitrators incur liability for resignation only if the resignation is proved to be unreasonable?

Yes

Please share your views below.:

Consultation Question 10: 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. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 11: 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. Do you agree?

Agree

Please share your views below.:

I think this would be most useful bearing in mind the effectiveness of such proceedings in court.

Consultation Question 12: 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. Do you agree?

Agree

Please share your views below.:

I think it very important that the tribunal take the parties with them on this, and that this procedure is agreed by a Consent Order to that effect.

Consultation Question 13: We provisionally propose that the Arbitration Act 1996 should stipulate the threshold for success in any summary procedure. Do you agree?

Agree

Please share your views below.:

That may be useful in determining costs.

Consultation Question 14: 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. Do you agree?

Agree

Please share your views below.:

Again, for reason of analogy to the civil procedure rules.

Consultation Question 15: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 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?

Yes

Please share your views below.:

That would save further time and costs and further applications.

Consultation Question 17: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 18: We provisionally conclude that the provisions of the Arbitration Act 1996 should not apply generally to emergency arbitrators. Do you agree?

Agree

Please share your views below.:

For reasons of expediency and effectiveness.

Consultation Question 19: 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?

Agree

Please share your views below.:

This is entirely a matter for the jurisdiction of arbitrators and not the courts whose time is at a premium.

Consultation Question 20: Do you think that section 44(5) of the Arbitration Act 1996 should be repealed, and why?

No

Please share your views below.:

I think this reserve power of the court is supportive of the dilemma which would otherwise arise if the tribunal is incapable of acting or any institution or person in such a position is incapable of acting effectively. The court is the backstop when all else has failed to act.

Consultation Question 21:

Peremptory order

Please share your views below.:

The Peremptory Order is more effective in my experience.

Consultation Question 22:

Agree

Please share your views below.:

A rehearing is not necessary as it is a matter of dealing with the key issues on which the Award on jurisdiction was made and seeking the parties' submissions thereon.

Consultation Question 23: 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?

Yes

Please share your views below.:

Yes, basically for the same reasons, but also reasons of costs.

Consultation Question 24: We provisionally conclude that our proposed change to section 67 of the Arbitration Act 1996 would not require any similar change to section 103. Do you agree?

Agree

Please share your views below.:

I do not see a particular difficulty with the application of the New York Convention whereby Section 67 amendments would not constitute a ground for refusal of enforcement.

Consultation Question 25: 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. Do you agree?

Agree

Please share your views below.:

Yes, as this makes it clearer instead of saying "set aside" as in section 67(3) (c).

Consultation Question 26: 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?

Agree

Please share your views below.:

Yes, because the application in that case has no merit and the applicant loses the application and costs follow that event.

Consultation Question 27: 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?

Agree

Please share your views below.:

I think the section is fair and balanced.

Consultation Question 28: Do you think that section 7 of the Arbitration Act 1996 (separability of arbitration agreement) should be mandatory, and why?

Yes

Please share your views below.:

Yes, for the sake of clarity and reduces possibly the risk of argument.

Consultation Question 29: 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?

Agree

Please share your views below.:

There may be some cases where there is good reason not to grant such a stay.

On the other hand, I wonder if it does not offend the New York Convention in not recognizing the arbitration agreement. Such a provision must therefore be carefully worded to avoid any misunderstanding.

Consultation Question 30: 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?

Other

Please share your views below.:

I think in the first instance the parties should apply to the tribunal for a determination but if that is refused then they may apply to the court. This is also something the parties might agree in their arbitration agreement.

Consultation Question 31: 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?

Yes

Please share your views below.:

This would be helpful. Remote hearings and electronic disclosure have become a norm since Covid. Most of my domestic cases have been conducted online some with virtual hearings. I have conducted preliminary case management conferences online in international matters and one by a virtual hearing.

In major cases, where witness evidence is important, I prefer hearings in person as cross examination is more effective in that traditional setting.

The question of costs often encourages such directions.

Consultation Question 32: Do you think that section 39 of the Arbitration Act 1996 should be amended to refer to "orders" (rather than "awards"), and why?

No

Please share your views below.:

I see no reason for amending this section.

Consultation Question 33: Do you think that section 39(1) of the Arbitration Act 1996 should be amended to refer to "remedies" (rather than "relief"), and why?

Yes

Please share your views below.:

Remedy is better as relief seems outdated. I do not use the term relief when lecturing on the subject.

Consultation Question 34: 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?

Agree

Please share your views below.:

Yes, as it makes it clearer than the word "process" which is too general.

Consultation Question 35: 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?

Agree

Please share your views below.:

Yes, because it sets the parameters for the granting of leave.

Consultation Question 36: We provisionally propose that sections 85 to 87 of the Arbitration Act 1996 (on domestic arbitration agreements) should be repealed. Do you agree?

Other

Please share your views below.:

Not sure on this.

Consultation Question 37: Do you think that any of the suggestions discussed in Chapter 11 needs revisiting in full, and if so, why?

Please share your views below.:

I would need to give further consideration to this.

Consultation Question 38: 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?

Please share your views below.:

I need to give this further consideration.

Response ID ANON-PT57-RUB5-E

Submitted to Law Commission Consultation: Review of the Arbitration Act 1996
Submitted on 2022-12-15 16:43:40

About you

What is your name?

Name:

[REDACTED]

What is the name of your organisation?

Enter the name of your organisation:

RICS (Royal Institution of Chartered Surveyors)

Are you responding to this consultation in a personal capacity or on behalf of your organisation?

Response on behalf of organisation

If other, please state::

What is your email address?

Email:

[REDACTED]

What is your telephone number?

Telephone number:

[REDACTED]

If you want the information that you provide in response to this consultation to be treated as confidential, please explain to us why you regard the information as confidential. As explained in our privacy notice, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

Please explain to us why you regard the information as confidential:

Consultation questions

Consultation Question 1: 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?

Agree

Please share your views below.:

In ADR the issue of confidentiality is paramount to the concept of having disputes determined outside of the public court system, both in the UK and internationally. In many cases, a key factor for parties choosing to use an ADR method such as arbitration, is because it is confidential. Confidentiality is sometimes erroneously confused or merged with the issue of transparency. Transparency is different in the two areas of the public arena (the courts) and private processes (ADR). In the public arena transparency is the openness and availability of information to the public at large so as to ensure responsibility and accountability are correctly adopted and applied. To this is added the concept of precedent in public arena decision making and the impact that has on how disputes and decisions are determined.

In arbitration transparency is just as important to ensure a fair resolution on an impartial basis without unnecessary delay or expense (Ref Para 1 of Part 1 AA96) but such transparency is that required within the framework of the arbitration structure and the confines of those involved with that dispute and is therefore different to the wider requirements for transparency in the public arena. Therefore, the requirement for transparency in the public arena must not be confused with the importance of confidentiality in private processes or act as an impediment to confidence in, and the reliability of arbitration.

Certain statutory arbitrations have moved away from confidentiality to transparency. The publication of Awards in the public arena and other information about the process and progress of an arbitration required to be disclosed to third parties in statutory based arbitrations has given rise to the law of unexpected consequences in terms of the perception of UK arbitral independence and confidentiality.

One example is that of Pubs Code Adjudicator Awards where the process and the arbitrator's administration of the dispute is shared with the CI Arb, which is the body which appoints the arbitrator, and PCA as third parties impacting on the principles of confidentiality but promoted on the basis of transparency and openness of the decisions to assist as precedents and conformity of decision making. There is also the imposition of timescales placed on the parties and the arbitrator as decision maker, detracting from the concept of an arbitration belonging to the parties and now governed by others. Therefore, RICS agrees that the AA96 should not include provisions dealing with confidentiality. If a dispute is determined by arbitration pursuant to the Arbitration Act, then there should be no prescriptive requirement for confidentiality. If an ADR process is established by statute, which looks like

arbitration but does not follow the Arbitration Act to the letter, e.g. it expressly provides that the process is not confidential, then it should be called something other than arbitration and the Arbitration Act should not apply.

RICS agrees that the law of confidentiality in arbitration is best developed by the courts and accepts that there is a wider consideration regarding the publication of arbitration awards where there is a clear public interest in doing so. The view of RICS is that the public interest imperative must take priority.

RICS does however acknowledge that there is a particular issue with rural arbitrations, under agricultural legislation, with regards to matters such as notices to quit or using arbitrated rents as comparables in future arbitrations. The latter is more of an issue because schedule 2 of the Agricultural Holdings Act 1986 Act expressly anticipates arbitrated rents being available such that the arbitrator shall consider "...available evidence with respect to the rents (whether fixed by agreement between the parties or by arbitration)"

One solution could be to consider the implementation of arbitral rules where the parties could agree that awards on rents, for example, are not confidential and can be provided in the context of other arbitrations on rents. A set of arbitral rules could be agreed and supervised by RICS and parties could agree to be bound by them. A database of arbitrated rents could be maintained and made available to RICS members.

Consultation Question 2: We provisionally conclude that the Arbitration Act 1996 should not impose a duty of independence on arbitrators. Do you agree?

Agree

Please share your views below.:

RICS agrees with the Law Commission that there should be no new express duty of independence.

RICS agrees with the Law Commission that there is a fundamental difference between impartiality and independence.

RICS is of the view that the requirement for an arbitrator to be impartial is necessary, but that a requirement to be also independent in neither necessary or practical. Parties involved in disputes concerning land, property and construction often choose arbitration because an arbitrator can be appointed who is a subject matter expert. It follows that someone who is an expert in a sector or market will have regular involvements with others who also operate in the sector or market to the extent that they will not be wholly independent. This does not mean that, when acting as an arbitrator, they are unable to act impartially.

RICS, guidance for chartered surveyors acting as arbitrators defines the concepts of "involvements" and "conflicts of interest" and provides a traffic light system with examples of when an involvement may lead to a conflict of interest.

RICS also emphasises to members who act as arbitrators the importance of perception of the possibility of bias when considering if a conflict of interest exists.

Consultation Question 3: 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. Do you agree?

Agree

Please share your views below.:

RICS is of the view that in this regard however 'justifiable doubts' needs to be carefully worded and refer to the fair-minded observer.

When appointing arbitrators, RICS requires potential appointees to disclose any circumstances that might reasonably give rise to justifiable doubts as to their impartiality before any appointment is made. In many circumstances disclosures made by potential appointees are passed on to the parties who are invited to make representations as to the appropriateness of an appointment.

RICS provides chartered surveyors and other professionals who are on the RICS President's Panel of Arbitrators with substantive training on this issue.

Consultation Question 4: Should the Arbitration Act 1996 specify the state of knowledge required of an arbitrator's duty of disclosure, and why?

Yes

Please share your views below.:

Yes, to the extent that arbitrators should understand there is a duty to disclose.

Case law (*Halliburton v Chubb*) has established the extent that an arbitrator should be expected to understand what is, and what is not, a conflict of interest, and undertake the necessary reasonable checks to ascertain if there are matters that need to be disclosed, and to disclose to parties and/or appointing authorities so as to retain confidence in the arbitration process. RICS provides guidance to surveyors who act as arbitrators, which includes a reminder of the ongoing duty of disclosure to avoid any surprises part way through a reference.

Consultation Question 5: 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?

Actual knowledge

Please share your views below.:

RICS believes that the duty should be based on the arbitrator's actual knowledge and also what they ought to know after making reasonable inquiries. The doubling of the duty here provides assurance.

Consultation Question 6:

More broadly justified

Please share your views below.:

RICS believes that the requirement of a protected characteristic in an arbitrator should be enforceable if it can be more broadly justified (as suggested by the House of Lords).

Consultation Question 7:

Agree

Please share your views below.:

RICS agrees with the Law Commission to adopt the language of the Equality Act 2010

However, RICS believes that this should be subject to the exception reading 'unless in the context of that arbitration, requiring the arbitrator to have that protected characteristic is a reasonable requirement for achieving a legitimate aim'.

Consultation Question 8: Should arbitrators incur liability for resignation at all, and why?

Other

Please share your views below.:

Yes, but RICS believes that an arbitrator should only incur liability for resignation if the resignation is demonstrably unreasonable. The arbitrator should have a duty to complete the appointment unless they have good reason not to do so.

Consultation Question 9: Should arbitrators incur liability for resignation only if the resignation is proved to be unreasonable?

Yes

Please share your views below.:

Yes, but RICS believes only in respect of 'wasted costs' and capped at the arbitrator's costs and the reasonable 'wasted costs' of the parties – i.e. consequential losses should not be included.

Consultation Question 10: 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. Do you agree?

Agree

Please share your views below.:

RICS believes that this will allow arbitrators to take a more robust approach to a section 24 application if they felt it appropriate to do so.

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.

Consultation Question 11: 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. Do you agree?

Other

Please share your views below.:

RICS considers that where parties are not able to agree a procedure, the arbitrator should have authority to decide whether or not to adopt a summary procedure to decide a claim or an issue. In doing so, the arbitrator should have regard to the relative complexity/simplicity of the issues to be decided.

Consultation Question 12: 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. Do you agree?

Agree

Please share your views below.:

If both parties decide not to adopt a summary procedure, the arbitrator should nevertheless remain duty bound to avoid unnecessary costs and delay. If the parties are consulted and agree to a summary procedure the arbitrator should adopt the procedure. If the parties are unable to agree e.g. one party wants the arbitrator to adopt a summary procedure and the other does not, the final decision should rest with the arbitrator, who should have regard to the requirements under Sections 1 and 33 to avoid unnecessary costs and delay

Consultation Question 13: We provisionally propose that the Arbitration Act 1996 should stipulate the threshold for success in any summary procedure. Do you agree?

Agree

Please share your views below.:

Consultation Question 14: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 15: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 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?

Yes

Please share your views below.:

For example, in rural arbitrations, RICS believes that, having the power to inspect property under the control of a third party would help avoid delay and expense especially in rent reviews when inspecting comparables that may be in the occupation of another tenant who is reluctant to get involved. The tenant can give access with a clear conscience of not having a choice when answering to the party to the arbitration who may be his neighbour. This would also assist landlords who may have good comparables but are unable to present them if the tenants (of the comparables) refuse access.

In addition, RICS is of the view that the circumstances in which such an order can be made could be scheduled and exclude joining a third party to the arbitration for the purpose of awarding costs.

Consultation Question 17: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 18: We provisionally conclude that the provisions of the Arbitration Act 1996 should not apply generally to emergency arbitrators. Do you agree?

Agree

Please share your views below.:

RICS asks whether a Schedule should be added to the Act prescribing which parts apply to the appointment of emergency Arbitrators?

Consultation Question 19: 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?

Agree

Please share your views below.:

RICS agrees with the assessment and findings of the Law Commission under this issue with the following supportive and additional comments:

RICS agrees with the Law Communication recommendation that there should be a non-mandatory provision which gives arbitrators the power to adopt procedures to decide issues which have no real prospect of success and no other compelling reason to continue to a full hearing.

RICS agrees with witness statements by deposition only.

RICS is neutral on the issue of amendments for emergency arbitrations but supports the Law Commission proposals.

The appealing of Awards must be carefully and strictly defined so as to respect the process of ADR and confidentiality as referred to above.

Consultation Question 20: Do you think that section 44(5) of the Arbitration Act 1996 should be repealed, and why?

No

Please share your views below.:

RICS is of the opinion the section 44(5) can be retained as its removal does not damage nor is it in conflict with the general provisions of sections 44(3) and 44(4). However, its removal may remove an important power available to the courts to ensure arbitral proceedings can continue if a moribund situation arises through a lack of powers available to the parties

Consultation Question 21:

Peremptory order

Please share your views below.:

Option (1). This reinforces the integrity of the arbitration process without removing the ultimate referral to the court by a dissenting party. It is also important to preserve the primacy of the arbitral regime and there is merit in the emergency arbitrator providing their own mechanism to enforce their own award.

Consultation Question 22:

Agree

Please share your views below.:

RICS submits that challenges under S67 of the AA96 should be by way of an Appeal and not by way of a rehearing. This approach will reinforce the status of the Arbitral Tribunal, strengthen the finality of Awards and ensure jurisdiction is seen as an issue on which the arbitrator is qualified to determine. RICS agrees with the Law Commission that amendments are necessary to clarify the remedies available to the court and to confirm that a Tribunal when determining jurisdiction can issue a costs order whether it finds it has jurisdiction or not. In the context of domestic arbitration. RICS believes that this follows the general principles when challenging an award in other ways. Allowing a rehearing potentially detracts from the arbitrator's authority and the purpose of arbitration under section 1. However, RICS draws attention to the relationship between Section 67 and Section 103. This is important in an international context and ensuring that London remain a major seat for international arbitration. There are concerns about limiting the parties' options under Section 67 and either doing the same under Section 103 to maintain consistency or not doing so and creating a divergence of approach between challenges under Section 67 and Section 103. RICS believes the current balance may well be about right with no real need for reform.

Consultation Question 23: 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?

No

Please share your views below.:

Section 32 circumstances are different as a Court hearing could be first and an arbitrator may actually want the court to decide instead. In addition, we have responded no because that would preclude a party who is not engaged with the tribunal on the question of jurisdiction from making their case to the court de novo.

Consultation Question 24: We provisionally conclude that our proposed change to section 67 of the Arbitration Act 1996 would not require any similar change to section 103. Do you agree?

Agree

Please share your views below.:

See further comment at question 22.

Consultation Question 25: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 26: 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?

Agree

Please share your views below.:

Consultation Question 27: 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?

Agree

Please share your views below.:

Yes. RICS agrees with the Law Commission that the existing arrangements under section 69 are satisfactory and should not be unsettled.

Consultation Question 28: Do you think that section 7 of the Arbitration Act 1996 (separability of arbitration agreement) should be mandatory, and why?

Yes

Please share your views below.:

Separability is intrinsically linked with the principles of arbitration set out in section 1 – without unnecessary delay or expense. If parties enter into an arbitration agreement in good faith, then that agreement (especially if part of a larger contractual arrangement) should not be voidable. To leave the door open of arguing the arbitration clause is void, for example because the rest of the obligations under a contract have been disposed of, leaves a complainant party with nowhere to go and facing unnecessary delay and expense, and litigation being the only route to a remedy. In addition, RICS believes that this will ensure certainty and fairness and will facilitate the resolution of disputes

Consultation Question 29: 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?

Agree

Please share your views below.:

RICS agrees with the Law Commission that there appears to be a drafting error at section 9 and that this should be corrected to permit an appeal.

Section 32 often arises, and section 45 arises on occasions in property disputes. The current wording has been found to be satisfactory to date and therefore RICS would prefer that these provisions are not reduced apart from simplification of language if that is felt appropriate.

Consultation Question 30: 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?

Other

Please share your views below.:

RICS believes that if these sections are to be reformed in this way, then the discretion already available to the court such that 'the court may determine the question raised' also needs to be addressed otherwise simply removing the courts discretion later in those clauses (32(2)(iii) and 45(2)(b)) seems pointless because the discretion remains but without any guidance on how it should be exercised.

We also question whether the removal of the express provisions would in fact result in the growth of applications that had little impact on costs and were significantly delayed? The express provisions might well act as a regulator in this respect?

In addition, it is useful that there is a higher hurdle to avoid the identified possibility for an abdication of responsibility by the tribunal and the potential abuse of the process by one or more of the parties. The existing wording also ensures applicants consider whether or not to make the applications and do not make them unnecessarily or without due thought and consideration.

Consultation Question 31: 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?

No

Please share your views below.:

RICS agrees with the Law Commission that technology is sufficiently accommodated in the AA96 as currently drafted

RICS believes that Section 34 is sufficient, combined with the ability of the parties to agree procedural matters.

Consultation Question 32: Do you think that section 39 of the Arbitration Act 1996 should be amended to refer to “orders” (rather than “awards”), and why?

Not Answered

Please share your views below.:

RICS, agrees with the Law Commission’s recommendation that reference to Orders in section39 should be adopted and “provisional awards” expunged. We believe that this will provide clarity and, in some instances, could potentially speed up the arbitration process and progress to a final award.

Consultation Question 33: Do you think that section 39(1) of the Arbitration Act 1996 should be amended to refer to “remedies” (rather than “relief”), and why?

Yes

Please share your views below.:

Yes, in order to have consistency of language

Consultation Question 34: 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?

Not Answered

Please share your views below.:

RICS agrees with the Law Commission’s recommendation to codify the law on amendments to section 70 so that there is clarity on the status and implications of a material correction.

Consultation Question 35: 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?

Agree

Please share your views below.:

Consultation Question 36: We provisionally propose that sections 85 to 87 of the Arbitration Act 1996 (on domestic arbitration agreements) should be repealed. Do you agree?

Agree

Please share your views below.:

Consultation Question 37: Do you think that any of the suggestions discussed in Chapter 11 needs revisiting in full, and if so, why?

Please share your views below.:

No. RICS believes that this is not required at this stage.

Consultation Question 38: 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?

Please share your views below.:

No

Response ID ANON-PT57-RUKR-M

Submitted to Law Commission Consultation: Review of the Arbitration Act 1996
Submitted on 2022-12-09 17:14:50

About you

What is your name?

Name:

Ian Salisbury

What is the name of your organisation?

Enter the name of your organisation:

Ian Salisbury Ltd

Are you responding to this consultation in a personal capacity or on behalf of your organisation?

Personal response

If other, please state::

What is your email address?

Email:

[REDACTED]

What is your telephone number?

Telephone number:

[REDACTED]

If you want the information that you provide in response to this consultation to be treated as confidential, please explain to us why you regard the information as confidential. As explained in our privacy notice, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

Please explain to us why you regard the information as confidential:

Consultation questions

Consultation Question 1: 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?

Agree

Please share your views below.:

Better left to common law

Consultation Question 2: We provisionally conclude that the Arbitration Act 1996 should not impose a duty of independence on arbitrators. Do you agree?

Agree

Please share your views below.:

s.33 is fine.

Consultation Question 3: 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. Do you agree?

Agree

Please share your views below.:

This is common sense

Consultation Question 4: Should the Arbitration Act 1996 specify the state of knowledge required of an arbitrator's duty of disclosure, and why?

No

Please share your views below.:

Best left to common law

Consultation Question 5: 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?

Other

Please share your views below.:

N/A - see above

Consultation Question 6:

Other

Please share your views below.:

I am a domestic technical construction arbitrator - something of a rare breed these days; and I am not a lawyer although I understand the law. I am an architect. It is important that the parties should be able to appoint an arbitrator with particular knowledge. If the parties agree to appoint an Ishmaeli arbitrator they should be free to do so. I was once appointed by two orthodox Jewish parties, as a Christian, to determine a boundary issue because I was not subject to Beth Din constraints. That was important to both parties in the dispute. (See AA s.48.(5)(b))

Consultation Question 7:

Disagree

Please share your views below.:

See previous answer.

Consultation Question 8: Should arbitrators incur liability for resignation at all, and why?

Other

Please share your views below.:

Treat it as a contract: simple.

Consultation Question 9: Should arbitrators incur liability for resignation only if the resignation is proved to be unreasonable?

Other

Please share your views below.:

See previous answer

Consultation Question 10: 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. Do you agree?

Other

Please share your views below.:

An arbitrator cannot be involved in such a process. The AA makes adequate provision to revoke an arbitrator's authority or to apply to the Court if there is no agreement between the parties. The AA is fine just as it is.

Consultation Question 11: 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. Do you agree?

Other

Please share your views below.:

Summary procedure is fine if the parties have agreed to it; not otherwise.

Consultation Question 12: 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. Do you agree?

Disagree

Please share your views below.:

Arbitration is not mediation. See previous answer.

Consultation Question 13: We provisionally propose that the Arbitration Act 1996 should stipulate the threshold for success in any summary procedure. Do you agree?

Other

Please share your views below.:

There can be private rules for this if the parties wish to agree to summary procedures. Don't complicate the AA; it's fine as it is.

Consultation Question 14: 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. Do you agree?

Disagree

Please share your views below.:

Put this into rules, if the parties want it; not the AA, which is fine as it is.

Consultation Question 15: 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. Do you agree?

Disagree

Please share your views below.:

Too restricting. The AA is fine as it is.

Consultation Question 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?

No

Please share your views below.:

It should never be possible to force a party into arbitration.

Consultation Question 17: 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. Do you agree?

Other

Please share your views below.:

N/A. See previous answer. These complications are not apposite to the process.

Consultation Question 18: We provisionally conclude that the provisions of the Arbitration Act 1996 should not apply generally to emergency arbitrators. Do you agree?

Agree

Please share your views below.:

Best dealt with by rule. See for instance ICC 2021 Rules.

Consultation Question 19: 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?

Agree

Please share your views below.:

If the parties consider that rules are appropriate, they can agree to them.

Consultation Question 20: Do you think that section 44(5) of the Arbitration Act 1996 should be repealed, and why?

No

Please share your views below.:

Arbitration has to be consensual. This will allow for all kinds of mischief as the arbitration agreement will be unsettled.

Consultation Question 21:

Other

Please share your views below.:

N/A. See above. This is an issue for rules, not the AA.

Consultation Question 22:

Other

Please share your views below.:

I was not aware that there was an issue with s.67. The constraints of ss.70 and 73 apply. Clearly if a party wishes to continue with the arbitral process after an s.67 application has been made, then they should be at risk.

Consultation Question 23: 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?

Other

Please share your views below.:

Same a previous question. If a party wishes to question the arbitrator's decision on jurisdiction then there should be a risk attached to accruing costs in the process once the application is made. I cannot think that this requires any change.

Consultation Question 24: We provisionally conclude that our proposed change to section 67 of the Arbitration Act 1996 would not require any similar change to section 103. Do you agree?

Not Answered

Please share your views below.:

This question is outside my area of interest, and I don't understand it anyway.

Consultation Question 25: 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. Do you agree?

Other

Please share your views below.:

The Court already has the power to set aside the award. If it is to be of "no effect" is that not the same? The beauty of the AA is that it is very well written and largely without ambiguity. These words look dangerous to me.

Consultation Question 26: 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?

Agree

Please share your views below.:

Although this is illogical, there is merit in being able to protect the hapless defendant.

Consultation Question 27: 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?

Agree

Please share your views below.:

Consultation Question 28: Do you think that section 7 of the Arbitration Act 1996 (separability of arbitration agreement) should be mandatory, and why?

No

Please share your views below.:

My guess is that you are contemplating a removal of the ability of the parties to reach an agreement that ousts severability. If they are so stupid as to go for that, then so be it.

Consultation Question 29: 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?

Disagree

Please share your views below.:

Too much opportunity for mischief

Consultation Question 30: 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?

No

Please share your views below.:

Here I think that the AA should be varied. In my view it is not appropriate for the tribunal to have any involvement in these two sections. It should be either agreement between the parties or the decision of the court.

Consultation Question 31: 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?

No

Please share your views below.:

A bear trap. Leave well alone. If the parties wish to adopt a protocol, fine; but treat it as a rule.

Consultation Question 32: Do you think that section 39 of the Arbitration Act 1996 should be amended to refer to "orders" (rather than "awards"), and why?

Yes

Please share your views below.:

This only refers to the heading, I presume. It could be tidied up, for there cannot be such a thing as a "provisional" award: it's either an award or it's not, and the main text makes it clear that it's not. There was a great deal of fuss over this when the AA came into force, but it amounted to nothing. Not a big deal.

Consultation Question 33: Do you think that section 39(1) of the Arbitration Act 1996 should be amended to refer to "remedies" (rather than "relief"), and why?

Yes

Please share your views below.:

If you're going to the trouble of ironing out the vocab in this section, then I agree, "remedy" is the better word for easy comprehension.

Consultation Question 34: 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 appellants was notified of the result of that request. Do you agree?

Disagree

Please share your views below.:

I guess you're not talking about the slip rule procedure. At present s.70 does not engage with s.57. Are you saying that it should? If so, then the extant process runs perfectly well and I see not need for any change - so please leave it just as it is.

Consultation Question 35: 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?

Agree

Please share your views below.:

Consultation Question 36: We provisionally propose that sections 85 to 87 of the Arbitration Act 1996 (on domestic arbitration agreements) should be repealed. Do you agree?

Disagree

Please share your views below.:

There will come a time when domestic arbitrations regain popularity in the construction industry. Such arbitrations have largely been ousted by adjudications under the Housing Grants, Construction and Regeneration Act. But there is now a growing discontent with adjudication as it gains unnecessary complexity. Lawyers will then wake up to the simplicity and efficiency of the AA and write a set of rules that ensures a rapid determination of the dispute, taking costs into consideration.

Consultation Question 37: Do you think that any of the suggestions discussed in Chapter 11 needs revisiting in full, and if so, why?

Please share your views below.:

Consultation Question 38: 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?

Please share your views below.:

The AA is a well-written and apposite statute. It works well. The problem in my area of dispute resolution (domestic, construction) is with adjudication.

Response ID ANON-PT57-RU1E-D

Submitted to Law Commission Consultation: Review of the Arbitration Act 1996
Submitted on 2022-11-06 19:56:56

About you

What is your name?

Name:
Adam Samuel

What is the name of your organisation?

Enter the name of your organisation:
Adam Samuel

Are you responding to this consultation in a personal capacity or on behalf of your organisation?

Personal response

If other, please state::

What is your email address?

Email:
[REDACTED]

What is your telephone number?

Telephone number:
[REDACTED]

If you want the information that you provide in response to this consultation to be treated as confidential, please explain to us why you regard the information as confidential. As explained in our privacy notice, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

Please explain to us why you regard the information as confidential:

N/A

Consultation questions

Consultation Question 1: 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?

Disagree

Please share your views below.:

It would help to state what the law is thought to be at the moment. Just ducking a question does not help arbitration users.

There are plenty of formulations which meet the English law exceptions reasonably well, namely "required by another legal requirement" and necessary to enable justice to be done in another dispute.

Consultation Question 2: We provisionally conclude that the Arbitration Act 1996 should not impose a duty of independence on arbitrators. Do you agree?

Disagree

Please share your views below.:

Such a conclusion shames English arbitration and results in its slightly odd status amongst arbitration users.

I appreciate the concerns about arbitrator-advocates in commodity trade body cases. These procedures are actually anomalous and should disappear. If you want them to continue, they can be brought within the notion of independence in that the fact of previously advocating a position does not necessarily make the arbitrator less independent than plenty of other people.

The law does not need changing here.

Consultation Question 3: 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. Do you agree?

Agree

Please share your views below.:

We should remove the exceptions suggested by one of the judgements in Haliburton for sporting, shipping and commodities. Disclosure is crucial and this is another area where English is embarrassing internationally even though the IBA Guidelines on Conflicts of Interest allow these exceptions.

Consultation Question 4: Should the Arbitration Act 1996 specify the state of knowledge required of an arbitrator's duty of disclosure, and why?

Yes

Please share your views below.:

All that is necessary is a standard of reasonable care. You cannot disclose what you don't know.

Consultation Question 5: 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?

What they ought to know

Please share your views below.:

First two together.

Consultation Question 6:

Only if necessary

Please share your views below.:

It may be necessary for international purposes to disconnect the link between race and nationality found in the Equality Act. In this way, you may have to preserve the right of arbitrators and appointing bodies to appoint people of neutral nationality.

Otherwise, there has never been any basis for discrimination on the basis of protected characteristics that are not relevant to the standards to be applied by the tribunal.

Consultation Question 7:

Agree

Please share your views below.:

It is a bit vague.

You should be more precise. The Court of Appeal in Hashwami would have ruled out a race-based choice except where the religion concerned was the religious law applicable to the dispute. That is and should be the only basis for such a clause.

Consultation Question 8: Should arbitrators incur liability for resignation at all, and why?

No liability for resignation

Please share your views below.:

This is difficult.

If a resignation is because of excessive work commitments over which the individual has no control or declining powers or illness, it seems inappropriate to charge the arbitrator. It is possible that a resignation in bad faith might generate a different view.

Consultation Question 9: Should arbitrators incur liability for resignation only if the resignation is proved to be unreasonable?

Yes

Please share your views below.:

In bad faith.

Consultation Question 10: 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. Do you agree?

Agree

Please share your views below.:

It is bizarre that an arbitrator participating in any sense in such proceedings even if only to correct factual errors is technically exposed to a costs sanction.

The opposite conclusion to this and the previous question imposes costs on arbitrator's professional indemnity insurance in relation to a claim that very rarely needs to succeed.

Consultation Question 11: 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. Do you agree?

Disagree

Please share your views below.:

It might be better if anything has to be said to confirm that the arbitration tribunal can conduct the proceedings as he or she sees fit including resolving matters through partial and final awards at any stage of the proceedings.

Otherwise, you will end up with pleading practice as part of arbitration with pointless applications during the process.

Consultation Question 12: 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. Do you agree?

Disagree

Please share your views below.:

This is unnecessary.

If the parties wish to exclude summary processes, they can already agree to do so. In the absence of agreement, this should be a matter for the tribunal.

Consultation Question 13: We provisionally propose that the Arbitration Act 1996 should stipulate the threshold for success in any summary procedure. Do you agree?

Disagree

Please share your views below.:

You are inventing pleading practice which we can live without. This would be wholly unnecessary in a piece of legislation that is already too long.

Consultation Question 14: 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. Do you agree?

Agree

Please share your views below.:

That is already the case. You don't need it.

Consultation Question 15: 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. Do you agree?

Disagree

Please share your views below.:

There is absolutely no need for such a limitation.

Consultation Question 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?

Yes

Please share your views below.:

Although it is probably unnecessary.

Consultation Question 17: 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. Do you agree?

Other

Please share your views below.:

No change is needed here.

Consultation Question 18: We provisionally conclude that the provisions of the Arbitration Act 1996 should not apply generally to emergency arbitrators. Do you agree?

Disagree

Please share your views below.:

Emergency arbitrators issue provisional measures like anyone else.

Consultation Question 19: 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?

Agree

Please share your views below.:

The Act is too long. There is no perceived demand.

Consultation Question 20: Do you think that section 44(5) of the Arbitration Act 1996 should be repealed, and why?

No

Please share your views below.:

No need.

Consultation Question 21:

Permission under section 44

Please share your views below.:

I'm not sure that one would need permission to seek an order under s 44(4) in that situation.

Consultation Question 22:

Disagree

Please share your views below.:

This is appalling and would bring English arbitration law into disrepute.

Jurisdictional challenges which depend on a factual finding are very rare in practice. However, where they do exist, an arbitrator's finding on jurisdiction has no normative validity unless he or she correctly concludes that the tribunal has jurisdiction.

The Swiss get away with this because the TF will not hear evidence. However, it represents a blot on Swiss arbitration law.

Consultation Question 23: 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?

No

Please share your views below.:

See my previous answer. None of this should be limited to an appeal.

Consultation Question 24: We provisionally conclude that our proposed change to section 67 of the Arbitration Act 1996 would not require any similar change to section 103. Do you agree?

Agree

Please share your views below.:

However, the appalling proposal to change section 67 would stop the English court's ruling from having the same validity that it would have now and affect enforcement courts around the world from respecting English decisions in this area.

After the English appalling decisions in *Dallah* and *Kabab-Ji*, respect for English courts in this area is at an all-time low.

Consultation Question 25: 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. Do you agree?

Agree

Please share your views below.:

Harmless enough

Consultation Question 26: 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?

Agree

Please share your views below.:

That would be helpful.

Consultation Question 27: 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?

Disagree

Please share your views below.:

England is the only major arbitration centre with a rule like this and it is widely despised internationally for this.

There is no harm in allowing the parties to select an appeal in a question of law if they wished to do so.

However, relying on parties accidentally forgetting to exclude the right of appeal to generate an almost random appeal process is appalling.

At the moment, the fate of a case subject to the leave process may depend on whether a judge considers an error of law to be obvious. The difference between being wrong and obviously wrong is so subjective as to bring English law into disrepute internationally.

All the major arbitration rules including the LCIA's are drafted with an effective exclusion of section 69 which tells you everything you need to know about the world thinks of this awful process.

Consultation Question 28: Do you think that section 7 of the Arbitration Act 1996 (separability of arbitration agreement) should be mandatory, and why?

No

Please share your views below.:

It's unnecessary. It could create some interesting although rare problems for people drafting arbitration clauses.

Consultation Question 29: 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?

Agree

Please share your views below.:

Harmless enough.

Consultation Question 30: 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?

No

Please share your views below.:

Neither provision is ever used in practice or should be.

If you want to, you can make these processes subject to the parties' agreement. The tribunal's view should be irrelevant.

Consultation Question 31: 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?

No

Please share your views below.:

No need.

Consultation Question 32: Do you think that section 39 of the Arbitration Act 1996 should be amended to refer to "orders" (rather than "awards"), and why?

No

Please share your views below.:

No need.

Consultation Question 33: Do you think that section 39(1) of the Arbitration Act 1996 should be amended to refer to "remedies" (rather than "relief"), and why?

No

Please share your views below.:

No need

Consultation Question 34: 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?

Agree

Please share your views below.:

Harmless enough

Consultation Question 35: 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?

Agree

Please share your views below.:

Consultation Question 36: We provisionally propose that sections 85 to 87 of the Arbitration Act 1996 (on domestic arbitration agreements) should be repealed. Do you agree?

Agree

Please share your views below.:

Never brought into force and they tend to cause confusion.

Consultation Question 37: Do you think that any of the suggestions discussed in Chapter 11 needs revisiting in full, and if so, why?

Please share your views below.:

Yes.

We urgently need to reverse the decision in *Kabab-Ji* by adopting the French rule on the law applicable to the arbitration agreement.

The seat governs the law applicable to the arbitration agreement unless the parties expressly agree otherwise.

Consultation Question 38: 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?

Please share your views below.:

It would be helpful if the role of section 72 was clarified or the provision deleted. At the same time, it should be made clear that the judge does not appoint arbitrator without concluding that the arbitrator has jurisdiction.

Basically, on an application to appoint an arbitrator, caselaw indicates that the court only makes a summary ruling on jurisdiction (which deprives it of any later res judicata effect). However, the respondent can bring a section 72 application which results in a full review of jurisdiction.

If the caselaw was reversed, section 72 would be unnecessary except as providing an alternative way of challenging jurisdiction. However, the applicant should not have to decline to participate in the arbitration in order to use it. This is intellectually incoherent and not found anywhere else in the world.

RESPONSE TO THE LAW COMMISSION'S CONSULTATION PAPER ON THE ARBITRATION ACT

2006

SECTION 67

This is a response in my personal capacity addressing the Law Commission's proposal to amend section 67 (at para. 8.46 of its Consultation Paper).

I agree with the LC's proposal that any challenge to substantive jurisdiction under s 67 should be by way of an appeal, save in exceptional circumstances.

The proposal is consistent with the objective of saving valuable court time and seeking judicial economy, while balancing the interests of the challenging party (which has already set out its case on jurisdiction in the arbitration, and lost).

Reasons

My reason for supporting the proposal is that the current system can lead to very considerable delay and expense for the parties, making England (and Wales) a less attractive seat.

England is competing with many other places in Europe and globally as the preferred seat for international disputes. Any argument attacking the attractiveness of England can and will be used against us.

It does not matter that there are not many challenges under s 67. The argument will still be made by our competitors and will gain traction with users.

Example

A dispute between Vladimir Churnukhin and Oleg Deripaska provides but one example of how a s 67 challenge can eclipse the original arbitral hearing. In that case, a four day arbitral hearing on jurisdiction, which was robustly fought, and resulted in a Partial Final Award issued by a distinguished tribunal, was followed by a challenge in which new evidence was introduced and consequently a much longer, more complex and very expensive hearing took place before Teare J (along with other issues) over 19 days, with the two protagonists cross examined at length again: *Filatona Trading Ltd & Anor v Navigator Equities Ltd & Ors* [2019] EWHC 173 (Comm) (07 February 2019). That decision was then appealed, with a further two-day hearing: [2020] EWCA Civ 109 (06 February 2020). On each occasion, Mr Chernukhin/Navigator Equities was successful.

There will, of course, be cases where the challenger will be successful after a rehearing and some where the challenger should be entitled to introduce additional evidence. The point is that this should not be the default position.

Support for proposal

Those against the LC's proposal say that only one commentary favours amending s 67 (namely *Merkin & Flannery*). The LC will know from the submissions that it has received that a

considerable number of people favour the LC's proposal. I respectfully suggest that particular weight be given to the comments of those who are closest to users of arbitration, who have a choice of seats from which to choose when drafting their arbitration agreements.

Recent support is found in the comments of Males LJ in *DHL Project & Chartering Ltd v Gemini Ocean Shipping Co Ltd (Re "Newcastle Express")* [2022] EWCA Civ 1555 (24 November 2022), in which he stated (at [16], emphasis added):

"This has led some commentators to suggest that the present approach is unsatisfactory. To the extent that it results in two fully contested hearings on the question of jurisdiction, the first before the arbitrators and the second before the court, there is some force in that suggestion. In general, a party who takes part in a challenge to jurisdiction before the arbitrators can reasonably be expected to deploy its full case and, if it loses after a fair procedure, has no inherent right to a second bite at the cherry. Even under the present law, however, the court is not without case management powers in such a case to control the evidence adduced on any section 67 challenge (see *The Kalisti* [2014] EWHC 2397 (Comm)). The position is different where, as in this case, the party challenging jurisdiction takes no part in the arbitration, as it is entitled to do (see section 72 of the Act). Such a party is entitled to say that it never agreed to the jurisdiction of the arbitral tribunal; that it took no part in the arbitral proceedings; that it is not bound in any way by whatever view was taken by an arbitral tribunal to which it never agreed of the evidence adduced before it; and that it is entitled to fresh consideration of the issue by the court.

Response to arguments against

Those against the LC's proposal make a number of arguments. The principal objections are the following:

1. **Court must have final say on jurisdiction**

The objectors argue that the proposal would undermine the authority of the court to determine whether a respondent is party to the agreement to arbitrate. As I understand the LC's proposal, the court will have the final say on issues of jurisdiction. S 67 is mandatory. The proposal simply limits the opportunity to present new evidence and have a complete rehearing.

2. **Court should not be constrained by the evidence before the tribunal**

The objectors argue that the proposal would constrain the court to determining jurisdiction based on the evidence before the tribunal, which would be unfair if the tribunal had for example limited document production. As I understand the LC's proposal, the court will be able to allow additional evidence where appropriate if it considers the challenging party would otherwise be unfairly prejudiced.

3. **An issue of case management**

The objectors argue that the scope of the rehearing is a question of case management and the court has powers to limit the introduction of new evidence. I disagree. If a challenge is a rehearing rather than a review, it follows that the challenging party should generally be

allowed to present the entirety of its case, which might include new evidence (so long as it is admissible and relevant), and additional witnesses, and be allowed to cross-examine again the other side's witnesses. Something should be done to change that default position, which leads to delay and huge costs, rather than simply to leave it to case management (unless the CPR or Commercial Court Guide could be changed to achieve the same result as the LC's proposal).

4. Consistency with s. 103

It is argued, as the 'clincher argument', that the challenge procedure under s 67 should be the same as objecting to registration/enforcement under s 103 (reflecting art V(1) of the New York Convention). For the latter, the court permits a rehearing.

I disagree. There is no overriding reason why the procedure under s 67 must be the same as s 103.

There is the obvious point that s 67 and s 103 deal with different situations, the former concerns arbitrations seated in England and s 103 concerns enforcement of a foreign award. England is entitled to make arbitrating in England more attractive than other jurisdictions.

Moreover, there already exist substantive and procedural differences between challenging an English award and objecting to a foreign award. A challenge under s 68 on grounds of serious irregularity, overlaps, but is not identical to the other grounds in s 103. Further, under s 68(2), the applicant must establish substantial injustice, which is not prescribed in s 103.

5. Consistency with other jurisdictions

Comparing the position concerning jurisdictional challenges of awards made in England with the position in other jurisdictions is a false equivalence. Court proceedings in England, at least those involving commercial disputes, are generally much more expensive than in other jurisdictions. Thus, a rehearing under s 67 can cost many hundreds of thousands of pounds. A rehearing in other jurisdictions is generally not as expensive. For this reason, England is comparatively unattractive as a seat.

Audley Sheppard KC

15 December 2022

DRAFTSMEN v. COURTS: THE RIGHT NODE TO DEMARCAT

CONFIDENTIALITY IN ARBITRATION

-Aditya Singh

I. INTRODUCTION

As the [Arbitration & Conciliation Act, 1996](#) ('the Act') completes 25 years of its enforcement, the law commission of England & Wales ('commission'), after various prompts by stakeholders, came forth with a [consultation paper](#) comprising a general review of the Act. The consultation paper identifies key areas such as confidentiality, disclosure and declaration, review on point of law, etc. This blog in particular will be critiquing the commission's recommendation on the point of confidentiality in arbitration.

The commission, while acknowledging that there is some merit in codifying a mandatory rule of confidentiality in arbitration, finally concluded that the same is better left for the courts to develop on a case-to-case basis. There were multiple points raised by the commission. This paper will address the fault in the point on why confidentiality cannot be a presumption in every arbitration, list the various merits of codification despite the provisions possessing the scope for generality.

To elaborate upon the same, this paper will *firstly*, dwell into how confidentiality as the default should remain the norm in all types of arbitrations as it is a right in personam. To that end, the paper will also analyse the [UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration](#) ('transparency rules') as the consultation paper state investor-state arbitration as a repeat example to argue against presumption of confidentiality. Stemming from this, the paper *secondly*, will elucidate why codification is necessary to enable efficient enforcement of confidentiality and govern its various facets while also shedding some light on the insufficiency of case laws to fulfil the same.

II. CONFIDENTIALITY – A DEFAULT NORM?

The commission in para 2.40 opined that there cannot be a presumption of confidentiality in all types of arbitrations and stated the examples of investor-state and family arbitrations. The pertinent point to be raised here is that arbitration essentially is a private mode of dispute resolution. The [courts in India](#) have construed confidentiality as a right in personam as interests are enforceable against select parties. While there may be other parties whose rights and

interests may be at crossroads, their *locus standi* in the matter is essentially indirect if the dispute is arbitrable in the first place. For example, the courts in India [do not allow](#) a dispute to be decided by arbitration if it has a direct *erga omnes* effect.

This is because the award will not bind the non-signatories hence making the process futile due to lack of finality and the inability to enforce as the same will not be limited to the parties of the arbitration. The above-stated points should also apply to investor-state arbitrations i.e., if the parties hold the capacity to settle the dispute through arbitration, it is essentially a right in personam hence confidentiality should be the norm. The author at no point disagrees that despite this, certain disclosures will still be necessary but that, in itself, is not sufficient to denote that confidentiality is not the norm and that a framework can sideline the interest of the arbitrating parties. There cannot be a better way to illustrate this than gauging the transparency rules. The rules across all of its provisions establish the arbitral tribunal as the authority to adjudicate on submissions of disclosures to ensure the secrecy of the process and requires the adjudication to be in consultation with the parties. Pertinent aspects of transparency, such as publications of documents and hearings, are subject to [Article 7](#) which lays down the exceptions to transparency and an exhaustive list of confidential information including confidential business information, ones protected by a treaty, laws or disclosure that would impede law enforcement. Even if one were to look at [the comments that had been made by IISD and CIEL on draft rules](#), they agreed that Article 7 does offer an important protection, however, they had suggested that the list in now Article 7(2) to be shortened. The above point can also be buttressed by using the commission's observation in para 2.12 wherein it states confidentiality is also a product of legitimate expectation formed by the circumstance in which certain information was received. And arbitration due its private nature does qualify as a circumstance giving rise to a legitimate expectation of confidentiality.

III. THE MERITS OF CODIFICATION

Another major point that can be deduced by examining the transparency rules is the insufficiency of common law in filling the necessary facets of confidentiality in arbitration, for example, the transparency rules where applicable, denote the authority of the tribunal, stakeholders to be consulted at various points, etc. The common law is not laid out in sufficient detail, leading to potential uncertainty hence, lacking the ability to evolve jurisprudence in the direction of the desired global standards. One needs a codified provision to address such details

as will be described below. This section will list the various merits of codifying the law on confidentiality.

A. Delegation of Authority

To begin with, the very purpose for which this review was undertaken [was to polish the English arbitration regime and maintain its gold standards](#). By codification, the law can *firstly*, allocate enforcement authority to the tribunal as confidentiality would remain of little significance otherwise and *secondly*, it can most importantly selectively allocate adjudicatory authority to the arbitral tribunal to determine disclosures. To elaborate, the commission, while stating that it is the leading case on exceptions to confidentiality(para 2.17), prepared their possible list of exceptions considering [Emmott v. Wilson](#)(para 2.32).

Of those, items such as the authority to determine whether the consent was free in case disclosure is by consent; whether the interests of the parties are legitimate and can only be served by disclosure and whether the legal duties cannot be fulfilled without disclosure can be delegated to the tribunal itself. While the authority to adjudicate on items such as to determine whether the disclosure is required in ‘public interest’ can be reserved to the courts if the commission believes there may be [considerable opposition and uneasiness](#) with the tribunal adjudicating on this. For example, in jurisdictions with developed administrative laws framework such as France, awards of public-private arbitration can be [reviewed](#) by administrative courts for their compliance with mandatory rules of public law because of their public character. Apart from this, delegating authority to the tribunal would also have its utility if the commission were to consider adding a customary exception, as the tribunal would possess specialized knowledge of the various nuances involved. For example, it was observed in [Halliburton v. Chubb](#) that it is common in Bermuda form of arbitration for arbitrators to disclose if the party in the instant arbitration is common without disclosing the details of the opposite party.

The adoption and codification of the above-described model of delegation of adjudication have obvious benefits such as; 1) it will ensure swifter disposal of disclosure applications and reduce the burdens of the courts; 2) the tribunal at places will be pre-acquainted with the facts and circumstances while having the specialized knowledge about the modalities involved in that mode/ type of arbitration. These cumulatively reduce the courts' intervention in arbitration and with the other outlined benefits altogether bolster England’s attractiveness as a seat.

B. Cementing the Parameters & Contours

Addressing the other point on items in the list, the commission opined that while there was hesitancy to include the public interest exception in *Emmott*, they believe that there should be one (para 2.34). To take a closer look at *Emmott*, the definition of public interest as stated in [London and Leeds Estates Ltd v Paribas Ltd \(No 2\)](#) was referred, wherein Mance J, defined it as circumstances wherein production to certain documents is necessary for “fair resolution and proceedings”. Post which Potter LJ’s ruling in [Ali Shipping Corporation](#) was referred to look at the definition of ‘public interest’. Potter LJ stated that the basis behind this is to ensure the courts reach their verdicts based on accurate evidence and hence this should be categorized as ‘interests of justice’ as opposed to ‘public interest’. This was to prevent its widening as seen in [Esso Australia Resources](#). Since *Emmott* relied on *Ali Shipping* as well, there is a lack of clarity on the nature of ‘public interest’ exception that exists. The same can be addressed by codifying both exceptions, hence creating room for an interpretation that the public interest exception exists and the legislative intent is to construe them as two separate exceptions. As an add-on, the meanings of the two could also be elaborated upon. Further guidance can be issued by codification as also done [u/s 23\(F\)\(1\)\(a\) of Australian International Arbitration Act, 1974](#). The same allows the court to prohibit disclosure if the public interests do not outweigh the interests of the disputing parties.

While it has been stated by the courts in snippets, the principle of ‘purpose limitation’ can be cemented with codification along with the proposed exceptions. This will provide the necessary guidance to the adjudicating authority and assurity to the parties that even in the event of disclosures, the authorities are to ensure there is no disclosure beyond what is necessary to serve the purpose for which disclosure is sought. A good example of this would again be the [Australian International Arbitration Act](#) which restates this principle at various exceptions and has also empowered the courts to prohibit disclosure on the breach of this ground in [S 23\(F\)\(1\)\(b\)](#).

IV. CONCLUSION

Although there is room for discretion left in the confidentiality provisions of common law countries, a detailed provision as elucidated still has the ability to lay down the contours of development in the [desired direction](#) of international best practices and community expectations. The Australian Law’s guidance on public interest considerations as mentioned above is a great manifestation of it. The courts in Singapore, for instance, have [decisive](#)

[guidelines](#) to refer to for publication of awards as opposed to digressing into let's say LCIA rules, IBA guidelines like courts in England have had to. While stating the need for codification, although the [New Zealand Law Commission](#) limited the observation of absence of detailed arbitration clauses with proper confidentiality provisions, etc to domestic arbitration, this may also be the case in international arbitration, In such a situation, a detailed provision touching upon various facets is of great assistance. While Singapore is already a major hub, [Australia](#) and [New Zealand's](#) legislative reforms on this have been [well received](#). The fact that a default rule aids in meeting the differences cannot be discounted. All of this cumulatively increases the certainty for the disputing parties and a seat's popularity as an arbitration destination. Hence the provision should be codified to set the contours while also leaving room for jurisprudential development in that direction.

RESPONSE TO LAW COMMISSION'S CONSULTATION ON THE ARBITRATION ACT 1996

15 December 2022

Skadden

1. 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? (Paragraph 2.47)

We agree the 1996 Arbitration Act (the “Act”) should not explicitly address the question of confidentiality, which is best addressed by the courts.

As a preliminary point, English common law deals effectively with the issue of confidentiality, such that no legislative intervention is currently needed. As Lord Dyson noted in his 2018 paper on privacy in arbitration “[t]here seems to be a consensus that it is of the essence of an arbitration that it is conducted in private”¹ and this is reflected in the English courts’ default position that arbitrations are private and confidential.² We also note in this respect that 87% of respondents to a 2018 survey on international arbitration attached at least some degree of importance to confidentiality.³

We do not consider that a legislative approach to this question is likely to be effective. This is because the DAC’s reasons for not addressing confidentiality explicitly in the Act are still relevant today. In particular, we agree that “*the exceptions to confidentiality are manifestly legion and unsettled in part*”, such that “*the formulation of any statutory principles would be likely to create new impediments to the practice of English arbitration*”.⁴ The English courts have developed the exceptions and qualifications that apply to this duty of confidentiality and it is preferable for the courts to continue to deal with any exceptions on a case by case basis.

We also believe that codifying an approach to confidentiality risks the Act not keeping pace with developments in the arbitration community. Both arbitral institutions and the courts are better able to evolve their approach to this issue over time. As Lord Dyson noted “[t]he institutions know and understand the arbitration world and are best placed, where necessary, to introduce changes of practice” as regards confidentiality.⁵ This approach is in keeping with the Law Commission’s desire to ensure the Act keeps up to date with modern arbitral practice.

¹ Lord Dyson, ‘Privacy in Arbitration: How Far Should we Lift the Curtain on What Happens?’ (Paper presented to a joint meeting of the Society of Construction Law and the Society of Construction Arbitrators, London, 3 July 2018), p. 4.

² This was confirmed most recently in *Halliburton Co v Chubb Bermuda Insurance Ltd* [2020] UKSC 48, [83] and [173].

³ Law Commission Consultation Questions Paper (“**Law Commission Paper**”), para. 2.6.

⁴ Departmental Advisory Committee (DAC), ‘Report on the Arbitration Bill’ (1996), paras. 16-17.

⁵ Lord Dyson (n 1), p. 14.

2. We provisionally conclude that the Arbitration Act 1996 should not impose a duty of independence on arbitrators. Do you agree? (Paragraph 3.44)

We agree that the Act should not impose a duty of independence on arbitrators for the reasons set out in paragraphs 3.40 to 3.42 of the Law Commission Paper. We agree that the focus is on impartiality as opposed to independence, and consider that some of the other proposals (namely the ongoing duty of disclosure) address this issue more effectively.

3. 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. Do you agree? (Paragraph 3.51)

We have no objection to the Act providing an ongoing duty for arbitrators to disclose any circumstances which might reasonably give rise to justifiable doubts as to their impartiality. While in our experience, arbitrators have generally been forthcoming as regards any such potential issues, we consider that a statement of the law on arbitration should include this duty so as to make the expectations of arbitrators clear. This will bring the Act in line with Article 12 of the UNCITRAL Model Law (which has been adopted by jurisdictions such as Singapore, although we note that the Model Law refers to both impartiality and independence). We also note that French arbitration law similarly imposes an ongoing duty of disclosure.

4. Should the Arbitration Act 1996 specify the state of knowledge required of an arbitrator's duty of disclosure, and why? (Paragraph 3.55)

We do not consider that the Act should specify the state of knowledge required of an arbitrator's duty of disclosure. We agree with Lady Arden's suggestion in *Halliburton v Chubb*⁶ that it would be better for the courts to develop the law, so that this area can continually evolve and reflect developing standards and expectations. We also consider that a case-by-case approach is better in resolving what is always likely to be a fact intensive question.

⁶ (n 2), [162].

- 5. 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? (Paragraph 3.56)**

N/A. See answer to Question 4.

6. 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 by the House of Lords)? (Paragraph 4.10)

We agree with the Supreme Court's approach in *Hashwani v Jivraj*.⁷ In particular:

- We agree with the finding that an arbitrator is not an employee for the purposes of the Employment Equality (Religion or Belief) Regulations 2003, but “*is rather in the category of an independent provider of services who is not in a relationship of subordination with the parties who receive his services*”.⁸ Being appointed as an arbitrator should not be equated with being hired as an employee, not least as the latter suggests an arbitrator is not neutral as regards the party which appointed them.
- We also agree with the Supreme Court's *obiter* remarks concerning respect for party autonomy, a principle enshrined in section 1 of the Act (which provides that “*the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest.*”)⁹ As Lord Clarke noted, “[o]ne of the distinguishing features of arbitration that sets it apart from proceedings in national courts is the breadth of discretion left to the parties and the arbitrator to structure the process for resolution of the dispute.”¹⁰ As Lord Clarke observed when considering this provision, a requirement that an arbitrator be a certain religion can be relevant to this aspect of arbitration. Similarly, arbitration clauses sometimes specify requirements as to personal characteristics (e.g. nationality) which are a valid and common form of party autonomy.

While we cannot exclude the possibility that an arbitration clause could be discriminatory, Lord Clarke's approach of considering whether the particular requirement is legitimate and justified provides a flexible and workable solution to this issue.¹¹ This approach is also aligned with article V.1(d) of the New York Convention, which ensures that if the “*composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties*”, this is a potential ground to refuse recognition and enforcement. In other words, the New York Convention recognises the primacy of party autonomy in the choice of the arbitral tribunal.

⁷ [2011] UKSC 40.

⁸ *ibid* [40].

⁹ *ibid* [61].

¹⁰ *ibid* [61].

¹¹ *ibid* [70].

7. We provisionally propose that:

- (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.

Do you agree? (Paragraph 4.36)

We disagree with the proposal for the following reasons:

- We do not agree that a reference to the language of the Equality Act 2010, as far as a basis for challenge to an arbitrator is concerned, will send an important message regarding equality and diversity. Rather, we think it risks undercutting party autonomy and interfering with the sensible flexibility adopted by the Supreme Court in the *Jivraj* case.¹²
- The starting point is party autonomy. Parties must be free to determine the identity of their arbitrators and must be free to determine any particular characteristics they deem appropriate for the resolution of disputes between them. For example, it is not uncommon for parties in the insurance sector to specify that arbitrators must have at least 10 years experience in the insurance industry. It is also commonplace for institutional rules to require that a presiding arbitrator must be of a nationality different to either of the parties to ensure neutrality (as the Law Commission Paper recognises).¹³
- If an arbitrator cannot be challenged on the basis of protected characteristics such as nationality, the ability to challenge a presiding arbitrator on the basis that he or she has the same nationality as one of the parties to the dispute is removed. Yet this is an established and extremely important feature of international arbitration. Thus, far from promoting equality and diversity, the proposed amendment runs the very real risk of reducing the attractiveness of London as a seat by denying parties a right to which they have been accustomed for many years (and with good reason, to ensure neutrality).
- We also do not agree that reference to the Equality Act 2010 is necessary to guard against the potential consequences identified in the Law Commission Paper (for example, at paragraph 4.16, the potential for the Supreme Court decision in *Jivraj* being relied on to justify restrictions on appointments by reference to age or sexuality). The safeguard against such potential consequences lies with the courts who will enforce the legislation as applicable, as they did in *Jivraj* and by reference to the standard identified by the Supreme Court in that case.¹⁴ .

¹² (n 7).

¹³ Para. 4.14.

¹⁴ (n 7) [59], [70].

- The arbitral institutions and practitioners involved in the practice of international arbitration have made great strides in addressing the promotion of diversity and quality for example with initiatives like the Pledge¹⁵ and with institutions taking a pro-active role in promoting under represented groups in arbitral appointments. Our firm view is that this, and intervention by the courts where necessary in those extremely rare cases (like *Jivraj*) where this is an issue, is the best course and that intervention by way of the Act would be a mistake.

¹⁵ Equal Representation in Arbitration Pledge, <<http://www.arbitrationpledge.com/>>.

8. Should arbitrators incur liability for resignation at all, and why? (Paragraph 5.23)

We consider that arbitrators should only incur liability for resignation if the resignation is unreasonable. Our view is that what is unreasonable should be left to the courts to determine.

While we do not consider that the Act should list examples of when a resignation will give rise to liability, we suggest that a consultation is undertaken in future on this question to pool together the views and experiences of the arbitration community. For example, we do not agree there should be a presumption that it is always unreasonable for an arbitrator to resign after being challenged by one of the parties, not least because the LCIA Rules expressly allow for this to happen (see Article 10). We have practical experience of this which tells us that the reasons for a challenge and the reasons why an arbitrator might resign following that challenge can be extremely subtle and nuanced (for example, sometimes with political ramifications where some of the parties are states / state owned entities). While we therefore understand the context of Mr Justice Popplewell's remarks at paragraph 63 of the first instance judgment in *Halliburton v. Chubb*¹⁶ (and Lord Hodge's similar remarks at [68] of the Supreme Court judgment in the same case),¹⁷ we do not agree that it will always be the case that resignation following a challenge by one party will always be unreasonable.

¹⁶ [2017] EWHC 137 (Comm).

¹⁷ (n 2).

9. Should arbitrators incur liability for resignation only if the resignation is proved to be unreasonable? (Paragraph 5.24)

See response to Question 8.

10. 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. Do you agree? (Paragraph 5.45)

Yes. This is in line with both section 29 of the Act and the rules of major arbitral institutions, all of which grant wide immunity to arbitrators when performing their functions.

11. 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. Do you agree? (Paragraph 6.25)

We agree with the proposal. We consider this will: (i) empower arbitrators to adopt summary procedures, where appropriate; (ii) make London more attractive as a seat; (iii) align the Act with current arbitral practice; (iv) reinforce the importance of party autonomy and flexibility; and (v) be a tool to help reduce costs and delays in arbitration.

It may well be argued that section 34 of the Act is broad enough to encompass this power already. However, experience tells us that many tribunals remain reluctant to adopt summary procedures. There will undoubtedly be many reasons for this but key among them is often a concern that an award determined on the basis of a summary procedure may be susceptible to challenge because, it could be argued, the power to do so did not exist. It is hoped that this amendment to the Act will overcome some of these concerns and thereby empower tribunals to adopt summary procedures where appropriate.

There are many benefits to the adoption of this proposed amendment.

- It will enhance the attractiveness of London as a seat. For example, many financial institution clients continue to choose courts over arbitration precisely because of the ‘summary judgment’ powers that courts have, which has obvious benefits for example in the enforcement of a simple debt.
- It will also align with arbitral practice in recent years, which has seen many arbitral institutions adopt similar powers in their rules.¹⁸
- It is hoped this proposal will add to the tools available to reduce costs and delay in arbitral proceedings. As Gary Born notes, parties agree to international arbitration with the objective of obtaining dispute resolution procedures that are flexible, streamlined and which allow for a speedy, efficient and expert result,¹⁹ as reflected in Section 33(1)(b) of the Act. Expressly empowering tribunals to adopt a summary procedure will allow tribunals to determine potentially meritless claims at an early stage in the proceedings, avoiding the costs and delays of a full arbitration.

The only serious concern that has been expressed in relation to the proposal is that in some jurisdictions – for example, across many in Asia – awards issued on the basis of a summary procedure may be unenforceable. But the answer to that is not to avoid the introduction of a power which is not mandatory and which will benefit many parties, but rather for parties in those cases where enforcement may be a potential risk simply not to invoke the power (or to resist its invocation by the other party, and arbitrators would be well advised that this would be a sound and legitimate basis to resist the determination of one or more issues on the basis of a summary procedure, where there is evidence of such enforcement risk).

¹⁸ For example, the SIAC incorporated the procedure into its 2016 rules (s. 29(1)), the SCC in January 2017 (Art. 39(1)), HKIAC in 2018 (Article 43), and the LCIA in 2020 (Rule 22(viii)). In addition, in 2021 the ICC issued its Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration which states “[a]ny party may apply to the arbitral tribunal for the expeditious determination of one or more claims or defences, on grounds that such claims or defences are manifestly devoid of merit or fall manifestly outside the arbitral tribunal’s jurisdiction” at VII(D) – [110].

¹⁹ Born, *International Arbitration: Law and Practice* (3rd edn, Kluwer 2021) §1.02, §15.01[A].

12. 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. Do you agree? (Paragraph 6.29)

We agree with this proposal, which is in line with Section 34(1) of the Act. As a general principle, we agree with Born that codifying the procedure to be followed by the arbitral tribunal risks undermining one of the most fundamental objectives of international arbitration: procedural freedom and flexibility, and the use of arbitral procedures that are tailored to the parties' particular dispute and mutual desires.²⁰ We are of the view, therefore, that any codification of the specific procedure to be followed by a tribunal risks undermining this. In this regard, we note that Article 39 of the SCC Rules provides guidance while also allowing flexibility for tribunals to adapt to the particular circumstances of the case.

²⁰ Born (n 19), §15.01[A].

13. We provisionally propose that the Arbitration Act 1996 should stipulate the threshold for success in any summary procedure. Do you agree? (Paragraph 6.31)

We disagree with this proposal. Given that summary procedures may concern issues of jurisdiction, admissibility or the merits, a more flexible approach is required. We note as well that the Act does not specify a threshold for a tribunal reaching a decision and do not consider that one is required here.

We note that Article 39 of the SCC Rules does not specify the threshold of success but instead gives an illustrative list of possible scenarios. These are: “*(i) an allegation of fact or law material to the outcome of the case is manifestly unsustainable; (ii) even if the facts alleged by the other party are assumed to be true, no award could be rendered in favour of that party under the applicable law; or (iii) any issue of fact or law material to the outcome of the case is, for any other reason, suitable to determination by way of summary procedure.*” We consider this provides useful guidance as to the high threshold that a successful summary procedure must meet while also giving necessary latitude for tribunals to adapt to the case at hand.

14. 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. Do you agree? (Paragraph 6.35)

We fundamentally disagree with the proposal that the Act should impose the threshold set out in Part 24 of the Civil Procedure Rules.

One of the main attractions of international arbitration is that parties can choose their own procedural rules, rather than having to comply with the typically more cumbersome civil procedural rule applicable in national court proceedings.²¹ We consider that adopting the Part 24 threshold for summary procedure directly conflicts with this feature, as it risks inappropriately importing procedures characteristic of litigation into arbitration legislation. This also risks making London a less attractive seat to parties (particularly international parties) who may not want to be constrained by English court procedure.

Flexibility and party autonomy are fundamental considerations for parties choosing to resolve disputes through arbitration, and for the reasons given in answer to question 13 thresholds should be stipulated by tribunals on a case-by-case basis, subject to guidance like that incorporated into the SCC Rules.

²¹ In particular, we note Gary Born's statement that many parties choose arbitration in order to provide commercially-sensible resolutions, which requires dispensing with many of the procedural protections that are designed for domestic litigation and the adoption of procedures that will achieve commercially-practicable results. Born (n 19), §15.01[A].

15. 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. Do you agree? (Paragraph 7.22)

We agree with this proposal, for the reasons listed in paragraph 7.21 of the Law Commission Paper.

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? (Paragraph 7.36)

We do not consider this proposal is necessary, in view of the wording of section 44 and the Court of Appeal's decision in *A v C* [2020] EWCA Civ 409.

17. 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. Do you agree? (Paragraph 7.39)

We agree with this proposal for the reasons set out in paragraph 7.38 of the Law Commission Paper.

18. We provisionally conclude that the provisions of the Arbitration Act 1996 should not apply generally to emergency arbitrators. Do you agree? (Paragraph 7.48)

We agree with this proposal for the reasons set out in paragraphs 7.43 to 7.46 of the Law Commission Paper.

19. 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? (Paragraph 7.51)

We agree that arbitral institutions should be responsible for administering emergency arbitrations in accordance with their respective rules. We do not consider that this is an appropriate role for the courts to take on, given both the level and type of direct management needed (appointment of the arbitrator(s) – including checking for conflicts –, document management, fees, etc.).

**20. Do you think that section 44(5) of the Arbitration Act 1996 should be repealed, and why?
(Paragraph 7.87)**

We agree with this proposal. The decision in *Gerald Metals SA v Timis*²² has led to widespread practice among those drafting arbitration clauses of disapplying the emergency arbitrator provisions in most institutional rules for fear that they will result in a party being precluded from having access to the courts for urgent interim relief, if necessary, at the outset of a dispute. This has been an unwelcome development. There are many types of relief that a party may seek or require at the outset of a dispute. The choice of forum for that relief is an important one. There may be cases where court ordered relief is preferable. There will be others where emergency arbitrator relief is more appropriate. The effect of section 44(5) and the decision in *Gerald Metals* has been effectively to remove that choice.

²² [2016] EWHC 2327 (Ch).

21. 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. (Paragraph 7.97)

We prefer Option (1). It is possible that an emergency arbitrator may issue an order which does not fall within section 44(4), and in that scenario an emergency arbitrator would have no means within the Act by which to order compliance.

22. We provisionally propose that:

(1) where a party has participated in arbitral proceedings, and has objected to the jurisdiction of the arbitral tribunal; and

(2) 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.

Do you agree? (Paragraph 8.46)

We strongly disagree with this proposal for the following reasons.

I. The proposal goes against the fundamental principle of consent to arbitration

As a preliminary point, if a party has not consented to arbitration, it cannot be bound by a decision on jurisdiction made by an arbitral tribunal that never had jurisdiction in the first place, irrespective of whether it participated in the underlying hearing. Such a party should not be prejudiced by the fact that it has participated in arbitral proceedings when challenging an award which the tribunal had no jurisdiction to issue.

The right to object to the jurisdiction of the tribunal is a fundamental one that should not be watered down. As expressed by Lord Collins in *Dallah*, “*fundamental rights include[e] the right of a party which has not agreed to arbitration to object to the jurisdiction of the tribunal*”.²³ In reducing a party’s right to challenge jurisdiction, this proposal could lead to a loss of confidence in London seated arbitrations. [REDACTED]

II. Absenteeism is not a realistic strategy for parties

The proposal would result in parties facing a choice between two potential evils. The reality is that jurisdiction is frequently interwoven with the merits,²⁵ meaning that the tribunal is often not in a position to make a decision on jurisdiction at the outset. If a party wishes to preserve the right to a full re-hearing of jurisdiction in that case, they must effectively elect to forego the right to defend the claim. The other

²³ *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46, [102].

²⁵ Hilary Heilbron KC, speech at Brick Court Chambers Annual Commercial Conference 2022 on 13 October 2022, on the topic of s.67 reform, available at <<https://www.youtube.com/watch?v=c8sILpYZQMI>>.

alternative, if they do not want to lose the right to defend themselves, is to forego the right to a full rehearing on jurisdiction because a provision in the Act now determines that in participating in the underlying arbitration (to defend themselves on the merits), they have conferred a sort of jurisdiction on the tribunal.

In our experience, absenteeism is not a realistic strategy for most clients and section 72 is not considered as a viable alternative to a section 67 challenge.²⁶ As Wendy Miles KC rightly said at a recent event considering the Law Commission reforms, practitioners rarely feel comfortable advising a client that non-participation and a section 72 application are appropriate avenues.²⁷ Section 32 is an equally unsatisfactory choice and a very limited portal due to its pre-conditions, including the need to apply to the tribunal for permission, which in the circumstances where their jurisdiction is being challenged, tribunals are unlikely to give. In line with this, the DAC made it clear in its report on the Act that section 32 is to be taken as an exception and is therefore narrowly drawn²⁸.

Section 30 (which reflects the principle of kompetenz-kompetenz) does not confer on tribunals a jurisdiction that is absolute. Instead it is one that, from the outset, can always be subject to an independent judicial rehearing by the English courts under section 67, in line with Article V of the New York Convention. There are very practical reasons why a tribunal should be allowed to decide on its own jurisdiction first, but this does not mean that there is no room for a court to consider this afresh. This will particularly allay any concerns that arbitration tribunals may be too quick to find they have jurisdiction.²⁹

III. Section 67 is functioning well and as intended

We also disagree that a hearing before the Tribunal is a “*dress rehearsal*”.³⁰ Rather, as noted by Aiken J (in *The Ythan*), a rehearing is not a fresh start, “*as if there had been no previous challenge to the jurisdiction of the arbitral tribunal*”.³¹ The award and the arbitral proceedings provide an important context, which allows the court to avoid any substantial prejudice to either party. As Mr Justice Males (as he then was) noted, while under section 67, the court exercises “*a full judicial determination on evidence*”, it does so “*in accordance with established principles, in particular the overriding objective and the interests of justice*”.³²

To the extent that the Law Commission considers that there are procedural issues arising from section 67 proceedings which should be addressed, these are better handled by the courts. These are already dealt with

²⁶ Jacob Grierson, ‘Two Brief Comments on the Law Commission’s Proposed Reform of the Arbitration Act 1996’, in Maxi Scherer(ed), *Journal of International Arbitration*, Kluwer Law International 2022, Volume 39 Issue 6, pp. 765 – 774.

²⁷ Wendy Miles KC, panel discussion at the ‘Public Consultation Event with the Law Commission’ hosted by CIArb on 29 November 2022, available at <<https://www.youtube.com/watch?v=IBWy-LT5I34>>.

²⁸ (n 4) above: Departmental Advisory Committee (DAC), ‘Report on the Arbitration Bill’ (1996), [141][iii].

²⁹ Sir Richard Aiken, speech at Brick Court Chambers Annual Commercial Conference 2022 on 13 October 2022, on the topic of s.67 reform, available at <<https://www.youtube.com/watch?v=u6d-YAo8uUM>>.

³⁰ Law Commission Paper, para. 8.29.

³¹ *Primetrade AG v Ythan Ltd* [2005] EWHC 2399 (Comm), [62].

³² *Central Trading & Exports Ltd v Fioralba Shipping Co* [2014] EWHC 2397 (Comm), [30].

in the Commercial Court Guide,³³ the most recent update of which includes provisions seeking to limit the scope of section 67 challenges (such as setting out the threshold conditions that the court will take into account (O8.3-4), the court’s ability to dismiss applications on paper (O8.6), as well as the threat of indemnity costs in circumstances where the challenge is dismissed after a hearing (O8.7)). In addition, the courts can consider whether a claimant has a realistic prospect of success for a challenge under section 67 as a preliminary issue. We therefore do not agree that a section 67 rehearing is an example of a party having “two [] bites of the cherry”.³⁴ As Males LJ recently observed, “[e]ven under the present law, however, the court is not without case management powers in such a case to control the evidence adduced on any section 67 challenge”³⁵ and indeed section 67 hearings rarely involve oral evidence or last more than a few days³⁶.

A measure of section 67’s success is both the low number of section 67 applications, and the even fewer successful challenges. A report by Osborne Clarke, in collaboration with Sir Bernard Eder, on arbitration cases between 2010 and 2020 shows that the total number of successful challenges to an award (whether on the basis of lack of jurisdiction under section 67 of the Act or on the basis of “serious irregularity” under section 68 of the Act or by way of appeal under section 69 of the Act) is less than 1% when compared with the total number of awards. As Sir Bernard Eder notes, “these numbers underline the already strong, robust pro-arbitration approach of the English courts”³⁷. This begs the question voiced by Professor Pierre Mayer, “why give such importance to a situation which appears rarely?”³⁸.

IV. The proposal would put London out of step and at a disadvantage to other major arbitration hubs

As expressed by Salim Moollan KC, in order to remain the capital of arbitral disputes it is important to follow the “right trends”³⁹. Parties have a choice whether to choose London as their seat and it is notable

³³ See (11th edn, 2022), <<https://www.judiciary.uk/wp-content/uploads/2022/06/Commercial-Court-Guide-11th-edition-1.pdf>>.

³⁴ Law Commission Paper, para. 8.35.

³⁵ *DHL Project & Chartering Limited v Gemini Ocean Shipping Co Limited (The Newcastle Express)* [2022] EWCA Civ 1555, [16].

³⁶ Shantanu Majumdar KC, ‘What difference does 25 years make? The Arbitration Act 1996 in 2022’ (2022) *New Law Journal*, <<https://www.newlawjournal.co.uk/content/what-difference-does-25-years-make-the-arbitration-act-1996-in-2022>>.

³⁷ Osborne Clarke, Sir Bernard Eder, ‘Arbitration in Court: Observations on over a decade of arbitration-led cases in the English courts’, (November 2021), <<https://www.osborneclarke.com/system/files/documents/21/11/10/Arbitration%20in%20Court%20report%20-%20FINAL%28113485318.1%29.pdf>>.

³⁸ Professor Pierre Mayer speech at Brick Court Chambers Annual Commercial Conference 2022 on 13 October 2022, on the topic of s.67 reform, available at <<https://www.youtube.com/watch?v=u6d-YAo8uUM>>.

³⁹ Salim Moollan KC speech at Brick Court Chambers Annual Commercial Conference 2022 on 13 October 2022, on the topic of s.67 reform, available at <<https://www.youtube.com/watch?v=QFybZPsgRQs>>.

that other arbitration jurisdictions have followed the Supreme Court's approach in *Dallah*.⁴⁰ Justice of the Singapore Court of Appeal Judith Prakash has recently defended⁴¹ the Singapore courts' adoption of the full determination position taken by Lord Mance in *Dallah*, on the basis that the Tribunal's view of its own jurisdiction has no legal or evidential value before the court that is considering that question.⁴² Another example is that of Hong Kong, which courts have noted that the ultimate decision on jurisdiction must be with the courts, as otherwise a tribunal would be the final judge in its own cause.⁴³ Canada, France, Australia⁴⁴ and most other countries that have adopted the UNCITRAL Model Law have also taken this stance.⁴⁵

Departing from this position in England would mean, for instance, that where two arbitration proceedings come out of the same dispute, one seated in England and one seated in Singapore, an English court will be able to carry out a full review of the Singapore-seated arbitration award, but cannot do so for an English-seated arbitration award, whereas a Singapore court will be able to fully review both.

Finally, this proposed change to section 67 may be incompatible with the review of awards under Article V of the New York Convention and may lead to inconsistencies between provisions of the Act, such as section 103(2)(b).

⁴⁰ *Dallah* (n 23).

⁴¹ Justice Judith Prakash speech at Brick Court Chambers Annual Commercial Conference 2022 on 13 October 2022, on the topic of s.67 reform, available on <<https://www.youtube.com/watch?v=c8sILpYZQMI>>.

⁴² See, for example, the Court of Appeal judgment in *PT Media TBK v Astro Nusantara International* [2013] SGCA 57.

⁴³ See, for example, the 2014 First Instance judgment of *S Co v. B Co* HCCT 12/2013.

⁴⁴ *Lin Tiger Plastering Pty Ltd v Platinum Construction (Vic) Pty Ltd* [2018] VSC 221.

⁴⁵ See Gary Born (n 19), *International Commercial Arbitration* (3rd edn, Kluwer 2021), §7.03[5][a] where he states that “in the absence of statutory guidance, courts in Model Law jurisdictions have generally adopted a *de novo* standard of judicial reconsideration in proceedings under Articles 16(3) and 34(2)(a), at least insofar as issues of law (as distinguished from fact) are concerned”.

23. 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? (Paragraph 8.51)

We do not consider that section 67 should be limited or that a limit to section 67 should impact section 32.

24. We provisionally conclude that our proposed change to section 67 of the Arbitration Act 1996 would not require any similar change to section 103. Do you agree? (Paragraph 8.57)

We disagree with the proposed changes to section 67, hence, we also do not think that they should be applied to section 103. To the extent that, as highlighted in response to Question 22, section 67 and 103 should be seen in parallel and treated with consistency, we believe changing both sections to an appeal would place England at a disadvantage to other arbitration centres.

25. 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. Do you agree? (Paragraph 8.64)

We agree with this proposal to add a further remedy of declaring an award to be of no effect, in whole or in part, to eliminate any uncertainty as to the question of jurisdiction once the court rules that a tribunal does not have jurisdiction.

26. 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? (Paragraph 8.71)

We agree with the proposal and consider it will remove any lingering uncertainty as to whether tribunals can validly rule on costs in circumstances where they have ruled they have no jurisdiction.

27. 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? (Paragraph 9.53)

We agree with this proposal. A point of distinction between arbitration and national court proceedings is that arbitral decisions are not subject to appeal in the same way that a lower court decision may be. Section 69 provides a limited exception to this feature and represents a compromise between the finality of awards and correcting obvious errors of law, and this section has been working well since the Act's inception.

As Lord Dyson noted previously, *“unless there is convincing evidence that users of arbitration want the test for appealing to be relaxed, I would be reluctant to interfere with the balance that has been struck by section 69....Section 69 in its present form is wide enough to permit the court to adjudicate on some of the important points of law that have been determined in an arbitration”*.⁴⁶

Without such evidence, we see no reason to reform section 69.

⁴⁶ Lord Dyson (n 1), ‘Privacy in Arbitration: How Far Should we Lift the Curtain on What Happens?’, p. 9.

28. Do you think that section 7 of the Arbitration Act 1996 (separability of arbitration agreement) should be mandatory, and why? (Paragraph 10.11)

We have no particular view on this question.

29. 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?

We agree with this proposal, for the reason that this appears to have been a drafting error which ought to be corrected. We consider there may be good reasons why a party may wish to appeal a section 9 decision, and parties should not be turned away from such an appeal based on an apparent drafting error.

30. 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? (Paragraph 10.34)

We agree with this proposal. It 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.

31. 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? (Paragraph 10.42)

We do not consider that this change is necessary. First, we consider that the powers under section 34 are sufficiently wide to encompass the power to hold remote hearings and move towards paperless proceedings. Secondly, the practice over the last couple of years (when there has been a large increase in the number of virtual hearings and electronic documents being filed and exchanged) has not in our experience raised any concerns that lead us to think that the Act should be amended to specifically address this issue.

32. Do you think that section 39 of the Arbitration Act 1996 should be amended to refer to “orders” (rather than “awards”), and why? (Paragraph 10.47)

We agree with the proposal, given that section 39 deals with interim or provisional orders . The title of the section has led to some confusion in terms of its interplay with other parts of the Act.

33. Do you think that section 39(1) of the Arbitration Act 1996 should be amended to refer to “remedies” (rather than “relief”), and why? (Paragraph 10.49)

We agree section 39(1) of the Act should be amended for internal consistency with section 48. We have experience of cases in which parties have argued that the scope of a tribunal’s powers in section 39 is not as broad as the scope of its powers in section 48 in part because section 39 refers to ‘relief’ and section 48 to ‘remedies’. In our view, sections 39 and 48 are complementary: section 39 deals with the powers of the tribunal to order provisional relief while section 48 deals with the same powers to order final relief. The two should be aligned in terms of the language they use.

34. 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? (Paragraph 10.59)

We agree with this proposal and its aim of codifying common law on the issue.

In addition, we note that it is not procedurally efficient for parties to be subject to a time limit for appeal based on the date of the original award in circumstances where that award may be corrected or an additional award be issued subsequently, not least because such corrections or additional award may obviate the need for an appeal in the first place or else could conceivably be the subject of an appeal in their own right.

We note in this regard that the proposal would mirror the procedural rules under the ICSID Convention, which provide that the time for applying to annul an award is counted from the date on which a supplementary decision or correction to the award are issued (see Article 49(2) of the ICSID Convention).

35. 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? (Paragraph 10.64)

We agree that section 70(8) of the Act should be retained, but suggest it is clarified so as to avoid the confusion noted in the Law Commission Paper.

36. We provisionally propose that sections 85 to 87 of the Arbitration Act 1996 (on domestic arbitration agreements) should be repealed. Do you agree? (Paragraph 10.69)

N/A.

37. Do you think that any of the suggestions discussed in Chapter 11 needs revisiting in full, and if so, why? (Paragraph 11.5)

38. 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? (Paragraph 11.7)

Law Commission Review of the Arbitration Act 1996 Consultation Responses

Contents

I.	Confidentiality [Q1]	2
II.	Arbitrator Independence and Disclosure [Q2 – 5]	3
III.	Discrimination [Q6 – 7]	7
IV.	Summary Disposal of Claims [Q11 – 14]	9
V.	Section 44 and Third Parties [Q16 – 17]	13
VI.	Emergency Arbitrators [Q18 – 21]	14
VII.	Challenges under Section 67 [Q22 – 26]	16
VIII.	Appeal on Points of Law under Section 69 [Q27]	20

I. CONFIDENTIALITY [Q1]

A. Q1: 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?

1. We agree. The flexibility and adaptability of the current regime is a virtue.
2. As the Law Commission notes, seeking to draft a mandatory statutory framework with exceptions could have real practical challenges – e.g. in connection with the drafting and framing of any exceptions at a conceptual level while providing clear guidance as to their applicability in practice. This could give rise to more uncertainty than it clarifies.
3. Even if the current laws of confidentiality in arbitration could be clearly codified, now does not seem the right time to do so given the ongoing debate regarding greater transparency in certain types of arbitration, such as investor-state arbitrations.

II. ARBITRATOR INDEPENDENCE AND DISCLOSURE [Q2 – 5]

A. **Q2: WE PROVISIONALLY CONCLUDE THAT THE ARBITRATION ACT 1996 SHOULD NOT IMPOSE A DUTY OF INDEPENDENCE ON ARBITRATORS. DO YOU AGREE?**

4. We agree.
5. As a matter of principle, impartiality (i.e. the absence of bias towards one or other party) is the proper benchmark for determining whether an arbitrator is able to resolve a dispute in a fair and proper manner which reflects the interests of justice:
 - (a) Impartiality is an inherent pre-requisite to the fair and proper determination of a dispute. If an arbitrator is biased, that will inevitably impact the arbitrator's judgment.
 - (b) A codified and mandatory duty of impartiality serves the interests of the parties to a dispute by ensuring the arbitrator's judgment is not impaired, and protects the legitimacy of arbitration as a means of private dispute resolution.
 - (c) Independence may be an indicator that a decision was fairly and properly reached, but independence is not necessarily a pre-requisite to the fair and proper determination of a dispute. This is because an arbitrator may not be independent but may nevertheless still be impartial.
 - (d) For example, a not uncommon circumstance is that an arbitrator is a member of the same chambers as an advocate instructed in a matter by one or the other party (or both). Further, parties in certain specialist sectors or industries often draw on a comparatively small number of qualified practitioners (such as in the construction industry), leading to repeat appointments. The arbitrator may therefore not strictly speaking be independent from the party's or the parties' counsel or, by extension, the parties to the dispute. However, the parties might see no issue in appointing that arbitrator to resolve their dispute.
 - (e) A duty of independence may be unworkable in such areas in the short term, and could negatively impact the quality of decision-making whilst a larger pool of appropriately experienced and qualified practitioners is developed.

- (f) Independence is therefore but one factor to be taken into account in ascertaining whether the benchmark of impartiality has been met. There is little to be gained from an additional, stand-alone duty of independence in circumstances where an obligation of impartiality is already codified in the Arbitration Act 1996 (the **Act**) and under the common law.

B. Q3: 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. DO YOU AGREE?

6. We agree.
7. We see merit in the proposal as it aligns with the original goal of the Act i.e. to create a cogent and comprehensive legal framework for arbitral proceedings in England & Wales.
8. Given the Supreme Court's findings in *Halliburton*¹ that there is no material difference between the duty as formulated by the court and the language already used in the Act, for clarity and consistency, we agree with the Law Commission that the current formulation in the Act should be maintained.
9. On balance, we agree that the duty should remain general in nature:
- (a) As matters stand, challenges to arbitrators on the basis of pre-appointment disclosures are a relatively confined issue, and it is not clear that there is sufficient uncertainty as to the scope of an arbitrator's duty of disclosure to justify a more prescriptive approach.²
- (b) In addition, even if additional guidance was a valid goal, we are not convinced that an extensively defined duty within the Act itself would be the appropriate method and forum for such guidance. We agree with the observation of Lady Arden in *Halliburton* where she quoted the fact that the DAC had purposefully omitted matters from the Act where it was considered

¹ *Halliburton Company v Chubb Bermuda Insurance Ltd* [2020] UKSC 48.

² The LCIA reports that in 2020 there were only 11 challenges brought on the basis of pre-appointment disclosures, of which only 5 were successful. Likewise, in 2021, only 8 such challenges were brought, of which (again) just 5 were successful.

too difficult to agree a statutory formulation (including exceptions for confidentiality and privacy), as the courts were seen as better placed to address such matters on a case-by-case basis.

- (c) Furthermore, the International Bar Association has already developed guidance to assist parties and arbitrators when considering the arbitrators' duty of disclosure, which provides a helpful resource to consider in this regard.³ To the extent that similar, bespoke guidance tailored to the continuing duty in the Act could be published or provided (e.g. by the Law Commission or the LCIA) that would no doubt be of assistance to parties and arbitrators alike.

C. Q4: SHOULD THE ARBITRATION ACT 1996 SPECIFY THE STATE OF KNOWLEDGE REQUIRED OF AN ARBITRATOR'S DUTY OF DISCLOSURE, AND WHY?

- 10. Yes, for the reasons set out in our response to Question 5 below.

D. Q5: 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?

- 11. Our view is that the Act should specify the state of knowledge required by an arbitrator in exercising their duty of disclosure, and that duty should include both an arbitrator's actual knowledge and what an arbitrator ought to know after making reasonable inquiries.

- (a) Arbitration users have a legitimate expectation that an arbitrator appointed to consider their dispute will conduct reasonable inquiries in identifying matters which might reasonably give rise to justifiable doubts as to their impartiality and which therefore should be disclosed.

- (b) We do not agree that such a duty would be an unreasonable burden. Making inquiries is an established and critical part of legal practice in England & Wales, and consistent with the reasonable care expected of other professionals. Law firms and barristers routinely conduct conflict

³ International Bar Association, The Guidelines on Conflicts of Interest in International Arbitration (2014).

checks before taking on clients, which may be repeated over time. This is generally viewed as a necessary and legitimate part of legal practice.

- (c) From a client's perspective, where there is a failure to disclose (for whatever reason), there is little difference between information which could reasonably have been known and information that was known: the perception is that the arbitrator is at fault and justice has not been done.
- (d) Making clear in primary legislation that an arbitrator's duty of disclosure extends to what they ought to know after making reasonable inquiries will enhance users' perception of the soundness of arbitration as a dispute resolution mechanism.
- (e) Departing from the position taken in Scottish law should not be a material concern. There are many differences between English and Scottish law, and international arbitration inherently goes beyond the borders of the UK.

III. DISCRIMINATION [Q6 – 7]

A. Q6: 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 BY THE HOUSE OF LORDS)?

12. We consider that the test should be whether it can be more broadly justified.
13. It strikes us that the two ‘tests’ laid down by the Supreme Court and Court of Appeal would in most circumstances go hand-in-hand: a genuine, legitimate and justified requirement will generally be one that is necessary (and vice versa).
14. Arguably the more significant divergence between the Court of Appeal and Supreme Court was in their respective interpretations of what an arbitrator does. The Court of Appeal’s analysis was focused on the narrow determination of the merits of the dispute by reference to English law, whereas the Supreme Court inherently recognised that an arbitrator’s function goes beyond that, for example by considering parties’ conduct (by reference to their backgrounds) and/or by determining and stewarding the arbitral process. In each of these respects, the cultural and legal background of the arbitrator may be very relevant, and may indeed be one of the reasons why a particular requirement was included in the first place.
15. Should it be necessary to choose between the test of ‘necessary’ and one of ‘genuine, legitimate and justified’, we would tend to agree with the Supreme Court and adopt the latter approach. By advocating a three-fold requirement, the Supreme Court has introduced a high threshold by which most cases of discrimination will not be permitted. For example, it is hard to see circumstances in which a requirement for a “commercial man” would pass muster.
16. At the same time, the Supreme Court’s approach balances the legitimate policy aim of avoiding discrimination with a fundamental tenet of the arbitration process upon which arbitration is premised: party choice.

B. Q7: WE PROVISIONALLY PROPOSE THAT: (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. DO YOU AGREE?

17. We agree.
18. The proposed approach strikes the right balance between anti discrimination and party choice. It also recognises that, in certain circumstances, it may be appropriate to require an arbitrator to have a particular characteristic.
19. One theoretical concern with the Commission's proposed approach under limb (2) would be that there could be an increase in litigation on what constitutes a "*proportionate means of achieving a legitimate aim*". However:
 - (a) From our experience, we expect that this would be a small risk: there are already a relatively small number of challenges to arbitrators, and difficult cases are likely to be few and far between.
 - (b) In the event litigation does arise, the inclusion of a test already existing under equality legislation will provide a framework of reference material and jurisprudence to assist in the context of a challenge.
 - (c) Even if this were not the case, the public interest in avoiding discrimination would likely outweigh the challenges created by additional litigation (as it has in the context of the Equality Act more generally).
20. Finally, we note that a further concern has been raised in respect of the grounds for resisting enforcement under Article V.1(d) of the New York Convention (i.e. on the basis that "*the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties*"). We agree with the Law Commission's analysis of this risk at paragraphs 4.24 to 4.35 of the Consultation Paper.

IV. SUMMARY DISPOSAL OF CLAIMS [Q11 – 14]

A. Q11: 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. DO YOU AGREE?

21. We agree with the proposal for two reasons: increased efficiency and combatting due process paranoia.

(a) 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.

(b) While it is arguable that arbitral tribunals already have the power to adopt summary procedures under the Act, and summary procedures already exist in major institutional rules, it is likely that such procedures are still being used less than they should.

22. As to the proposed language:

(a) We agree that summary disposal should be “*subject to the agreement of the parties*” (i.e. non-mandatory, along the lines of section 69) and that the tribunal only be permitted to adopt summary procedures “*on the application of a party*”.

(b) We agree with the proposed reference to summary disposal of a “*claim or issue*”. This language is sufficiently broad to give the tribunal flexibility to use targeted summary procedures, for example in relation to specific procedural objections.

(c) We note that the Law Commission adopts the English litigation language of “summary” disposal, whereas most arbitral institutions prefer the term “early” determination or dismissal when incorporating such mechanisms into their rules. In our view, “early determination” is a better fit with wider international arbitration practice and avoids any potential misunderstandings associated with ‘summary justice’.

A. Q12: 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. DO YOU AGREE?

23. We agree.
24. This is a good proposal which aims to strike a balance between increased efficiency and maintaining flexibility by placing strong reliance on the tribunal's judgment and the parties' preferences. The particular summary procedure adopted in any particular arbitration will depend on all the factors, including the complexity and significance of the issue(s) to be decided. A one-size-fits-all procedure is to be avoided.
25. The Law Commission's proposal reflects the approach taken by the LCIA Rules, which permit a wide discretion to the arbitrators to determine the most suitable procedure in each case. By contrast, other major arbitral institutions have opted for more detailed provisions stating specific deadlines and giving the tribunal the gatekeeping function of deciding whether to permit the application to proceed.
26. Incorporating such a detailed mechanism in the Act, in our view, is likely to be too rigid and risks being incompatible with existing mechanisms in arbitration rules and agreements. Therefore, the Act should adopt broad language giving the tribunal a wide discretion to adopt summary procedures as it sees fit in the circumstances and in consultation with the parties.

B. Q13: WE PROVISIONALLY PROPOSE THAT THE ARBITRATION ACT 1996 SHOULD STIPULATE THE THRESHOLD FOR SUCCESS IN ANY SUMMARY PROCEDURE. DO YOU AGREE?

27. We agree.
28. Specifying such a threshold would increase legal certainty and consistency of application of the new provision. In turn, legal certainty and consistency may encourage more parties to apply for summary procedures, and more tribunals to grant such applications.

C. Q14: 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. DO YOU AGREE?

29. The arguments for and against each proposed test are finely balanced and we do not express a strong view either way. On balance, for the reasons set out below, we express a slight preference for the “manifestly without merit” test.
30. The main benefit of adopting the “manifestly without merit” test is that the Act would align with wider international arbitration practice, including the rules and guidelines of major institutions including the LCIA, ICC, SIAC, HKIAC, SCC and ICSID. By contrast, the inclusion of a different test in the Act may create uncertainty for London-seated arbitrations administered under institutional rules that contain the “manifestly without merit” test (or indeed some other test).
31. On its face the “manifestly without merit” test could be interpreted as more stringent than the “no real prospect of success” and “no other compelling reason” tests. A claim or issue that is without merit is likely to have no real prospect of success. By implication, characterising a claim or issue as *manifestly* without merit suggests a higher threshold. A higher threshold might actually undermine the attractiveness of a summary procedure as it might lessen the chance of successful applications, and in turn might discourage parties to apply for summary procedures in the first place.
32. That said, it may be desirable to have a potentially higher threshold for summary disposal in arbitration given the enhanced due process concerns and the absence of an appeal mechanism. Therefore, while we recognise the Law Commission’s attraction to the established body of case law concerning the “no real prospect of success” and “no other compelling reason for trial” tests, our view is that the “manifestly without merit” test is marginally more suited to making London a truly global arbitral seat.
33. In any case, whichever substantive test the Law Commission decides to recommend, we propose that it should be expressly made subject to the parties’ freedom to agree to a different test, e.g. through a bespoke arbitration agreement or the selection of institutional rules. The introduction of the words “*unless otherwise agreed by the parties*” in the new statutory provision would help reduce uncertainty for London-

seated arbitrations conducted under institutional rules and arbitration clauses that already contain a substantive test for summary disposal.

V. SECTION 44 AND THIRD PARTIES [Q16 – 17]

A. Q16: 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?

34. In our view, section 44 should be amended to confirm that orders under section 44(2) can be made against third parties to the extent that this is consistent with the courts' powers in English court proceedings.

35. It would strike the right balance between, on one hand, the rights of parties to an arbitration not to have the outcome of their arbitration pre-determined by the actions of third parties and, on the other hand, the rights of third parties not to be drawn, without safeguards, into a dispute resolution method to which they have not agreed and under which they have no recourse.

B. Q17: 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. DO YOU AGREE?

36. We agree. 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.

VI. EMERGENCY ARBITRATORS [Q18 – 21]

A. Q18: WE PROVISIONALLY CONCLUDE THAT THE PROVISIONS OF THE ARBITRATION ACT 1996 SHOULD NOT APPLY GENERALLY TO EMERGENCY ARBITRATORS. DO YOU AGREE?

37. While we agree that the provisions of the Act should not apply generally to emergency arbitrators, it would, in our view, be in the interests of legal certainty and clarity for the Act to set out expressly which provisions do apply to emergency arbitrators.

B. Q19: 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?

38. To the extent that administering a scheme of emergency arbitrators refers to maintaining a list of candidates and dealing with appointments and challenges, we agree with the Law Commission's conclusion.

39. The case load of the courts in England and Wales is already voluminous, so it would be more appropriate and expeditious to have these aspects managed by arbitral institutions. If and to the extent that an arbitral institution is unable or unwilling to administer a scheme, the result of which is that the emergency arbitrator procedure is ineffective, the applicant can apply directly to the court for relief under section 44 (see section 44(5)).

C. Q20: DO YOU THINK THAT SECTION 44(5) OF THE ARBITRATION ACT 1996 SHOULD BE REPEALED, AND WHY?

40. On balance, we do not think that section 44(5) should be repealed.

41. We appreciate the Law Commission's concerns regarding the misunderstanding of *Gerald Metals v Timis*⁴. We also agree with the Law Commission's point that section 44(3) is sufficiently flexibly worded such that the court can, in considering whether to grant relief, take into account the factors set out in section 44(5) (i.e. whether the 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).

⁴ [2016] EWHC 2327 (Ch).

42. That said, the current regime in section 44, including section 44(5), is a long-established regime that generally works well. Repeal of section 44(5) might give rise to legal uncertainty which requires a new body of case law to resolve, particularly as regards the court's exercise of its discretion under section 44(3).
43. Whilst *Gerald Metals* might be misunderstood, it seems to us that the better course to correct this misunderstanding is for the English courts to continue to apply section 44 and section 44(5) in a consistent, fair and predictable manner.

D. Q21: 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.

44. We prefer Option 1 above. If the parties have agreed to an emergency arbitrator procedure which has resulted in an order by the emergency arbitrator, that order should be enforceable by the courts with minimum delay and without additional procedural steps. To require an applicant to make an application under section 44(4) would be to require it, in effect, to reargue its application before the courts.

VII. CHALLENGES UNDER SECTION 67 [Q22 – 26]

- A. **Q22: WE PROVISIONALLY PROPOSE THAT (1) WHERE A PARTY HAS PARTICIPATED IN ARBITRAL PROCEEDINGS, AND HAS OBJECTED TO THE JURISDICTION OF THE ARBITRAL TRIBUNAL; AND (2) 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. DO YOU AGREE?**

45. We disagree with the Law Commission's proposal.

- (a) A party who has not agreed to be bound by an arbitration agreement, or who has not agreed to submit a particular dispute to arbitration, does not recognize the authority of the arbitral tribunal in that respect. Such party, if it is right, is not bound by such decision of the arbitral tribunal deciding it has jurisdiction. In principle, therefore, such party should retain right to a full *de novo* hearing under section 67, as is the *status quo*.
- (b) Some jurisdictional decisions involve not only legal arguments, but also complex factual determinations (e.g. on the credibility of and weight to be attached to the testimony of factual or expert witnesses) and prior procedural decisions that might have a material impact on the outcome (e.g. on the exclusion of evidence or whether document production orders should be made). If a tribunal does not have jurisdiction, then all such decisions are *ultra vires*, even if made with all good faith. A challenging party (if correct in its contention) has never agreed to such tribunal deciding such matters and more importantly, it is far from clear that a court restricted to sitting on appeal only has the necessary tools to address the situation.
- (c) This view finds strong judicial support. In *Dallah v Pakistan*⁵, Lord Mance, rejecting the argument for a review akin to an appeal, stated (at para. 26): "*Domestically, there is no doubt that, whether or not a party's challenge to the jurisdiction has been raised, argued and decided before the arbitrator, a party who has not submitted to the arbitrator's jurisdiction is entitled to a full judicial determination on evidence of an issue of jurisdiction before the English court, on an application made in time for that purpose under s.67 of the Arbitration Act 1996.*" [Emphasis added]

⁵ [2010] UKSC 46.

- (d) The risks of delay and increased costs in a *de novo* jurisdictional hearing can and should be managed by the courts applying their existing case management powers in light of all the circumstances. Not all applications under section 67 necessarily or reasonably require a full rerun of all the evidence or arguments.
- (e) Setting out statutory provisions for whether courts should grant a full rehearing, or a limited appeal, and the grey procedural areas in-between (oral evidence, new evidence, length of hearing), is not advisable as it will remove flexibility currently within a court's case management discretion.
- (f) The risks associated with a party using the tribunal hearing as a 'dress rehearsal' and then seeking new evidence, and developing new arguments, can also be addressed by the court's case management powers and costs decisions. In this regard we note Gross J's comments in *Electrosteel Castings*⁶ regarding section 67, as quoted in the Consultation Paper: "*Nothing said here should encourage parties to seek two evidential bites of the cherry in disputes as to the jurisdiction of arbitrators, not least because: (1) evidence introduced late in the day may well attract a degree of scepticism and (2) the Court has ample power to address such matters when dealing with questions of costs*".

B. Q23: 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?

46. Given our response to Q22, no changes are required to section 32.

C. Q24: WE PROVISIONALLY CONCLUDE THAT OUR PROPOSED CHANGE TO SECTION 67 OF THE ARBITRATION ACT 1996 WOULD NOT REQUIRE ANY SIMILAR CHANGE TO SECTION 103. DO YOU AGREE?

47. Given our response to Q22, no changes are required to section 103.

⁶ *Electrosteel Castings Ltd v Scan-Trans Shipping & Chartering Sdn Bhd* [2002] EWHC 1993 (Comm), [2002] 2 All ER (Comm) 1064. See also the comments in *The Kalisti* [2015] 1 All ER (Comm) 580 at [41]: "*It is not the function of an [arbitral] award to operate as an advice on evidence enabling the claimant to plug the gaps in its case identified by the arbitrators*".

D. Q25: 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. DO YOU AGREE?

48. We disagree.
49. It is not clear to us that the proposal identifies a problem in section 67 that needs to be rectified. We are not aware of any examples of tribunals continuing proceedings notwithstanding a successful section 67 challenge, and the Consultation Paper does not provide any either. It may be that the proposal addresses a problem that does not exist.
50. Even if there was a legitimate concern to be addressed, to the extent that a tribunal would go so far as to ignore the setting aside of their positive jurisdictional award under section 67, there is no guarantee that such tribunal would not simply ignore the declaration that its award has no effect either.
51. If an award is rendered without substantive jurisdiction, the principled and logical conclusion is that it should be set aside. It should not be left in existence but without effect. Doing so may give rise to unforeseen complications, which the Law Commission has itself raised.

E. Q26: 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?

52. We agree.
53. The proposal goes to a fundamental point of fairness. Where a tribunal rules that it has substantive jurisdiction, a successful party will ordinarily recover its costs of meeting the challenge. On the flipside, if the tribunal rules that it does not have substantive jurisdiction, the successful party does not get anything and is effectively left out of pocket.
54. Allowing the proposal would mean that a party which wrongly initiated arbitral proceedings would not walk away free of consequences, in circumstances where it has triggered the costs of bringing arbitration proceedings in the first place and progressing them to the point of an award.

55. This conclusion can also be justified by the principle of implied consent. A party bringing an arbitration claim, which is later found to be without jurisdiction, can be said to have impliedly agreed to and accepted the jurisdiction of the tribunal to decide the costs of such claim if the tribunal finds it does not have jurisdiction.

VIII. APPEAL ON POINTS OF LAW UNDER SECTION 69 [Q27]

A. Q27: 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?

56. We agree with the Law Commission's conclusion. In particular we agree with the Law Commission's view that the *status quo* is "*a defensible compromise between securing the finality of arbitral awards and ensuring that blatant errors of law are corrected.*"

Response of the Spotlight on Corruption to the Law Commission’s Consultation paper on Arbitration Act 1996.

Consultation Question 1.

12.1 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?

“Although the public interest may sometimes dictate a higher confidentiality, it may in some other instances preclude confidentiality”¹

Summary position:

We do not agree. In our view the Arbitration Act 1996 (“AA’96”) should be amended to provide that confidentiality is removed in the event that there is a reasonable suspicion that the proceedings are tainted by corruption. Corruption is a fundamental area raising issues of public interest. In our view, it is essential that the AA’96 is brought in line with the international and national anti-corruption and transparency legislation that has been passed since the AA’96 came into force. Transparency in corruption-related cases is an important safeguard to protect the integrity of courts in England and Wales.

This would: address disparity in the way arbitral tribunals treat allegations and/or concerns of corruption raised during arbitration proceedings; ensure that the courts do not unwittingly facilitate arbitration awards that are tainted by underlying and undisclosed corrupt activity; and also reduce the threat of arbitration being utilised as an instrument for endorsing illegal practices.

Inadequacy of the current confidentiality regime under AA’96 with the international anti-corruption regulations

The Law Commission’s Consultation paper concludes that the AA’96 functions well and that “root and branch reform” is not necessary. However, it also recognises that there are difficulties in addressing issues of confidentiality.

AA’96 does not contain any explicit provision on confidentiality of arbitrations seated in England. The drafters of the AA’96 regarded privacy and confidentiality to be “*better left to the common law to*

¹ Francois Dessemontet, ‘*Arbitration and Confidentiality*’ (1996) 7 Am. Rev. Int’l Arb. 299, 311

evolve” given various exceptions to confidentiality and acknowledged that “*none doubt at English law the existence of the general principles of confidentiality and privacy.*”²

Spotlight on Corruption³ (“**Spotlight**”) welcomes the reluctance of the Law Commission to endorse the suggestion that all types of arbitration should be confidential by default and the inclusion of such a provision in AA’96, given that there are sound public policy reasons for transparency in some arbitrations⁴. However, Spotlight submits that there is a pressing need to bring arbitrations into line with the international and national anti-corruption and transparency legislation that has been passed since the AA’96 came into force. This could be done, in our view, by way of an express legislative provision removing confidentiality in cases involving corruption allegations.

Section 1(b) of the AA’96 provides that: ‘*the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest*’. ‘Public interest’ is not defined anywhere in the Act. Given its constantly evolving nature, any attempts to define it would possibly result in an overly restrictive concept. However, when considering what amounts to the public interest, the Commission in our view should take into account the raft of national and international anti-corruption and transparency legislation that has been passed since the AA’96 came into force⁵.

English common law has accepted⁶ the general principle that confidentiality can be subject to the exception of public interest. The Commission also acknowledged in the Consultation paper that “[*m*]ore transparency might also be appropriate in areas which affect the general public, like public procurement contracts, or sport, and family law arbitrations”⁷. Corruption, however, is not identified in the paper as a fundamental area raising issues of public interest.

Corruption in international arbitration: egregious lack of consistency

² *John Forster Emmott v. Michael Wilson & Partners Limited* [2008] EWCA Civ 184 referring to The Departmental Advisory Committee on Arbitration Law, Report on the Arbitration Bill, 1996 (reprinted in Mustill and Boyd, *Commercial Arbitration*, 2nd edition, 2001 Companion, Appendix 1), paras 10, 12

³ Spotlight on Corruption is registered as a charitable company. Charity Number (England and Wales) 1185872. Company number 1212348.

⁴ *Department of Economic Policy and Development of the City of Moscow v Bankers Trust Company* [2004] EWCA Civ 314, para [56] referring to CPR Rule 62.10(3)(b): “*Plainly not all the arbitration claims ... need to be treated as confidential. And those that do will vary in the extent to which they should be so treated and the method by which to do so*”

⁵ UK: Proceeds of Crime Act 2002, Bribery Act 2010, Constitutional Reform and Governance Act 2010, Crime and Courts Act 2013, Criminal Justice and Courts Act 2015, Economic Crime (Transparency and Enforcement) Act 2022, etc.

International: OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 1997, United Nations Convention against Transnational Organized Crime and its Protocols 2000, United Nations Convention against Corruption 2003, Additional Protocol to the Criminal Law Convention on Corruption 2003, etc

⁶ E.g. *Ali Shipping Corporation v Shipyard Trogir* [1998] 2 All ER 136; [1999] 1 WLR 314 [326]

⁷ Para 2.28

The harmful effects of corruption and the violation of *bonos mores* in national, international, and transnational public policy has long gained universal recognition. Corruption affects the wider public rather than just the disputing parties. Therefore, the benefits of disclosing those parts of arbitration proceedings which deal with corruption allegations outweigh the parties' interest in maintaining blanket confidentiality: the public, by default, has a strong overriding interest in knowing the content of arbitration proceedings that involve allegations of corruption.

With the proliferation of global corruption, international commercial arbitration – which is by its very nature a private and consensual form of dispute resolution - is increasingly being asked to rule on cases which involve allegations of corruption, or contracts which bear the hallmarks of it, which inherently are of public interest. There is however presently no consensus on how to deal with these.

The review of the existing, somewhat scarce, arbitral practice in corruption cases available in the public domain demonstrates that there is a great disparity in how corruption allegations are dealt with in commercial arbitration. Such discrepancies can have a significant impact on the outcome of tribunal's assessment and finding of corruption. Despite the challenges faced by arbitrators, there is currently a notable lack of guidance which in practice probably deters arbitrators from adopting a proactive approach. The current and arguably dysfunctional confidentiality regime in commercial arbitration exacerbates these discrepancies in the treatment of allegations and/or concerns of corruption raised during arbitration proceedings.

The implications of such a lack of uniformity are potentially very serious for the general public and even risk arbitration being utilised as an instrument for endorsing illegal practices. The failure to provide for arbitral transparency in the event of corruption may serve to encourage corrupt parties to insist on arbitration clauses, if only to avoid or reduce the risk of corrupt acts being aired in the public domain. Indeed, Spotlight believes that the potential removal of confidentiality in the event of corrupt activity would provide a powerful deterrent to parties to engage in corruption and is aligned with the current legislative intent.⁸

The need for a defined clear legislative steer

All of this points towards a need to create a stronger framework to ensure arbitration meet the ever-increasing expectations of transparency of justice, in particular when the underlying issue of public policy involves corruption. There should be no “*question of withholding publication of reasoned judgments on a blanket basis of a generalised concern*”⁹ that a higher degree of transparency will drive users away to other jurisdictions. As also discussed in the Consultation paper, the examples of other

⁸ The Economic Crime (Transparency and Enforcement) Act 2022

⁹ *Symbion Power LLC v Venco Intiaz Construction Company* [2017] EWHC 348 (TCC) [90] (Jefford J)

jurisdictions, including Australia, Canada, USA and New Zealand, demonstrate that the principle of confidentiality may be subservient to the public interest.¹⁰

The Commission's preliminary conclusion was not to include explicit confidentiality provisions in AA'96 and to leave it to the courts to develop the law of confidentiality. However, the reliance on the courts' ability to develop the law on confidentiality in arbitration on a case-by-case basis, without a legislative steer, is likely to be overly optimistic. The majority of contentious issues arising in the context of corruption allegations do not tend even to reach the courts, and remain hidden from the public eye, unless an issue of a challenge, enforcement, or appeal under ss 67-69 AA'96 comes into play. The public interest demand for transparency can currently be endorsed only in very limited circumstances where, for example, enforcement of an award is resisted on public policy grounds¹¹ or where a court deals with a challenge to an award for serious irregularity.¹²

However, given that there are no express rules in the Civil Procedure Rules (CPR) governing the confidentiality of arbitrations in related court proceedings, it remains at the court's discretion whether or not details of an underlying arbitration are made publicly available, which significantly limits predictability of court decisions in this area.

Despite this discretion, there is emerging case law¹³ which shows that the English courts have determined that the public interest in ensuring and maintaining standards of fairness for arbitrators and parties outweigh the benefit to the parties of maintaining confidentiality in respect of the arbitration. In these cases, materials contained in arbitration proceedings and awards have been divulged in judgments. Codification in the CPR and through the AA'96 would help establish this emerging case law and ensure it is applied consistently.

Insufficiency of common law as a main regulator of confidentiality in arbitration

Leaving it to courts to determine on their own the scope and limits of confidentiality in arbitration and to vary them on a case-by-case basis does not always strike an adequate balance between the wider needs of society. The primary reason for this is that the courts have taken a pragmatic approach to what constitutes a public interest exception but in a piecemeal manner.¹⁴ It is inherently unsatisfactory for the courts to have to interpret legislative intentions where the legislature itself has declined to set out

¹⁰ *American Central Eastern Texas Gas Co. v Union Pacific Resources Group*, US Dist LEXIS 18536.2000- 2 Trade Cases (CCH) P72,997 (District Court, Texas, 9 August 2000); *Commonwealth of Australia v Cockatoo Dockyard Pty Ltd (Cockatoo Dockyard)*, (1995) 36 NSWSC 97; *Eso Australia Resources Ltd v Plowman* [1995] HCA 19

¹¹ *Westacre Investments Inc v Jugoimport-SDRP Holding Co Ltd* [1999] EWCA Civ 1401; [2000] QB 288

¹² *Lesotho Highlands Development Authority v Impregilo SpA and Others* [2002] EWHC 2435 (Comm); [2003] 1 All ER (Comm) 22 [2005] UKHL 43

¹³ *Symbion Power LLC v Venco Imtiaz Construction Company* [2017] EWHC 348; *Teekay Tankers Ltd v STX Offshore & Shipbuilding Co Ltd* [2017] EWHC 253 (Comm); *P v Q* [2017] EWHC 148 (Comm)

¹⁴ Brown, Julian Christopher Patric (2021) *The protection of confidentiality in arbitration: balancing the tensions between commerce and public policy*. Doctoral thesis, London Metropolitan University, page 158

guidelines, definitions or principles of public interest exception. In the words of the Court of Appeal “... a freedom which is restricted to what Judges think to be responsible or in the public interest is no freedom.”¹⁵

The Consultation paper also stated that the parties seeking to keep their arbitrations confidential should express their consent via their choice of arbitral rules governing their arbitration which provide for schemes of confidentiality (for example, the London Court of International Arbitration (LCIA) rules). However, the choice by the parties of arbitral rules containing the preferred (whichever) formula on confidentiality does not address in any way the public interest concerns arising from, nor will it lead to uniform treatment of, corruption issues in arbitration. The LCIA Rules state that parties must keep all awards and materials created for an arbitration confidential, unless all parties agree to publish the award. Whilst LCIA has policies for publishing some decisions on challenges to the appointment of arbitrators with names redacted to provide insight into arbitral decision-making, the LCIA Rules do not grant any leeway for the tribunals to overrule parties that have agreed, on grounds of public interest, interest of justice, or any other exception.

The Commission’s decision not to recommend action in this regard is a missed opportunity to clarify the position.¹⁶ The introduction of clearly drafted, statutory provisions setting out a transparency regime for cases involving corruption allegations would be a positive step towards uniformity of treatment of corruption allegations in arbitration, as well as assisting arbitrators in discharging their overarching duty in the fight against corruption and rendering an enforceable award.

Spotlight therefore suggests that the AA’96 should be amended to provide that an arbitrator must either remove confidentiality from the proceedings in the event that there is a reasonable suspicion that the proceedings are tainted by corruption or refer the matter to His Majesty's High Court of Justice in England for directions. For that purpose, a clear definition of what amounts to corruption¹⁷ would be required as well as a clear evidentiary threshold for when an arbitrator should either act to remove confidentiality from the proceedings or at least the award or refer the matter to the High Court for directions. These would not be onerous obligations for arbitration professionals, particularly, in the context of the current anti-corruption and transparency obligations facing other professionals under the Proceeds of Crimes Act and the Economic Crime (Transparency and Enforcement) Act 2022.

Codification of confidentiality regime as a guarantee for arbitrators

¹⁵ *Burke v Central Independent Television Plc* [1994] EWCA Civ J0209-2

¹⁶ The BCLP International Arbitration Survey Report Survey has shown that 83%, of respondents thought that the Act should address the issue of confidentiality but opinion was divided on how best to do so. Hence, there is a real appetite for codification of the duty of confidentiality, at least to some degree.

¹⁷ For example, a definition that is aligned with other UK anti-corruption legislation cited above

Spotlight acknowledges that as a private dispute resolution mechanism, arbitration is a system where the arbitration community's perception of arbitrators and their exercise of discretion can significantly affect their prospects of reappointment.¹⁸ This can act as a strong deterrent for tribunals to opt in favour of ordering disclosure of confidential materials. While we recognise that arbitrators might be reluctant to remove confidentiality for the fear of not being re-appointed in future nonetheless we think codification is important because it will remove the burden of discretion from the arbitrators and will subject them to a mandatory framework.

Hence, an express legislative provision requiring tribunals to remove confidentiality where the dispute involves corruption, under threat of non-enforceability of the award, would provide a safety net for arbitrators who would otherwise be reluctant to pursue corruption concerns¹⁹ and would incentivise them to comply with their overriding duty to issue an enforceable award.²⁰ The proposed amendment to the AA '96 would also enable tribunals to refer matters to the High Court for directions. This would address the Commission's concern in the Consultation paper that any exceptions to confidentiality, if codified, "*would be at such a high level of generality as to provide little concrete guidance.*"²¹

The Commission should take into account that whilst arbitrations may provide a valuable form of private dispute resolution, the English courts are often called upon to play an important role by providing not only procedural assistance (ss42-45 AA'96) but ultimately recognition and enforcement of arbitration awards (ss66-71 AA'96). Therefore, it is vital, and in the public interest, that the courts do not unwittingly facilitate arbitration awards that are tainted by underlying and undisclosed corrupt activity. Introducing statutory provisions setting out a transparency regime for cases involving corruption would reduce the chance of an illegal activity being disguised under the arbitration cover and would strengthen the ability of arbitral tribunals seated in England to handle corruption matters.

¹⁸ Todd Tucker, 'Inside the Black Box: Collegial Patterns on Investment Tribunals' (2016) 19 Journal of International Dispute Settlement 190.

¹⁹ Especially on a *sua sponte* basis where they have not been raised by the parties

²⁰ Under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958

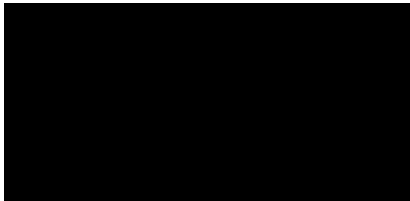
²¹ Consultation Paper, para 2.2

THE SUGAR ASSOCIATION OF LONDON

ESTABLISHED 1882

THE REFINED SUGAR ASSOCIATION

ESTABLISHED 1891



WEBSITE
WWW.SUGARASSOCIATION.CO.UK

154 BISHOPSGATE
LONDON, EC2M 4LN

TELEPHONE
+44 (0) 20 7377 2113

09 December 2022

Review of the 1996 Arbitration Act Joint Sugar Association of London (“SAL”) and Refined Sugar Association (“RSA”) Consultation response.

Dear Sirs/Mesdames,

The Sugar Association of London was founded by prominent sugar traders in 1882 to state Contract Rules providing contract terms for the proper conduct of the international raw sugar trade. The SAL delivers a dispute resolution service by arbitration to both Members and Non-Members.

The Refined Sugar Association was founded on 8th January 1891 for the purpose of establishing the Rules and Regulations required for the proper conduct of the white refined sugar trade in the United Kingdom and international markets.

Today the SAL and RSA are the foremost trade associations in the world for the international sugar trade.

The two Associations run an international arbitration service, based on English Law, to deal with disputes, each Association averages between 5 and 20 cases a year. Based on current open Arbitrations an average claim under SAL is just over USD 2 million, and RSA just under USD 1 Million.

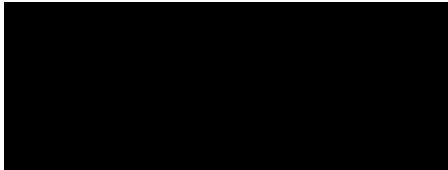


THE SUGAR ASSOCIATION OF LONDON

ESTABLISHED 1882

THE REFINED SUGAR ASSOCIATION

ESTABLISHED 1891



154 BISHOPSGATE
LONDON, EC2M 4LN

TELEPHONE
+44 (0) 20 7377 2113

WEBSITE
WWW.SUGARASSOCIATION.CO.UK

Both Associations appreciated representatives from the Law Commission coming to address the Federation of Commodities Association (which both Associations are members of) meeting in December 2021 to discuss the initial scope of the consultation into the Review of the 1996 Arbitration Act and welcome this opportunity to respond to the consultation.

Whilst both Associations support the concept of ‘updating’ rather than reforming the legislation, and the main recommendations of the review, We would like to make the following comments:

Confidentiality

Both Associations agree with the conclusions of the Law Commission that the Act should not seek to codify the law of confidentiality and that the law of confidentiality is best left to be developed by the courts.

Independence of arbitrators and disclosure

Neither Association supports the introduction of a duty of Statutory Duty Disclosure for Arbitrators which was a key consideration with *Halliburton v Chubb* and was ultimately rejected by the Supreme Court.

Arbitrators already have a statutory duty to act impartially. We do not believe that a move to create a statutory duty of disclosure would improve the confidence in, nor perception of, the impartiality of English law arbitration.



THE SUGAR ASSOCIATION OF LONDON

ESTABLISHED 1882

THE REFINED SUGAR ASSOCIATION

ESTABLISHED 1891



WEBSITE

WWW.SUGARASSOCIATION.CO.UK

154 BISHOPSGATE
LONDON, EC2M 4LN

TELEPHONE

+44 (0) 20 7377 2113

Rather We feel it may create an increase in challenges to Arbitral appointments on spurious grounds, creating unnecessary delay to Arbitration proceedings and ultimately impact the reputation of our Associations and that of Arbitration under English Law.

Of particular concern is the possible impact that a new statutory duty of Disclosure would have on specialist arbitral bodies including trade commodity associations, like the SAL and RSA, where there is necessarily a comparatively small pool of specialist arbitrators.

Both Associations appoint Arbitration Tribunals (unlike some other Arbitral bodies where the parties appoint the arbitrators) inviting those being appointed to declare any possible conflicts of interest/impartiality, and either decline the appointment, or invite the Parties to the arbitration to object to the appointment.

It is considered by our members to be advantageous to have arbitrators with considerable experience and expertise in the international trade of sugar. As such we have a relatively small pool of arbitrators upon whom we can appoint. This, in turn, may lead to an occurrence of overlapping common parties and repeat appointments, however this is not considered a concern by the users of the arbitration service supplied by either Association.



154 BISHOPSGATE, LONDON, EC2M 4LN

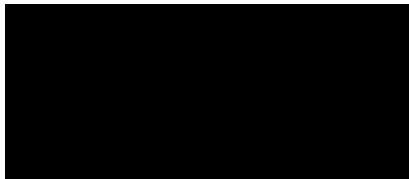
www.sugarassociation.co.uk

THE SUGAR ASSOCIATION OF LONDON

ESTABLISHED 1882

THE REFINED SUGAR ASSOCIATION

ESTABLISHED 1891



WEBSITE
WWW.SUGARASSOCIATION.CO.UK

**154 BISHOPSGATE
LONDON, EC2M 4LN**

TELEPHONE
+44 (0) 20 7377 2113

Under both Associations it is not just the Arbitral proceedings which are confidential, but the very fact of going to arbitration- which is known only to the Association full-time employed staff, the appointed Tribunal (including Legal advisor to the Tribunal) and the parties concerned.

A statutory duty of disclosure would fundamentally undermine the confidentiality of both Association's arbitral proceedings, and potentially create a situation where the number of arbitral nominations required could exceed the numbers of arbitrators available, effectively halting the system.

Previously the Supreme Court recognised the necessity of treating commodity and other specialist arbitral bodies, in a different way (2020) as did the International Bar Association guidelines on 'Conflicts of Interest in International Arbitration'.

As such we request that should a statutory duty of disclosure be recommended, there be a clear exemption is made for the SAL, RSA and similar organisations.

Discrimination

Both Associations agree with the Law Commission "that arbitration benefits when free from prejudice". As such, We support their proposals to increase



THE SUGAR ASSOCIATION OF LONDON

ESTABLISHED 1882



[WEBSITE
WWW.SUGARASSOCIATION.CO.UK](http://WWW.SUGARASSOCIATION.CO.UK)

THE REFINED SUGAR ASSOCIATION

ESTABLISHED 1891

154 BISHOPSGATE
LONDON, EC2M 4LN

TELEPHONE
+44 (0) 20 7377 2113

diversity in the appointment of arbitrators and to resist challenges to arbitral appointments on discriminatory grounds.

Immunity of Arbitrators

Both Associations agree with the proposal of the Law Commission to extend the immunity of arbitrators who have acted in 'good faith' in situations where they resign or where there is an application to the Courts to remove an arbitrator, which impugns them. The Law Commission notes that Professional Indemnity insurance may not cover an arbitrator in either situation.

Summary disposal of issues which lack merit

Both Associations support the proposal that the Act should provide explicitly that an arbitral tribunal may adopt a non mandatory summary procedure to dispose of a claim or defence, which parties are able to opt out from in the wording of their arbitration agreement.

Neither Association has a preference on threshold wording.

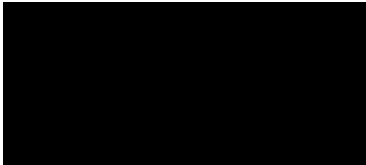


THE SUGAR ASSOCIATION OF LONDON

ESTABLISHED 1882

THE REFINED SUGAR ASSOCIATION

ESTABLISHED 1891



WEBSITE

WWW.SUGARASSOCIATION.CO.UK

154 BISHOPSGATE
LONDON, EC2M 4LN

TELEPHONE
+44 (0) 20 7377 2113

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

Both Associations agree there should be no requirement for the Act to be explicit regarding court's right to make orders under section 44 against third parties, and there where orders are made against third parties that those third parties should have the usual right to appeal.

Jurisdictional challenges against arbitral awards (section 67)

Both Associations agree with the proposal 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 sections 32 or 67 should be by way of an appeal and not a rehearing.



**THE SUGAR ASSOCIATION
OF LONDON**

ESTABLISHED 1882

**THE REFINED SUGAR
ASSOCIATION**

ESTABLISHED 1891



**154 BISHOPSGATE
LONDON, EC2M 4LN**

TELEPHONE
+44 (0) 20 7377 2113

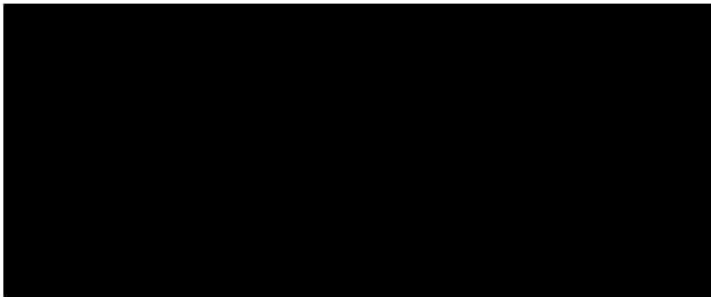
WEBSITE
WWW.SUGARASSOCIATION.CO.UK

Appeals on a point of law (section 69)

Neither Association would support any reform of Section 69 at this time.

Yours faithfully

For and on Behalf and the Chairmen and Councils of the Sugar Association of
London, and The Refined Sugar Association



Submitted to Law Commission Consultation: Review of the Arbitration Act 1996
Submitted on 2022-12-12 10:57:40

About you

What is your name?

Name:

[REDACTED]

What is the name of your organisation?

Enter the name of your organisation:

The Sugar Association of London
The Refined Sugar Association

Are you responding to this consultation in a personal capacity or on behalf of your organisation?

Response on behalf of organisation

If other, please state::

What is your email address?

Email:

[REDACTED]

What is your telephone number?

Telephone number:

[REDACTED]

If you want the information that you provide in response to this consultation to be treated as confidential, please explain to us why you regard the information as confidential. As explained in our privacy notice, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

Please explain to us why you regard the information as confidential:

Consultation questions

Consultation Question 1: 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?

Agree

Please share your views below.:

Both Associations agree with the conclusions of the Law Commission that the Act should not seek to codify the law of confidentiality and that the law of confidentiality is best left to be developed by the courts.

Consultation Question 2: We provisionally conclude that the Arbitration Act 1996 should not impose a duty of independence on arbitrators. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 3: 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. Do you agree?

Disagree

Please share your views below.:

Consultation Question 4: Should the Arbitration Act 1996 specify the state of knowledge required of an arbitrator's duty of disclosure, and why?

No

Please share your views below.:

Neither Association supports the introduction of a duty of Statutory Duty Disclosure for Arbitrators which was a key consideration with *Halliburton v Chubb* and was ultimately rejected by the Supreme Court. Arbitrators already have a statutory duty to act impartially. We do not believe that a move to create a statutory duty of disclosure would improve the confidence in, nor perception of, the impartiality of English law arbitration.

Rather We feel it may create an increase in challenges to Arbitral appointments on spurious grounds, creating unnecessary delay to Arbitration proceedings and ultimately impact the reputation of our Associations and that of Arbitration under English Law. Of particular concern is the possible impact that a new statutory duty of Disclosure would have on specialist arbitral bodies including trade commodity associations, like the SAL and RSA, where there is necessarily a comparatively small pool of specialist arbitrators. Both Associations appoint Arbitration Tribunals (unlike some other Arbitral bodies where the parties appoint the arbitrators) inviting those being appointed to declare any possible conflicts of interest/impartiality, and either decline the appointment, or invite the Parties to the arbitration to object to the appointment. It is considered by our members to be advantageous to have arbitrators with considerable experience and expertise in the international trade of sugar. As such we have a relatively small pool of arbitrators upon whom we can appoint. This, in turn, may lead to an occurrence of overlapping common parties and repeat appointments, however this is not considered a concern by the users of the arbitration service supplied by either Association.

Under both Associations it is not just the Arbitral proceedings which are confidential, but the very fact of going to arbitration- which is known only to the Association full-time employed staff, the appointed Tribunal (including Legal advisor to the Tribunal) and the parties concerned. A statutory duty of disclosure would fundamentally undermine the confidentiality of both Association's arbitral proceedings, and potentially create a situation where the number of arbitral nominations required could exceed the numbers of arbitrators available, effectively halting the system. Previously the Supreme Court recognised the necessity of treating commodity and other specialist arbitral bodies, in a different way (2020) as did the International Bar Association guidelines on 'Conflicts of Interest in International Arbitration'. As such we request that should a statutory duty of disclosure be recommended, there be a clear exemption is made for the SAL, RSA and similar organisations.

Consultation Question 5: 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?

Not Answered

Please share your views below.:

Consultation Question 6:

Not Answered

Please share your views below.:

Consultation Question 7:

Not Answered

Please share your views below.:

Consultation Question 8: Should arbitrators incur liability for resignation at all, and why?

No liability for resignation

Please share your views below.:

Both Associations agree with the proposal of the Law Commission to extend the immunity of arbitrators who have acted in 'good faith' in situations where they resign or where there is an application to the Courts to remove an arbitrator, which impugns them. The Law Commission notes that Professional Indemnity insurance may not cover an arbitrator in either situation.

Consultation Question 9: Should arbitrators incur liability for resignation only if the resignation is proved to be unreasonable?

No

Please share your views below.:

Both Associations agree with the proposal of the Law Commission to extend the immunity of arbitrators who have acted in 'good faith' in situations where they resign or where there is an application to the Courts to remove an arbitrator, which impugns them. The Law Commission notes that Professional Indemnity insurance may not cover an arbitrator in either situation.

Consultation Question 10: 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. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 11: 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. Do you agree?

Agree

Please share your views below.:

Both Associations support the proposal that the Act should provide explicitly that an arbitral tribunal may adopt a non mandatory summary procedure to dispose of a claim or defence, which parties are able to opt out from in the wording of their arbitration agreement.

Neither Association has a preference on threshold wording.

Consultation Question 12: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 13: We provisionally propose that the Arbitration Act 1996 should stipulate the threshold for success in any summary procedure. Do you agree?

Other

Please share your views below.:

Neither Association has a preference on threshold wording.

Consultation Question 14: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 15: 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. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 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?

No

Please share your views below.:

Both Associations agree there should be no requirement for the Act to be explicit regarding court's right to make orders under section 44 against third parties, and there where orders are made against third parties that those third parties should have the usual right to appeal.

Consultation Question 17: 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. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 18: We provisionally conclude that the provisions of the Arbitration Act 1996 should not apply generally to emergency arbitrators. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 19: 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?

Not Answered

Please share your views below.:

Consultation Question 20: Do you think that section 44(5) of the Arbitration Act 1996 should be repealed, and why?

Not Answered

Please share your views below.:

Consultation Question 21:

Not Answered

Please share your views below.:

Consultation Question 22:

Agree

Please share your views below.:

Both Associations agree with the proposal 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 sections 32 or 67 should be by way of an appeal and not a rehearing.

Consultation Question 23: 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?

Yes

Please share your views below.:

Both Associations agree with the proposal 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 sections 32 or 67 should be by way of an appeal and not a rehearing.

Consultation Question 24: We provisionally conclude that our proposed change to section 67 of the Arbitration Act 1996 would not require any similar change to section 103. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 25: 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. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 26: 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?

Agree

Please share your views below.:

Consultation Question 27: 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?

Agree

Please share your views below.:

Neither Association would support any reform of Section 69 at this time.

Consultation Question 28: Do you think that section 7 of the Arbitration Act 1996 (separability of arbitration agreement) should be mandatory, and why?

Not Answered

Please share your views below.:

Consultation Question 29: 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?

Not Answered

Please share your views below.:

Consultation Question 30: 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?

Yes

Please share your views below.:

Consultation Question 31: 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?

No

Please share your views below.:

Consultation Question 32: Do you think that section 39 of the Arbitration Act 1996 should be amended to refer to "orders" (rather than "awards"), and why?

Not Answered

Please share your views below.:

Consultation Question 33: Do you think that section 39(1) of the Arbitration Act 1996 should be amended to refer to "remedies" (rather than "relief"), and why?

Not Answered

Please share your views below.:

Consultation Question 34: 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 appellants was notified of the result of that request. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 35: 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?

Agree

Please share your views below.:

Consultation Question 36: We provisionally propose that sections 85 to 87 of the Arbitration Act 1996 (on domestic arbitration agreements) should be repealed. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 37: Do you think that any of the suggestions discussed in Chapter 11 needs revisiting in full, and if so, why?

Please share your views below.:

Consultation Question 38: 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?

Please share your views below.:

Submitted to Law Commission Consultation: Review of the Arbitration Act 1996
Submitted on 2022-12-15 16:15:05

About you

What is your name?

Name:
John Tackaberry

What is the name of your organisation?

Enter the name of your organisation:

39Essex Chambers, Chancery Lane London - Also The Society of Construction Law and the Society of Construction Arbitrators

Are you responding to this consultation in a personal capacity or on behalf of your organisation?

Other (please state)

If other, please state::
Both personal and on behalf of the organisations

What is your email address?

Email:

[REDACTED]

What is your telephone number?

Telephone number:

[REDACTED]

If you want the information that you provide in response to this consultation to be treated as confidential, please explain to us why you regard the information as confidential. As explained in our privacy notice, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

Please explain to us why you regard the information as confidential:

Consultation questions

Consultation Question 1: 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?

Disagree

Please share your views below.:

THE ARBITRATION ACT 1996
Confidentiality and Transparency

CONFIDENTIALITY AND TRANSPARENCY

1. Your admirable summary of the position notes that the topic is controversial, that there are a variety of approaches across the world, and that in some areas there is a movement towards greater transparency.

2. In discussing codification and thus the possibility of express statutory provision for confidentiality, you observe that "any statutory list should include a public interest exception". From there you turn to Your Preference. Under that heading you identify factors relevant to your preference:

- a. The default in some arbitrations favours transparency already;
- b. If confidentiality is to be the default, the exceptions must be robust; but existing lists are not exhaustive and new and different approaches may arise;
- c. Existing listed exceptions are expressed in broad terms and a high level of generality – they will not provide much in the way of guidance to users;
- d. The world view suggests a lack of consensus on what precisely are the limits of confidentiality; and the variety of approaches may reflect that the proper balance of transparency and confidentiality is still a matter of debate;
- e. What's more the dividing line will be likely to differ according to the context.

3. That leads your paper to para 2.44 where you make what, for me, is an important point. You say

“Although confidentiality is important to arbitration, the law of confidentiality is far broader than arbitration; an attempt to codify the law of confidentiality within an arbitration statute seems misplaced.”

4. I agree with that proposition. The law and rules governing arbitration should (also) be subject to the generally understood principles which underlie English law. Those principles favour transparency; and it follows that, if provision is to be made, it should make transparency the default position, leaving parties to argue for confidentiality in particular contexts.

5. In commenting on this topic I have limited myself to quoting from a very small number of writings – and in particular Sir Bernard Rix’s Jones Day lecture ; Lord Thomas’ BAILLI lecture ; Sir Bernard Eder’s riposte to Lord Thomas ; and an article by Messrs Partasides and Maynard in *Arbitration International* . The views of the individuals are worth listening to; and they cover the key points.

6. The respects noted by Sir Bernard in which the current regime of confidentiality was failing properly to acknowledge the public interest in commercial activity were the following :

- a. The basic philosophy of open justice is almost entirely reversed in arbitration;
- b. Even if there is general confidentiality there may be a better case for the publication of awards;
- c. Even in one off contracts there is a loss in not knowing how arbitrators perform the role of fact finders or contract interpreters ;
- d. Where standard forms of contract are involved, or there are jurisdictional issues, or principles of law or important forms of interim relief then the confidentiality regime means that the commercial law is going underground;
- e. Institutional rules are reinforcing this loss;
- f. Certainty and predictability in the law is being lost;
- g. Likewise being lost is the helpful analysis, development and creativity of the common law;
- h. “In ignorance of decisions already made, disputants are having to reinvent the wheel time and time again” ;

7. Lord Thomas came from the same viewpoint but put it in broader terms; and also went somewhat further in his attack on s. 69. For present purposes it suffices that he noted the loss of decision making in the courts and thus the enabling of

- a. the law to develop in the light of reasoned argument;
- b. public scrutiny of the law as it develops; and
- c. the ability to ensure that the law’s development is not hidden from view. “Where markets are concerned publicity in this sense is of fundamental importance; publicly articulated laws, and precedents, are the basis from which markets and market actors can organise their affairs and business arrangements.”

8. Partasides and Maynard also started from the same base as Sir Bernard, and go on to argue in favour of reversing the presumption of confidentiality. In particular they argue that the costs of confidentiality are real:

“The paucity of information about what takes place in arbitrations undoubtedly makes the process less predictable for all participants. The misinformation that is allowed to endure in the face of such paucity also undermines the legitimacy of a process that those same users depend upon”.

9. Sir Bernard Rix summarised it as follows:

“...it is in my opinion inevitable that the public interest is being and will increasingly be damaged as more and more decisions on areas of commercial law become inaccessible to the public arena ”

10. And Sir Bernard Eder was

“prepared to agree that the development of the law may possibly have been hindered by the reduction in the number of cases reaching the Courts on appeal” .

11. The list of items where there is damage to the public interest is substantial. I respectfully suggest that the key issue in this debate is whether arbitration should be subject to or excused from the traditional philosophy of open justice.

12. The principal defect in the section in the consultation paper on confidentiality is that it does not spell out that key issue. Since in substance a Law Commission report is advice to the government, then, in my view, it should spell out that issue so that the government can at least consider it.

13. Also objectionable is a subsidiary but important flaw in the reasoning. In substance the Commission in the consultation paper has followed the lead of the DAC and proposes to leave it to the courts. Paragraph 2.45 contains the following:

“The law of confidentiality is complex, fact-sensitive, and in the context of arbitration, a matter of ongoing debate. In such circumstances, there is a significant practical advantage in relying on the courts’ ability to develop the law on a case-by-case basis”

14. Given how very few are the cases that will reach the courts under the current regime, from where are the cases going to come which might enable the courts to develop the law of confidentiality?

15. Surely also that development ought to be in the public domain so that the public interest in the cases and the issues can be debated within society? Does not the development of the common law depend not only on the decisions of judges but also on the public understanding and ability to debate the cases? Such public debate is also not going to happen under the current regime even in respect of such cases as the courts do get to see.

16. The first sentence in the quotation above is simply factual. I regret to say that the second sentence is wishful thinking so far as arbitration under the current regime is concerned .

17. Next I return to the broad philosophic principle. It should carry great weight in the argument but does not appear to.

18. In setting out in The Rule of Law the reasons as to why

“The law must be accessible and so far as possible intelligible, clear and predictable” Tom Bingham made a number of points. This was one of them The third reason is rather less obvious, but extremely compelling. It is that the successful conduct of trade, investment and business generally is promoted by a body of accessible legal rules governing commercial rights and obligations.”

19. It meshes nicely with Lord Thomas arguing for measures to reinforce and enhance London as a centre for business rather than seeking to make the business of arbitration the main focus of the business community in London.

20. Going back further in time, Lord Acton, he of the saw about the tendency of power to corrupt, put another powerful argument in favour of transparency:

“Everything secret degenerates, even the administration of justice; nothing is safe that does not show how it can bear discussion and publicity”

21. Confidentiality can clothe iniquity as easily as it can hide honest sensitive information. While it is unduly pessimistic perhaps to suggest that the quotation about movements becoming businesses and then degenerating into a racket is the path that we are on, it would equally be unduly pollyannaish to assume that the confidentiality provided by the present system is not already being abused by some.

22. I would add to that that while it is interesting to know what the world thinks and to tabulate the different practices to be found across the globe, the UK should be holding to that basic philosophy of transparency; and, if anything, should be leading and not following.

23. Finally, it would be sensible to suggest that some of the problems identified by the critics would be alleviated if Rule 62.10(3) at least was reversed. I can see no good reason why that possibility should not be mentioned in the Commission’s final report.

John Tackaberry KC

8 December 2022 39 Essex Chambers London

Consultation Question 2: We provisionally conclude that the Arbitration Act 1996 should not impose a duty of independence on arbitrators. Do you agree?

Other

Please share your views below.:

I can see the argument for not including it and I agree that the concept of independence can be taken too far; but on balance I would have included it. However it is not a point I feel strongly about.

Consultation Question 3: 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. Do you agree?

Agree

Please share your views below.:

See the answer to Q5 below

Consultation Question 4: Should the Arbitration Act 1996 specify the state of knowledge required of an arbitrator’s duty of disclosure, and why?

Yes

Please share your views below.:

See the answer to Q5 below

Consultation Question 5: 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?

What they ought to know

Please share your views below.:

Disclosure should be as comprehensive as possible. And that disclosure should continue to apply through the arbitration process. Anything less opens the door to a challenge to the award which will take time and cost money. Experience seems to me to suggest that the fullest possible disclosure at the beginning either results in acceptance of the situation; or in having the argument at that point rather than after the award. If one does not wish to get into the discussion at that point then it is easy to withdraw without disrupting the process.

Consultation Question 6:

Other

Please share your views below.:

Only if absolutely necessary. I view with some reservations tight communities with strong views which will not always be in tune with the more of the society effectively enforcing those views on parties who may have decided to opt out from under them. It is also very difficult to be sure that conflicts have been identified in such cases.

Consultation Question 7:

Agree

Please share your views below.:

Consultation Question 8: Should arbitrators incur liability for resignation at all, and why?

No liability for resignation

Please share your views below.:

My preference is for a complete shield from liability

Consultation Question 9: Should arbitrators incur liability for resignation only if the resignation is proved to be unreasonable?

Other

Please share your views below.:

If a complete shield is not possible then the rule should be only if unreasonable.

Consultation Question 10: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 11: 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. Do you agree?

Other

Please share your views below.:

I would go further. As formulated the parties' agreement is required for the tribunal to have the power to decide summarily. It ought to be a built in power of the tribunal with the parties, if they do not like it having to agree specifically to remove it.

Consultation Question 12: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 13: We provisionally propose that the Arbitration Act 1996 should stipulate the threshold for success in any summary procedure. Do you agree?

Agree

Please share your views below.:

I am comfortable with the proposal as formulated in the consultation paper.

Consultation Question 14: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 15: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 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?

Yes

Please share your views below.:

Expressly providing for orders against third parties removes any doubt about it; and the ability to obtain third party evidence is obviously likely to assist the proper resolution of disputes.

Consultation Question 17: 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. Do you agree?

Disagree

Please share your views below.:

The proposal if implemented would create an imbalance in the ancillary proceedings between the party to the arbitration and the third party. rights of appeal should be the same for both parties to the application. the preferable course is to remove the restriction on the party to the arbitration.

Consultation Question 18: We provisionally conclude that the provisions of the Arbitration Act 1996 should not apply generally to emergency arbitrators. Do you agree?

Agree

Please share your views below.:

Consultation Question 19: 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?

Agree

Please share your views below.:

Consultation Question 20: Do you think that section 44(5) of the Arbitration Act 1996 should be repealed, and why?

No

Please share your views below.:

I found the arguments in support of redundancy unconvincing; and I do not think that some possible mis-understanding by some of one application in Gerald Metals should drive the amendment of the Act. Para 7.64 seems to me to have substance; and the DAC's dislike is merely part and parcel of its determination to elevate party autonomy above all other considerations.

Consultation Question 21:

Permission under section 44

Please share your views below.:

The courts can move with quite remarkable speed if suitably briefed. if the emergency arbitrator's order has been ignored there is no reason to think that a peremptory order will have any better outcome. One would need the extra muscle of a Court order.

Consultation Question 22:

Disagree

Please share your views below.:

The question as to whether the tribunal has or has not got jurisdiction is such a critical question that it seems to me to be desirable that the subsequent challenge should be by way of rehearing. the Risks of a party using the first stage as a practice run seems to me to be small and is easily addressed by the court; and the first outing of the issue before the arbitrations may have taken place under pressure inhibiting the proper analysis of the issues or the gathering of necessary evidence. I would prefer the status quo to remain.

Consultation Question 23: 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?

No

Please share your views below.:

Section 32 provides an effective and quick route to court to address this very important issue of jurisdiction. As I am against the proposed limitation on s. 67 it is unsurprising that I see no reason to place limits on s. 32. I would leave both as they are. I see this pair of minor amendments as amendments for the sake of amendment. There seems to be no real evidence of a problem in practice - only in the writings of people about the sections.

Consultation Question 24: We provisionally conclude that our proposed change to section 67 of the Arbitration Act 1996 would not require any similar change to section 103. Do you agree?

Other

Please share your views below.:

I do not agree with the change to s. 67 but if made then I agree that no change is needed to s. 103.

Consultation Question 25: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 26: 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?

Agree

Please share your views below.:

Consultation Question 27: 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?

Disagree

Please share your views below.:

i am firmly in the same camp as Lord Thomas and I respectfully disagree with your characterisation of his views or some of them as "askew"!

Consultation Question 28: Do you think that section 7 of the Arbitration Act 1996 (separability of arbitration agreement) should be mandatory, and why?

Yes

Please share your views below.:

on the whole it seems to be a tidier provision that way.

Consultation Question 29: 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?

Agree

Please share your views below.:

Consultation Question 30: 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?

Yes

Please share your views below.:

A convincing case is made in the Paper.

Consultation Question 31: 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?

No

Please share your views below.:

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.

Consultation Question 32: Do you think that section 39 of the Arbitration Act 1996 should be amended to refer to "orders" (rather than "awards"), and why?

Yes

Please share your views below.:

unless one is going to give to a tribunal the power to revisit and amend its previous awards (thus retrospectively reinvigorating its role as a tribunal which would normally be spent upon the issue of an award) then the section should be concerned with orders and should so say both in the heading and in the text.

Consultation Question 33: Do you think that section 39(1) of the Arbitration Act 1996 should be amended to refer to "remedies" (rather than "relief"), and why?

Yes

Please share your views below.:

it is a tidy solution and removes the possibility of ingenious but meritless arguments based on the distinction if the existing text is maintained.

Consultation Question 34: 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 appelland was notified of the result of that request. Do you agree?

Agree

Please share your views below.:

Consultation Question 35: 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?

Other

Please share your views below.:

I am intrigued by your gloss on the section. if it is intended to address appeals from decisions under ss 67-9 then I think that it should say so.

Consultation Question 36: We provisionally propose that sections 85 to 87 of the Arbitration Act 1996 (on domestic arbitration agreements) should be repealed. Do you agree?

Disagree

Please share your views below.:

THE ARBITRATION ACT
SECTIONS 85, 86, 87, 88

WHAT THE SECTIONS CONTAIN

1. Part II of the Act - Other Provisions relating to Arbitration – starts with Sections 85, 86 and 87. These sections set up a separate code for domestic arbitration in in England and Wales. Section 88 enabled the Secretary of State to repeal or amend the provisions of sections 85, 86 and 87 by order.
2. The three sections retained aspects of the law of arbitration as it stood immediately before the enactment of the 1996 Act and which had been removed in the process of drafting the overall regime established by Part I of the Act (and indeed had been limited to domestic arbitration by earlier legislation).

3. The concept of a “domestic” arbitration was very carefully defined. The seat of the arbitration had to be in the United Kingdom, (if the seat had been designated or determined). The limits on who could be a party to a domestic arbitration were defined negatively:

- a. No individual who was a national of or habitually resident in a state other than the United Kingdom could be a party to a domestic arbitration .
- b. Similarly on the corporate front. If there was a corporate party to an arbitration that was incorporated outside the UK or had its central control and management outside the UK, the arbitration fell under Part I.

4. Section 86 provided a power for the court in certain circumstances to override an arbitration agreement. This constituted a wider power than provided by section 9 of Part I, which required the court to enforce the arbitration agreement unless it was null and void, inoperative or incapable of being performed. Under part II, the court was empowered by this section to refuse a stay on the same grounds as in Section 9; but in addition it was entitled to refuse to enforce the arbitration agreement if there were “other sufficient grounds for not requiring the parties to abide by the arbitration agreement”.

5. One ground for refusing to enforce the arbitration agreement was expressed in the section, namely that the applicant for a stay of court proceedings in favour of arbitration was not actually ready and willing or had at a material time been unwilling and unready to do all things necessary for the proper conduct of the arbitration or for the execution of any pre-arbitration resolution procedures.

6. That however was only one ground. It must have been intended that the old law on these sorts of stays would still apply in the context of an arbitration agreement. An example of such a “sufficient ground” is where related arbitrations might lead to conflicting results. For example, the building owner is sued by the building contractor who blames the architect; and the owner in its turn commences proceedings against the architect, it is clear that different tribunals might reach conflicting decisions. The owner could lose both ways. If the disputes stay in court they can be decided by the same tribunal – see *Berkshire Senior Citizens Housing Association Ltd v McCarthy E Fitt Ltd and National, Westminster Bank Ltd, (Trustees of the Estate of Anthony Cripps, Deceased)* .

7. The third section in this little group, section 87, addressed agreements to exclude the jurisdiction of the court under section 45 – determination of a preliminary point of law – or under section 69 – challenging the award: appeal on a point of law. It provided that no such agreement should be effective unless it was entered into after the commencement of the arbitral proceedings in which the question arose or the award was made.

8. Section 88 rounded up the group of sections by enabling adjustment of these provisions or indeed their repeal in suitable circumstances by order, in the light of experience.

9. One regime for domestic disputes and a different one for non-domestic ones appeared to be at odds with the requirements of European Community Law and accordingly these sections were never brought into force. By reason of Brexit, that objection no longer stands; and the question is whether the sections should now be brought into effect or repealed.

THE DAC'S VIEW

10. It did not like these sections. For example it disliked empowering the court to override the arbitration agreement of two parties where there were layered contracts and where overriding the agreement enabled other interested parties to be brought before a single tribunal. *Berkshire Senior Citizens* is an example. The way that the DAC put it in the report in February 1996 was as follows:

“323. the justification for refusing to stay legal proceedings [in this situation] is that it would be much better for all the concerned parties to be brought into one proceeding, so that the whole matter can be sorted out between them all.

324. This reasoning of course is in one sense supported by common sense and justice, for in certain cases it would be better and fairer for all the disputes between all the parties involved to be dealt with by one tribunal, thereby avoiding delay and the possibility of inconsistent findings by different tribunals. However, ...to refuse a stay because other parties are involved involves tearing up the arbitration agreement that the applicant for a stay has made. In other words, with the benefit of hindsight, the Court adjusts the rights and obligations of contracting parties.”

11. The report also commented on some anomalous results that flowed from the definition of a “domestic” agreement. It continued as follows;

“327. Notwithstanding the foregoing, we do not propose in this Bill to abolish the distinction. Some defend it, and we have not had an opportunity to make all the soundings we would like on this subject. What we have done is to put the domestic arbitration rules into a separate part of the Bill and provided in Clause 88 for a power of repeal through the mechanism of a positive joint resolution of each House of Parliament.”

12. The February Report then turns to section 87 and the inhibition of an effective agreement to exclude the jurisdiction of the court to deal with points of law.

“330. Again we are not persuaded of the value or validity of this, but we have preserved the existing law for the same reason as we have preserved the present position on stays. Our own view is that this distinction should disappear.”

13. It is to be noted that in this case at least it would not be a case of the court retrospectively remaking the parties' agreement. If they, once proceedings were in train, wanted to agree to exclude the jurisdiction of the court then they would be able to.

14. It is also to be noted that at least in the context of domestic arbitration this provision would have brought legal issues to court and to that extent would have been a contribution to the development of the common law in that the cases would not have gone “underground” – to pick up a point from Sir Bernard Rix and Lord Thomas in their lectures in 2015 and 2016 .

THE LAW COMMISSION'S CONSULTATION PAPER

15. I hope it will not seem discourteous if I summarise the relevant paragraphs in the Paper as adopting the default view of the DAC with the addition only of the assertion that it is “inappropriate to reintroduce distinctions from earlier legislation” when the 1996 Act had been operating without these sections

for 25 years.

16. As to that point, it is the case that the Act so operated by reason of the requirements of applicable European law. Those requirements no longer apply. The sections deserve consideration on merit, particularly since the DAC acknowledged that it had not completed its soundings exercise. It left them in and provided a mechanism to adjust or terminate them as experience of them suggested. There is no good reason for not allowing that exercise to go ahead now.

THE PROBLEM

17. The problem lies with the default view of the DAC. It elevated the autonomy of the parties to a position of pre-eminence – indeed it would not be wrong to formulate it as total pre-eminence. There is in particular no allowance for or consideration of public interest in the resolution of commercial disputes. That party autonomy in commercial arrangements should so completely override the requirements of public interest should only need to be stated to be seen to be seriously flawed – but apparently not.

18. As it happens, the DAC report provides an example of how that elevation of party autonomy distorts thinking. In its discussion of the power of the Court to override an arbitration agreement so as to enable a single process of resolution where more parties than the two signatories to the agreement itself are involved, it makes a telling point.

“This reasoning [leading to the single forum] of course is in one sense supported by common sense and justice, for in certain cases it would be better and fairer for all the disputes between all the parties involved to be dealt with by one tribunal, thereby avoiding delay and the possibility of inconsistent findings by different tribunals.”

19. What is it that overrides this course “supported by common sense and justice”? It is the excessive weight given to the autonomy of the Parties. So far as reasoning in support of the DAC position is concerned, it relies on this:

“...to refuse a stay because other parties are involved involves tearing up the arbitration agreement that the applicant for a stay has made. In other words, with the benefit of hindsight, the Court adjusts the rights and obligations of contracting parties.”

20. The expression “tearing up the arbitration agreement” is an emotive formulation which adds nothing of substance to a formulation such as “overriding the arbitration agreement for reasons of common sense and justice”. The hindsight point also should not carry weight. It is specious. If one makes a contract subject to a legal system that permits a court, in suitable circumstances, to override a term of an arbitration agreement there is no question of hindsight; the possibility can be clearly foreseen in a legal system that is transparent and predictable.

SUMMARY

21. The Law Commission should recommend carrying through the process originally envisaged when the 1996 Act was passed – namely that these sections should come into force; and that section 88 would provide the opportunity to see how things went and whether repeal or amendment was appropriate.

22. The DAC’s default position was based upon a flawed determination to elevate the autonomy of the parties above all other considerations, including proper public interest.

23. As it happens, the domestic regime would meet to some extent the sort of complaints made by Lord Thomas and Sir Bernard Rix, which surely constitute soundings that need to be given proper consideration.

24. I respectfully invite the Law Commission to revisit these sections and do one or more of the following:

- a. Recommend bringing into force the sections in the way that would have occurred originally but for the European rules;
- b. Reconsider the sections from scratch;
- c. Seek input generally and also on the specific point as to the extent that public interest should override party autonomy at least in a domestic context.

25. If none of these solutions appeal, the final report should make clear that in reaching the recommendation to repeal them, there has been no consideration of the relationship between public interest in dispute resolution in the commercial world on the one hand and the elevation of party autonomy and its preference for confidentiality on the other - either in the DAC or in this latest exercise. It should also make clear that there has been no consideration of allowing the experiment that the DAC had effectively set up to go ahead.

John Tackaberry KC
14 December 2022 39 Essex Chambers London

Domestic arbitration agreements

85 Modification of Part I in relation to domestic arbitration agreement

(1) In the case of a domestic arbitration agreement the provisions of Part I are modified in accordance with the following sections.

(2) For this purpose a “domestic arbitration agreement” means an arbitration agreement to which none of the parties is—

- (a) an individual who is a national of, or habitually resident in, a state other than the United Kingdom, or
- (b) a body corporate which is incorporated in, or whose central control and management is exercised in, a state other than the United Kingdom, and under which the seat of the arbitration (if the seat has been designated or determined) is in the United Kingdom.

(3) In subsection (2) “arbitration agreement” and “seat of the arbitration” have the same meaning as in Part I (see sections 3, 5(1) and 6).

86 Staying of legal proceedings

(1) In section 9 (stay of legal proceedings), subsection (4) (stay unless the arbitration agreement is null and void, inoperative, or incapable of being performed) does not apply to a domestic arbitration agreement.

(2) On an application under that section in relation to a domestic arbitration agreement the court shall grant a stay unless satisfied—

(a) that the arbitration agreement is null and void, inoperative, or incapable of being performed, or

(b) that there are other sufficient grounds for not requiring the parties to abide by the arbitration agreement.

(3) The court may treat as a sufficient ground under subsection (2)(b) the fact that the applicant is or was at any material time not ready and willing to do all things necessary for the proper conduct of the arbitration or of any other dispute resolution procedures required to be exhausted before resorting to arbitration.

Part II – Other provisions relating to arbitration

Document Generated: 2022-05-13

(4) For the purposes of this section the question whether an arbitration agreement is a domestic arbitration agreement shall be determined by reference to the facts at the time the legal proceedings are commenced.

87 Effectiveness of agreement to exclude court's jurisdiction

(1) In the case of a domestic arbitration agreement any agreement to exclude the jurisdiction of the court under—

(a) section 45 (determination of preliminary point of law), or

(b) section 69 (challenging the award: appeal on point of law), is not effective unless entered into after the commencement of the arbitral proceedings in which the question arises or the award is made.

(2) For this purpose the commencement of the arbitral proceedings has the same meaning as in Part I (see section 14).

(3) For the purposes of this section the question whether an arbitration agreement is a domestic arbitration agreement shall be determined by reference to the facts at the time the agreement is entered into.

88 Power to repeal or amend sections 85 to 87

(1) The Secretary of State may by order repeal or amend the provisions of sections 85 to 87.

(2) An order under this section may contain such supplementary, incidental and transitional provisions as appear to the Secretary of State to be appropriate.

(3) An order under this section shall be made by statutory instrument and no such order shall be made unless a draft of it has been laid before and approved by a resolution of each House of Parliament.

Consultation Question 37: Do you think that any of the suggestions discussed in Chapter 11 needs revisiting in full, and if so, why?

Please share your views below.:

Consultation Question 38: 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?

Please share your views below.:

THE ARBITRATION ACT 1996
Confidentiality and Transparency

CONFIDENTIALITY AND TRANSPARENCY

1. Your admirable summary of the position notes that the topic is controversial, that there are a variety of approaches across the world, and that in some areas there is a movement towards greater transparency.

2. In discussing codification and thus the possibility of express statutory provision for confidentiality, you observe that “any statutory list should include a public interest exception”. From there you turn to Your Preference. Under that heading you identify factors relevant to your preference:
 - a. The default in some arbitrations favours transparency already;
 - b. If confidentiality is to be the default, the exceptions must be robust; but existing lists are not exhaustive and new and different approaches may arise;
 - c. Existing listed exceptions are expressed in broad terms and a high level of generality – they will not provide much in the way of guidance to users;
 - d. The world view suggests a lack of consensus on what precisely are the limits of confidentiality; and the variety of approaches may reflect that the proper balance of transparency and confidentiality is still a matter of debate;
 - e. What’s more the dividing line will be likely to differ according to the context.

3. That leads your paper to para 2.44 where you make what, for me, is an important point. You say

“Although confidentiality is important to arbitration, the law of confidentiality is far broader than arbitration; an attempt to codify

the law of confidentiality within an arbitration statute seems misplaced.”

4. I agree with that proposition. The law and rules governing arbitration should (also) be subject to the generally understood principles which underlie English law. Those principles favour transparency; and it follows that, if provision is to be made, it should make transparency the default position, leaving parties to argue for confidentiality in particular contexts.
5. In commenting on this topic I have limited myself to quoting from a very small number of writings – and in particular Sir Bernard Rix’s Jones Day lecture¹; Lord Thomas’ BAILII lecture²; Sir Bernard Eder’s riposte to Lord Thomas³; and an article by Messrs Partasides and Maynard in *Arbitration International*⁴. The views of the individuals are worth listening to; and they cover the key points.
6. The respects noted by Sir Bernard in which the current regime of confidentiality was failing properly to acknowledge the public interest in commercial activity were the following⁵:
 - a. The basic philosophy of open justice is almost entirely reversed in arbitration;
 - b. Even if there is general confidentiality there may be a better case for the publication of awards;
 - c. Even in one off contracts there is a loss in not knowing how arbitrators perform the role of fact finders or contract interpreters⁶;
 - d. Where standard forms of contract are involved, or there are jurisdictional issues, or principles of law or important forms of

¹ The Jones Day Professorship in Commercial Law lecture – 12 March 2015

² The BAILII Lecture 2016 – 9 March 2016

³ 28 April 2016 – speech at the AGM of the London Branch of the CI Arb

⁴ Raising the Curtain on English Arbitration, *Arbitration International*, 2017, 33, 197-202

⁵ These are taken from the Rix paper; but the substance of his view is reflected in Thomas, who would go further with his attack on s. 69; and

⁶ Law firms that have a large arbitration practice will be at a distinct advantage over firms who rarely go there since the former will have a working or are likely to have a working knowledge of a considerable number of arbitrators and counsel and how they perform in arbitration.

interim relief then the confidentiality regime means that the commercial law is going underground;

- e. Institutional rules are reinforcing this loss;
 - f. Certainty and predictability in the law is being lost;
 - g. Likewise being lost is the helpful analysis, development and creativity of the common law;
 - h. "In ignorance of decisions already made, disputants are having to reinvent the wheel time and time again"⁷;
7. Lord Thomas came from the same viewpoint but put it in broader terms; and also went somewhat further in his attack on s. 69. For present purposes it suffices that he noted the loss of decision making in the courts and thus the enabling of
- a. the law to develop in the light of reasoned argument;
 - b. public scrutiny of the law as it develops; and
 - c. the ability to ensure that the law's development is not hidden from view. "Where markets are concerned publicity in this sense is of fundamental importance; publicly articulated laws, and precedents, are the basis from which markets and market actors can organise their affairs and business arrangements."
8. Partasides and Maynard also started from the same base as Sir Bernard, and go on to argue in favour of reversing the presumption of confidentiality. In particular they argue that the costs of confidentiality are real:

"The paucity of information about what takes place in arbitrations undoubtedly makes the process less predictable for all participants. The misinformation that is allowed to endure in the face of such paucity also undermines the legitimacy of a process that those same users depend upon".

⁷ Of course a benefit for the legal profession

9. Sir Bernard Rix summarised it as follows:

“ ...it is in my opinion inevitable that the public interest is being and will increasingly be damaged as more and more decisions on areas of commercial law become inaccessible to the public arena ”

10. And Sir Bernard Eder was

“prepared to agree that the development of the law may possibly have been hindered by the reduction in the number of cases reaching the Courts on appeal” .

11. The list of items where there is damage to the public interest is substantial. I respectfully suggest that the key issue in this debate is whether arbitration should be subject to or excused from the traditional philosophy of open justice.

12. The principal defect in the section in the consultation paper on confidentiality is that it does not spell out that key issue. Since in substance a Law Commission report is advice to the government, then, in my view, it should spell out that issue so that the government can at least consider it.

13. Also objectionable is a subsidiary but important flaw in the reasoning. In substance the Commission in the consultation paper has followed the lead of the DAC⁸ and proposes to leave it to the courts. Paragraph 2.45 contains the following:

“The law of confidentiality is complex, fact-sensitive, and in the context of arbitration, a matter of ongoing debate. In such circumstances, there is a significant practical advantage in relying

⁸ The DAC is also guilty of the same mistake; but it is – just – arguable that, not foreseeing how completely the flow of cases to the Commercial Court which arise in arbitration would dry up, they were less at fault than any one writing now and with that knowledge.

on the courts' ability to develop the law on a case-by-case basis
....."⁹

14. Given how very few are the cases that will reach the courts under the current regime, from where are the cases going to come which might enable the courts to develop the law of confidentiality?
15. Surely also that development ought to be in the public domain so that the public interest in the cases and the issues can be debated within society? Does not the development of the common law depend not only on the decisions of judges but also on the public understanding and ability to debate the cases? Such public debate is also not going to happen under the current regime even in respect of such cases as the courts do get to see.
16. The first sentence in the quotation above is simply factual. I regret to say that the second sentence is wishful thinking so far as arbitration under the current regime is concerned¹⁰.
17. Next I return to the broad philosophic principle. It should carry great weight in the argument but does not appear to.
18. In setting out in *The Rule of Law* the reasons as to why

"The law must be accessible and so far as possible intelligible, clear and predictable" Tom Bingham made a number of points. This was one of them
The third reason¹¹ is rather less obvious, but extremely compelling. It is that
the successful conduct of trade, investment and business generally is
promoted by a body of accessible legal rules governing commercial rights and
obligations."

⁹ Paragraph 2.24

¹⁰ The last sentence in paragraph 2.24 – "Far from being a weakness, we consider it one of the strengths of arbitration law in England and Wales that confidentiality is not codified" – ignores the excellent point made earlier that confidentiality is a wider topic than arbitration; ignores the fact that in other areas of the law the courts can develop the law since they are not hamstrung in anything like the comprehensive way that is the case in arbitration; and wholly ignores the public interest element applicable to the resolution of commercial disputes.

¹¹ The first two were concerned with knowing one's personal rights and obligations in the context of the criminal law and likewise under civil law

19. It meshes nicely with Lord Thomas arguing for measures to reinforce and enhance London as a centre for business rather than seeking to make the business of arbitration the main focus of the business community in London.
20. Going back further in time, Lord Acton, he of the saw about the tendency of power to corrupt, put another powerful argument in favour of transparency:

“Everything secret degenerates, even the administration of justice; nothing is safe that does not show how it can bear discussion and publicity”¹²
21. Confidentiality can clothe iniquity as easily as it can hide honest sensitive information. While it is unduly pessimistic perhaps to suggest that the quotation about movements becoming businesses and then degenerating into a racket is the path that we are on, it would equally be unduly pollyannaish to assume that the confidentiality provided by the present system is not already being abused by some.
22. I would add to that that while it is interesting to know what the world thinks and to tabulate the different practices to be found across the globe, the UK should be holding to that basic philosophy of transparency; and, if anything, should be leading and not following.
23. Finally, it would be sensible to suggest that some of the problems identified by the critics would be alleviated if Rule 62.10(3) at least was reversed. I can see no good reason why that possibility should not be mentioned in the Commission’s final report.

8 December 2022

John Tackaberry KC
39 Essex Chambers London

¹² letter (23 January 1861), published in *Lord Acton and his Circle* (1906) by Abbot Gasquet, Letter 24

THE ARBITRATION ACT
SECTIONS 85, 86, 87, 88

WHAT THE SECTIONS CONTAIN

1. Part II of the Act - Other Provisions relating to Arbitration – starts with Sections 85, 86 and 87. These sections set up a separate code for domestic arbitration in in England and Wales. Section 88 enabled the Secretary of State to repeal or amend the provisions of sections 85, 86 and 87 by order.
2. The three sections retained aspects of the law of arbitration as it stood immediately before the enactment of the 1996 Act and which had been removed in the process of drafting the overall regime established by Part I of the Act (and indeed had been limited to domestic arbitration by earlier legislation).
3. The concept of a “domestic” arbitration was very carefully defined. The seat of the arbitration had to be in the United Kingdom, (if the seat had been designated or determined). The limits on who could be a party to a domestic arbitration were defined negatively:
 - a. No individual who was a national of or habitually resident in a state other than the United Kingdom could be a party to a domestic arbitration¹.
 - b. Similarly on the corporate front. If there was a corporate party to an arbitration that was incorporated outside the UK or had its central control and management outside the UK, the arbitration fell under Part I.

¹ Thus all the parties could be as English as you like but if one of them was living in France the arbitration to which it was a party fell under Part I and not Part II

4. Section 86 provided a power for the court in certain circumstances to override an arbitration agreement. This constituted a wider power than provided by section 9 of Part I, which required the court to enforce the arbitration agreement unless it was null and void, inoperative or incapable of being performed. Under part II, the court was empowered by this section to refuse a stay on the same grounds as in Section 9; but in addition it was entitled to refuse to enforce the arbitration agreement if there were “other sufficient grounds for not requiring the parties to abide by the arbitration agreement”.
5. One ground for refusing to enforce the arbitration agreement was expressed in the section, namely that the applicant for a stay of court proceedings in favour of arbitration was not actually ready and willing or had at a material time been unwilling and unready to do all things necessary for the proper conduct of the arbitration or for the execution of any pre-arbitration resolution procedures.
6. That however was only one ground. It must have been intended that the old law on these sorts of stays would still apply in the context of an arbitration agreement. An example of such a “sufficient ground” is where related arbitrations might lead to conflicting results. For example, the building owner is sued by the building contractor who blames the architect; and the owner in its turn commences proceedings against the architect, it is clear that different tribunals might reach conflicting decisions. The owner could lose both ways. If the disputes stay in court they can be decided by the same tribunal – see *Berkshire Senior Citizens Housing Association Ltd v McCarthy E Fitt Ltd and National Westminster Bank Ltd, (Trustees of the Estate of Anthony Cripps, Deceased)*².
7. The third section in this little group, section 87, addressed agreements to exclude the jurisdiction of the court under section 45 – determination of a

² Court of Appeal (Civil Division), (1979) 15 *Build LR* 27, 19 December

preliminary point of law – or under section 69 – challenging the award: appeal on a point of law. It provided that no such agreement should be effective unless it was entered into after the commencement of the arbitral proceedings in which the question arose or the award was made.

8. Section 88 rounded up the group of sections by enabling adjustment of these provisions or indeed their repeal in suitable circumstances by order, in the light of experience.
9. One regime for domestic disputes and a different one for non-domestic ones appeared to be at odds with the requirements of European Community Law and accordingly these sections were never brought into force. By reason of Brexit, that objection no longer stands; and the question is whether the sections should now be brought into effect or repealed.

THE DAC'S VIEW

10. It did not like these sections. For example it disliked empowering the court to override the arbitration agreement of two parties where there were layered contracts and where overriding the agreement enabled other interested parties to be brought before a single tribunal. *Berkshire Senior Citizens*³ is an example. The way that the DAC put it in the report in February 1996⁴ was as follows:

“323. the justification for refusing to stay legal proceedings [in this situation] is that it would be much better for all the concerned parties to be brought into one proceeding, so that the whole matter can be sorted out between them all.

³ Cit. sup.

⁴ The Supplementary Report in January 1997 added nothing to the substantive debate. It assumed that, in the light of the position vis a vis the European Community Law the sections would in due course be repealed. It so happened that they have not been.

324. This reasoning of course is in one sense supported by common sense and justice, for in certain cases it would be better and fairer for all the disputes between all the parties involved to be dealt with by one tribunal, thereby avoiding delay and the possibility of inconsistent findings by different tribunals. However, ...to refuse a stay because other parties are involved involves tearing up the arbitration agreement that the applicant for a stay has made. In other words, with the benefit of hindsight, the Court adjusts the rights and obligations of contracting parties."

11. The report also commented on some anomalous results that flowed from the definition of a "domestic" agreement. It continued as follows;

"327. Notwithstanding the foregoing, we do not propose in this Bill to abolish the distinction. Some defend it, and we have not had an opportunity to make all the soundings we would like on this subject. What we have done is to put the domestic arbitration rules into a separate part of the Bill and provided in Clause 88 for a power of repeal through the mechanism of a positive joint resolution of each House of Parliament."

12. The February Report then turns to section 87 and the inhibition of an effective agreement to exclude the jurisdiction of the court to deal with points of law.

"330. Again we are not persuaded of the value or validity of this, but we have preserved the existing law for the same reason as we have preserved the present position on stays. Our own view is that this distinction should disappear."

13. It is to be noted that in this case at least it would not be a case of the court retrospectively remaking the parties' agreement. If they, once

proceedings were in train, wanted to agree to exclude the jurisdiction of the court then they would be able to.

14. It is also to be noted that at least in the context of domestic arbitration this provision would have brought legal issues to court and to that extent would have been a contribution to the development of the common law in that the cases would not have gone “underground” – to pick up a point from Sir Bernard Rix and Lord Thomas in their lectures⁵ in 2015 and 2016⁶.

THE LAW COMMISSION’S CONSULTATION PAPER

15. I hope it will not seem discourteous if I summarise the relevant paragraphs in the Paper⁷ as adopting the default view of the DAC with the addition only of the assertion that it is “inappropriate to reintroduce distinctions from earlier legislation” when the 1996 Act had been operating without these sections for 25 years.
16. As to that point, it is the case that the Act so operated by reason of the requirements of applicable European law. Those requirements no longer apply. The sections deserve consideration on merit, particularly since the DAC acknowledged that it had not completed its soundings exercise. It left them in and provided a mechanism to adjust or terminate them as experience of them suggested. There is no good reason for not allowing that exercise to go ahead now.

THE PROBLEM

17. The problem lies with the default view of the DAC. It elevated the autonomy of the parties to a position of pre-eminence – indeed it would

⁵ Rix: The Jones Day Professorship in Commercial Law Lecture, 12 March 2015; Thomas: The BAILII Lecture 9 March 2016

⁶ The confidentiality debate is very much alive today – see the recent IAI Conference in tribute to Professor Emmanuel Gaillard – 9 December 2022 in Paris.

⁷ Paragraphs 10.65 – 10.68. page 110

not be wrong to formulate it as total pre-eminence. There is in particular no allowance for or consideration of public interest in the resolution of commercial disputes. That party autonomy in commercial arrangements should so completely override the requirements of public interest should only need to be stated to be seen to be seriously flawed – but apparently not.

18. As it happens, the DAC report provides an example of how that elevation of party autonomy distorts thinking. In its discussion of the power of the Court to override an arbitration agreement so as to enable a single process of resolution where more parties than the two signatories to the agreement itself are involved, it makes a telling point.

“This reasoning [leading to the single forum] of course is in one sense supported by common sense and justice, for in certain cases it would be better and fairer for all the disputes between all the parties involved to be dealt with by one tribunal, thereby avoiding delay and the possibility of inconsistent findings by different tribunals.”⁸

19. What is it that overrides this course “supported by common sense and justice”? It is the excessive weight given to the autonomy of the Parties. So far as reasoning in support of the DAC position is concerned, it relies on this:

“to refuse a stay because other parties are involved involves tearing up the arbitration agreement that the applicant for a stay has made. In other words, with the benefit of hindsight, the Court adjusts the rights and obligations of contracting parties.”

⁸ My emphasis

20. The expression "tearing up the arbitration agreement" is an emotive formulation which adds nothing of substance to a formulation such as "overriding the arbitration agreement for reasons of common sense and justice". The hindsight point also should not carry weight. It is specious⁹. If one makes a contract subject to a legal system that permits a court, in suitable circumstances, to override a term of an arbitration agreement there is no question of hindsight; the possibility can be clearly foreseen in a legal system that is transparent and predictable.

SUMMARY

21. The Law Commission should recommend carrying through the process originally envisaged when the 1996 Act was passed – namely that these sections should come into force; and that section 88 would provide the opportunity to see how things went and whether repeal or amendment was appropriate.
22. The DAC's default position was based upon a flawed determination to elevate the autonomy of the parties above all other considerations, including proper public interest.
23. As it happens, the domestic regime would meet to some extent the sort of complaints made by Lord Thomas and Sir Bernard Rix, which surely constitute soundings that need to be given proper consideration.
24. I respectfully invite the Law Commission to revisit these sections and do one or more of the following:
- a. Recommend bringing into force the sections in the way that would have occurred originally but for the European rules;
 - b. Reconsider the sections from scratch;

⁹ And would have been quashed immediately if put to Savile J as he then was in his days in the Commercial Court!

- c. Seek input generally and also on the specific point as to the extent that public interest should override party autonomy at least in a domestic context.
25. If none of these solutions appeal, the final report should make clear that in reaching the recommendation to repeal them, there has been no consideration of the relationship between public interest in dispute resolution in the commercial world on the one hand and the elevation of party autonomy and its preference for confidentiality on the other - either in the DAC or in this latest exercise¹⁰. It should also make clear that there has been no consideration of allowing the experiment that the DAC had effectively set up to go ahead.

14 December 2022

John Tackaberry KC
39 Essex Chambers London

Domestic arbitration agreements

85 Modification of Part I in relation to domestic arbitration agreement

- (1) In the case of a domestic arbitration agreement the provisions of Part I are modified in accordance with the following sections.
- (2) For this purpose a "domestic arbitration agreement" means an arbitration agreement to which none of the parties is—
- (a) an individual who is a national of, or habitually resident in, a state other than the United Kingdom, or
 - (b) a body corporate which is incorporated in, or whose central control and management is exercised in, a state other than the United Kingdom,
- and under which the seat of the arbitration (if the seat has been designated or determined) is in the United Kingdom.

¹⁰ Fast tract access to PPE contracts, the blame game as graphically illustrated by Richard Millett KC in the Grenfell Enquiry, allegations of corruption in Europe, etc etc seem to militate in favour of maximum transparency.

- (3) In subsection (2) “arbitration agreement” and “seat of the arbitration” have the same meaning as in Part I (see sections 3, 5(1) and 6).

86 Staying of legal proceedings

- (1) In section 9 (stay of legal proceedings), subsection (4) (stay unless the arbitration agreement is null and void, inoperative, or incapable of being performed) does not apply to a domestic arbitration agreement.
- (2) On an application under that section in relation to a domestic arbitration agreement the court shall grant a stay unless satisfied—
- (a) that the arbitration agreement is null and void, inoperative, or incapable of being performed, or
 - (b) that there are other sufficient grounds for not requiring the parties to abide by the arbitration agreement.
- (3) The court may treat as a sufficient ground under subsection (2)(b) the fact that the applicant is or was at any material time not ready and willing to do all things necessary for the proper conduct of the arbitration or of any other dispute resolution procedures required to be exhausted before resorting to arbitration.

Part II – Other provisions relating to arbitration

Document Generated: 2022-05-13

- (4) For the purposes of this section the question whether an arbitration agreement is a domestic arbitration agreement shall be determined by reference to the facts at the time the legal proceedings are commenced.

87 Effectiveness of agreement to exclude court’s jurisdiction

- (1) In the case of a domestic arbitration agreement any agreement to exclude the jurisdiction of the court under—
- (a) section 45 (determination of preliminary point of law), or
 - (b) section 69 (challenging the award: appeal on point of law), is not effective unless entered into after the commencement of the arbitral proceedings in which the question arises or the award is made.
- (2) For this purpose the commencement of the arbitral proceedings has the same meaning as in Part I (see section 14).
- (3) For the purposes of this section the question whether an arbitration agreement is a domestic arbitration agreement shall be determined by reference to the facts at the time the agreement is entered into.

88 Power to repeal or amend sections 85 to 87

- (1) The Secretary of State may by order repeal or amend the provisions of sections 85 to 87.
- (2) An order under this section may contain such supplementary, incidental and transitional provisions as appear to the Secretary of State to be appropriate.
- (3) An order under this section shall be made by statutory instrument and no such order shall be made unless a draft of it has been laid before and approved by a resolution of each House of Parliament.

TECBAR RESPONSE TO THE LAW COMMISSION'S CONSULTATION IN RELATION TO THE ARBITRATION ACT 1996

1. TECBAR members are heavily involved in domestic and international arbitrations taking place in England and Wales. Many of the standard forms of construction contract, including the standard forms of appointments for construction professionals, allow or require disputes to be referred to arbitration. Many insurance contracts relevant to construction projects similarly allow or require arbitration as the primary dispute resolution process. Section 10 of the Technology and Construction Court Guide¹ explains the role of the Court in relation to arbitrations occurring in those areas.
2. Following the publication of the consultation paper entitled “*Review of the Arbitration Act 1996*” by the Law Commission of England and Wales (“the Consultation Paper”) TECBAR undertook a review based upon a consultation exercise involving its members. Responses to the Consultation Paper were invited from all members and a targeted consultation exercise was undertaken in the form of sending a selection of the key questions to TECBAR practitioners with substantial arbitration practises². Analysis of the results and further consideration by the TECBAR Consultation Committee has brought about this response.

Confidentiality

3. The Law Commission has considered whether it is desirable to codify the common law requirements for confidentiality in Arbitration. It decided not to recommend such changes to the Act. Having set out its reasons for that conclusion it posed the question³:

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?

¹ 2022

² TECBAR’s membership is confined to barristers practising in England Wales

³ Paragraph 2.47

TECBAR agrees with this conclusion for the reasons set out by the Law Commission. In particular, it was thought that codification of the common law on confidentiality was likely to be difficult and to be overly restrictive.

Arbitrators – Independence and Disclosure Obligations

4. The Arbitration Act 1996 provides neither an obligation upon arbitrators to be independent of the parties, but it does impose an obligation to be impartial. It does not impose an obligation to disclose facts and matters relevant to an appreciation impartiality.
5. As the Law Commission points out, total independence is something of a chimera and the real issue is the impartiality of arbitrators. Some connections between an arbitrator and the parties have a bearing on an appreciation of impartiality and some do not. The practice has developed⁴ for arbitrators to disclose facts or matters which might have a real bearing on whether either of the parties viewed the arbitrator as being impartial. Following Halliburton v Chubb it is clear the practice reflects a common law obligation. To that extent, the issue is whether it is appropriate for the Arbitration Act 1996 to codify that duty.
6. Those considerations led the Law Commission to make two recommendations, both stated in the consultation questions:

*We provisionally conclude that the Arbitration Act 1996 should not impose a duty of independence on arbitrators. Do you agree?*⁵

And

*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. Do you agree?*⁶

⁴ Which has its roots in the practice of other tribunals and in international practice – see the UNCITRAL Model Law

⁵ Paragraph 3.44

⁶ Paragraph 3.51

TECBAR agrees with this conclusion for the reasons set out by the Law Commission. A duty of independence is very difficult to operate in a way which does not have unintended adverse consequences given that arbitrators cannot be expected to exist in complete isolation. TECBAR members highlighted the legal difficulties attaching to policing relationships where “independence” is the guiding determinant.

The real issue is impartiality and here TECBAR members consider that there is a well-established practice underpinned by the Courts at the highest level. On balance, it was thought that it would be helpful for the Act to reflect the existence of this duty.

However, there was concern as to whether this was necessary at all and whilst there was widespread agreement with the Law Commission’s formulation it was pointed out that the existing body of case law would provide guidance as to how the formulation was applied. Having had regard to the likelihood of a developing body of case law the ultimate conclusion of the TECBAR Consultation Committee is that a statutory duty is unlikely to be of substantial benefit and might present some risk.

7. Building on the second proposal the Law Commission considered the means by which the general duty might be shaped. Should it require the arbitrator to make reasonable inquiries or is it sufficient that arbitrator performs the duty based upon what the arbitrator knows ? The Law Commission came to no firm conclusion. Consequently, two further consultation questions were advanced:

Should the Arbitration Act 1996 specify the state of knowledge required of an arbitrator’s duty of disclosure, and why?⁷

And

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?⁸

TECBAR does not think that the Arbitration Act 1996 should specify the state of knowledge required of an arbitrator’s duty of disclosure. It is likely to be very difficult to formulate a test which could adequately cover all of the circumstances in which a duty might arise. TECBAR members expressed a preference to leave the application of the statutory duty to the Courts.

⁷ Paragraph 3.55

⁸ Paragraph 3.56

Discrimination

8. The issue is whether the Arbitration Act 1996 should prohibit discrimination in the appointment of arbitrators and specifically whether the arbitration agreement can stipulate requirements for the appointment of an arbitrator which stipulations might be regarded as discriminatory. In modern arbitration agreements this is an issue which is most likely to arise where it is thought by the contracting parties to be a necessary attribute of the arbitrator that the arbitrator comes from a particular religious or ethnic background, as in Hashwani v Jivraj. However, it is conceivable that contracting parties could insist upon other characteristics, including gender or age.
9. In Hashwani the Supreme Court ruled that the test was whether the requirement was legitimate and justified rather than strictly necessary. In so doing it differed with the Court of Appeal. “Legitimate” engages the requirements of the Equality Act 2010 which whilst not applying to the appointment of arbitrators nevertheless provides a framework for assessing whether and in what circumstances specific kinds of discrimination might be lawful.
10. In paragraph 4.19 the Law Commission proposes that the Arbitration Act 1996 should contain specific prohibitions against discriminating in the appointment of an arbitrator.
11. Two Consultation Questions flow from this proposal. TECBAR members were not directed to the first question – which concerned whether the approach of the Supreme Court in Hashwani was preferable to the approach of the Court of Appeal - but they were specifically asked to provide their views on the second question, which encompasses the Law Commissions proposal for change:

We provisionally propose that:

the appointment of an arbitrator should not be susceptible to challenge on the basis of the arbitrator’s protected characteristic(s); and

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.

*Do you agree?*⁹

The experience of TECBAR members responding to the consultation is that these issues do not arise in the construction and technology disputes arbitrated in England Wales. The technical nature of the disputes results in the appointment criteria directed at the appointment of construction professionals or lawyers. However, the public importance of the issues was recognised and TECBAR agrees with the Law Commission’s proposals for the reasons given by the Law Commission. There were some dissenting views and in particular views were expressed that there should be minimal statutory interference with the ability of contracting parties to choose appropriate arbitrators and that only plainly unjustified agreements should be susceptible of challenge.

Arbitrator Immunity

12. Section 29 of the Arbitration Act 1996 provides arbitrators with immunity from liability for anything done in the discharge of their functions as arbitrators. However, that immunity does not extend to the liabilities of arbitrators who resign or are removed in respect of their resignation or removal. The Law Commission notes: “This puts the arbitrator in a very exposed position. If a party is displeased with an arbitrator, the arbitrator risks incurring liability, either for resigning, or for being removed instead of resigning. This jeopardy potentially undermines the ability of the arbitrator to make robust and impartial decisions. It also encourages collateral litigation against the arbitrator, undermining the finality of the arbitral dispute resolution process”.

13. The Law Commission considers resignation and removal separately. In respect of resignation, it makes no proposals for change. To some extent this is due to the paucity of evidence that arbitrators are in fact discouraged from resigning (in circumstances where they have good reason) by the threat of an adverse costs liability. In any situation where a party sought costs it would probably have to prove unreasonable behaviour. Instead presents two Consultation Questions:

*Should arbitrators incur liability for resignation at all, and why?*¹⁰

And

⁹ Paragraph 4.36

¹⁰ Paragraph 5.23

*Should arbitrators incur liability for resignation only if the resignation is proved to be unreasonable?*¹¹

Most TECBAR members were of the view that arbitrators should not incur liability on resignation and that the risk of liability was a substantial inroad into the principle of arbitral immunity. However, that was far from being the universal view. Many members wished to preserve a liability for costs in circumstances of unreasonable resignation. It was felt by this group that this should be a remedy available to disappointed parties. If the Law Commission decided to recommend some such form of liability, TECBAR members were divided as to whether “unreasonable” should be unqualified or whether it should be restricted so that any “reasonableness” test should be exacting and probably require irrationality or Wednesbury unreasonableness. A fair summary of the overall response is that TECBAR members would wish to see a position where the arbitrators were only exposed to a costs liability on resignation in circumstances where they had resigned both in breach of their contractual obligations and in a way which invites sanction (whether that is expressed as acting unreasonably or to some other standard).

14. In respect of removal the Law Commission notes the somewhat unsatisfactory position established in some of the cases whereby arbitrators have been required to pay the costs of proceedings to remove them notwithstanding statutory immunity. It considers that the policy benefits of immunity should not be eroded by this kind of liability risk. That consideration prompts this Consultation Question:

*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. Do you agree?*¹²

TECBAR members were mostly in agreement with the Law Commission’s proposal for the reasons given by the Law Commission, although there was a very substantial body of opinion which favoured leaving the availability of a costs remedy to the Courts.

Summary Disposal

¹¹ Paragraph 5.24

¹² Paragraph 5.45

15. The Arbitration Act 1996 contains no provision for summary disposal similar to summary judgment under CPR Part 24. Sections 33 and 34 of the Arbitration Act 1996 accord a broad jurisdiction to the tribunal to adopt procedures which avoid unnecessary delay and expense. The issue considered by the Law Commission is whether some kind of summary disposal provision should be added to the legislation. Having had regard to the advantages of summary disposal generally and the need for clarity in the Act the Law Commission concludes that a summary procedure ought to be adopted.

16. The Law Commission raises four Consultation Questions, although the purposes of its review TECBAR considers that the substantive issues are raised in three of them¹³:

*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. Do you agree?*¹⁴

And

*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. Do you agree?*¹⁵

And

*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. Do you agree?*¹⁶

TECBAR members were strongly supportive of these proposals. It was pointed out that preliminary issues are encouraged in many sets of arbitration rules employed in construction and technology cases and that the experience of the use of such preliminary issues was favourable. It was thought that the availability of a summary remedy would be a considerable benefit to construction and technology arbitrations and would lead to savings in time and costs. TECBAR members expressed the view that aside from case management advantages the availability of a summary remedy would inhibit hopeless references and abusive references. TECBAR members did not think that the

¹³ The issue in paragraph 6.31 is inherent in the issue in paragraph 6.35

¹⁴ Paragraph 6.25

¹⁵ Paragraph 6.29

¹⁶ Paragraph 6.35

Arbitration Act 1996 should set out the procedure for such applications (it could not be said with certainty that any one code of procedure was bound to be the most appropriate code for all cases). There was considerable support for the adoption of what is essentially the CPR test, but it was recognised that “manifestly without merit” is a less complex standard and one with broad international recognition.

Section 44 and Third Parties

17. The question under consideration is whether an order under section 44 should be available against persons who are not parties to the arbitration agreement. There have been conflicting decisions as to whether the provision as currently drafted permits this and, at the very least, it might be thought that clarification is appropriate. However, the real issue is whether it is desirable for the Court to be granted this jurisdiction in respect of witness evidence, orders for inspection and preservation and freezing orders.
18. The Law Commission provisionally recommends that section 44(2)(a) of the Arbitration Act 1996 should be amended to confirm that it relates to the taking of depositions only. This is a clarification amendment based upon the manifest statutory intention, but it clears the way for the more substantive issue which is whether an order for deposition evidence can be made against a third party. The Commission believes that it should.
19. By contrast the Commission is firm that an order for the preservation and inspection of evidence should remain, as currently regulated by section 44(2)(c), confined to property in the possession or control of one of the parties as is the case under the CPR.
20. In respect of freezing orders the Commission points out that section 44(2)(e) permits the service of freezing orders on third parties in very narrow circumstances in alignment with the general practice in the Courts.
21. Because section 44(2) effectively imports the law relating to domestic legal proceedings the Commission suggests that amendment to the Arbitration Act 1996 which goes further than the clarification referred to above is undesirable. However, it none the less raises the question as to

whether the availability of these remedies against third parties should proceed on a more explicit basis.

22. Specifically it asks:

*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?*¹⁷

TECBAR agrees that section 44 remedies should be available against third parties. It agrees that the Arbitration Act 1996 should be amended as proposed by the Law Commission for the reasons set out in the Consultation Paper save that TECBAR believes that any revised provisions should permit the taking of written evidence as well as oral evidence. TECBAR does not think that further amendment is required having had regard to the fact that Section 44(2) imports a recognised body of law.

23. A separate issue arises on appeals from a decision made under Section 44. Section 44(7) restricts the scope for seeking permission to appeal to the court making the order. This would necessarily impede any third party wishing to seek permission. Accordingly, the Commission suggests that Section 44(7) should be confined to appeals by the parties. It asks this question:

*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. Do you agree?*¹⁸

TECBAR members were in agreement with the Law Commission's proposal for the reasons given by the Law Commission.

Appeal on a Point of Law

¹⁷ Paragraph 7.36

¹⁸ Paragraph 7.39

24. The Law Commission considered potential reforms in respect of Sections 67 of the Arbitration Act 1996, but TECBAR considered that the limited practical use of this provision in construction disputes did not give the issues sufficient prominence to be specifically referred to members. However, the Law Commission's consideration of Section 69 raises important issues in respect of a provision which is regularly in consideration, even if Section 69 challenges are unusual.
25. Having considered the genesis and purpose of Section 69 and in particular the impact of The Nema the Law Commission analyses the thresholds required for the court's permission for a challenge on a point of law and compares those tests to the regimes in other jurisdictions. It further considers the arguments put forward by those who argue there should be no right to challenge on a point of law and the arguments who contend, in contrast, that the test should be more liberal. The competing philosophies are those of enhancing finality and those of improving the quality of decisions.
26. The Law Commission concludes that Section 69 appears to be working well and that no change is required in either direction. It asks:

*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?*¹⁹

Whilst there were different views expressed as to the merits of an appeal on a point of law, the majority of the TECBAR members who responded to the consultation exercise favoured no change. They shared the Law Commission's view that the current statutory provision works well and that it should not be amended.


31 December 2022




¹⁹ Paragraph 9.53

Response ID ANON-PT57-RUR9-2

Submitted to Law Commission Consultation: Review of the Arbitration Act 1996
Submitted on 2022-11-27 20:51:57

About you

What is your name?

Name:
Simon Tolson

What is the name of your organisation?

Enter the name of your organisation:
Fenwick Elliott LLP

Are you responding to this consultation in a personal capacity or on behalf of your organisation?

Personal response

If other, please state::

██████████

What is your email address?

Email:

██

What is your telephone number?

Telephone number:

████████████████████

If you want the information that you provide in response to this consultation to be treated as confidential, please explain to us why you regard the information as confidential. As explained in our privacy notice, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

Please explain to us why you regard the information as confidential:

Consultation questions

Consultation Question 1: 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?

Agree

Please share your views below.:

The AA 1996 does not expressly provide for confidential arbitral proceedings, since the drafters in 1996 regarded privacy and confidentiality to be "better left to the common law to evolve". I think it is still evolving as the CA in *Manchester City Football Club Ltd v Football Association Premier League Ltd and others* [2021] EWCA Civ 1110, shows where the court considered whether to order the publication of a High Court judgment that rejected challenges to an arbitral award under ss 67 and 68 of the 1996 Act. Weighing the factors militating in favour of publicity against the desirability of preserving confidentiality, the CA determined that here the balance fell clearly in favour of publication.

Given CPR 62.10 confirms that the Court may order an arbitration claim to be heard either in public or in camera it shows process is not all hush behind closed doors. The 2004 CA case of *City of Moscow v Bankers Trust* confirmed that "The consideration that parties have elected to arbitrate confidentially and privately cannot dictate the position in respect of arbitration claims brought to court under CPR 62.10. CPR 62.10 therefore only represents a starting point. So confidentiality is qualified.

This is because the courts, when called upon to exercise the supervisory role assigned to them under the AA 1996, are acting in the public interest, not as a mere extension of the consensual arbitral process. So court process like s45, 67, 68 make arbitration susceptible to public gaze.

Consultation Question 2: We provisionally conclude that the Arbitration Act 1996 should not impose a duty of independence on arbitrators. Do you agree?

Agree

Please share your views below.:

I do not think we need the equivalent of Rule 26 under the Arbitration (Scotland) Act 2010.

The UKSC could have been bolder in Halliburton and Chubb. Most UK lawyer arbitrators I know think their Lordships were a bit lame regarding M the arbitrator in that case.

The AA 1996 imposes a general duty on arbitrators to act fairly and impartially between the parties (Section 33(1)(a)). The AA 1996 also offers the parties the power to apply to English courts to remove an arbitrator on the ground that circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality (Section 24(1)(a)). The IBA Traffic Light standards are well understood in my opinion in the UK.

English courts historically, have generally interpreted the Section 24(1)(a) standard of "justifiable doubts" in line with the common law test for "apparent bias", and that is well developed law.

Consultation Question 3: 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. Do you agree?

Agree

Please share your views below.:

I think it is hard to argue with Halliburton's main submission that by failing to disclose M's appointment to the subsequent arbitrations, the arbitrator had failed in his continuing duty of disclosure and accordingly there was an objective appearance of bias. The Arbitrator must observe this dynamic duty upon him or her in my opinion.

Consultation Question 4: Should the Arbitration Act 1996 specify the state of knowledge required of an arbitrator's duty of disclosure, and why?

No

Please share your views below.:

But guidance should be given.

Most English lawyers, particularly practicing commercial solicitors know actual knowledge is one thing but after the making of reasonable inquiries often things are learnt, or potential nexuses to a party becomes known and he or she must then consider what is found most carefully, IBA traffic light system again useful, affiliate companies is an area where things can become tenuous.

Consultation Question 5: 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?

Actual knowledge

Please share your views below.:

Plus I have to say things they ought to know!

Consultation Question 6:

Only if necessary

Please share your views below.:

Very rarely in my experience is seeking a protected characteristic a benefit to the process.

In my opinion discrimination is not acceptable and equality is necessary - education is key, we educate our clients not to discriminate on such grounds.

Consultation Question 7:

Agree

Please share your views below.:

Consultation Question 8: Should arbitrators incur liability for resignation at all, and why?

No liability for resignation

Please share your views below.:

I think excluding liability for party or court costs would support the finality of arbitral awards by discouraging 'satellite litigation' against arbitrators and encouraging arbitrator impartiality.

Consultation Question 9: Should arbitrators incur liability for resignation only if the resignation is proved to be unreasonable?

Yes

Please share your views below.:

In cases where resignation is perverse and unreasonable, they probably go together.

Consultation Question 10: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 11: 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. Do you agree?

Agree

Please share your views below.:

Yes were summary process necessary in interests of costs and time and project continuity, but should be non-mandatory.

Consultation Question 12: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 13: We provisionally propose that the Arbitration Act 1996 should stipulate the threshold for success in any summary procedure. Do you agree?

Agree

Please share your views below.:

Probably helpful to have a test akin to 'no real prospect of success' to dispose of a claim or defence.

Consultation Question 14: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 15: 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. Do you agree?

Agree

Please share your views below.:

I remark that Section 44(2)(a) of the Arbitration Act grants the English courts the power to compel a non-party to provide evidence in arbitral proceedings, regardless of the seat of arbitration. The decision turned, inter alia, on the wording of the Act which provides that the English courts have the power to order the taking of evidence from "witnesses", a word which is not synonymous with "parties" or with those who were in the control of a party. The court noted parallels that the English courts could, in support of foreign court proceedings, order evidence to be taken from a non-party witness by way of deposition pursuant to CPR 34.8.

I agree an order for deposition evidence should if it is not already be made against a third party within the jurisdiction, and a witness outside the jurisdiction if this is not "inappropriate".

Consultation Question 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?

Yes

Please share your views below.:

Consultation Question 17: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 18: We provisionally conclude that the provisions of the Arbitration Act 1996 should not apply generally to emergency arbitrators. Do you agree?

Agree

Please share your views below.:

Consultation Question 19: 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?

Agree

Please share your views below.:

To burdensome upon judges and cluttering for arbitration.

Consultation Question 20: Do you think that section 44(5) of the Arbitration Act 1996 should be repealed, and why?

No

Please share your views below.:

Under s 44(3) of the Act, the court may, in cases of urgency, make in support of arbitration proceedings such orders as it thinks necessary to preserve evidence or assets (e.g. freezing injunctions). However, s 44(5) provides that the court may only act to the extent that the arbitral tribunal (or other person or body vested with power in that regard) has no power or is unable for the time being to act.

I think this should remain as it is an important check and balance should the Tribunal fail to act.

Consultation Question 21:

Peremptory order

Please share your views below.:

Consultation Question 22:

Agree

Please share your views below.:

I agree this proposal still leaves the courts as the final arbiter of the tribunal's jurisdiction and represents a pragmatic approach that should bring about significant savings in costs and delays.

Consultation Question 23: 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?

Yes

Please share your views below.:

Consultation Question 24: We provisionally conclude that our proposed change to section 67 of the Arbitration Act 1996 would not require any similar change to section 103. Do you agree?

Agree

Please share your views below.:

I agree as s103 of the AA 1996 transposes article V of the New York Convention 1958 into English law. It allows an English court to refuse to recognise or enforce a foreign arbitral award on the ground that the relevant arbitration agreement was invalid "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".

Consultation Question 25: 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. Do you agree?

Agree

Please share your views below.:

I agree to ensure consistency with other similar remedies available under s68 (for serious irregularity) and to make it clear that the tribunal has the power to award costs where it has determined that it has no substantive jurisdiction.

Consultation Question 26: 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?

Agree

Please share your views below.:

Consultation Question 27: 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?

Agree

Please share your views below.:

Consultation Question 28: Do you think that section 7 of the Arbitration Act 1996 (separability of arbitration agreement) should be mandatory, and why?

Yes

Please share your views below.:

It is of paramount importance in my opinion that an arbitration agreement is to be treated as separate from the main agreement in which it is contained and, as such, survives the termination or invalidity of the main agreement.

Consultation Question 29: 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?

Agree

Please share your views below.:

It would be consistent with Inco Europe Ltd and Others -v- First Choice Distribution and Others (CA), [1998] All ER (D) 433

Consultation Question 30: 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?

Yes

Please share your views below.:

All three too difficult sometimes!

Consultation Question 31: 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?

Yes

Please share your views below.:

Yes, since the pandemic the world has embraced legal tech - hooray.

Consultation Question 32: Do you think that section 39 of the Arbitration Act 1996 should be amended to refer to "orders" (rather than "awards"), and why?

Other

Please share your views below.:

No firm opinion, although [REDACTED] gave a good account of why the 1996 Act was drafted the way it is. Words chosen carefully in the Act.

Consultation Question 33: Do you think that section 39(1) of the Arbitration Act 1996 should be amended to refer to “remedies” (rather than “relief”), and why?

Yes

Please share your views below.:

Probably yes.

Consultation Question 34: 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?

Agree

Please share your views below.:

Logical and procedurally fair to do as LC propose.

Consultation Question 35: 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?

Agree

Please share your views below.:

Consultation Question 36: We provisionally propose that sections 85 to 87 of the Arbitration Act 1996 (on domestic arbitration agreements) should be repealed. Do you agree?

Agree

Please share your views below.:

I agree after quarter of a century not having these clause sin operation that we do not need them. I see no reason there should be any distinction between domestic and international arbitrations.

Consultation Question 37: Do you think that any of the suggestions discussed in Chapter 11 needs revisiting in full, and if so, why?

Please share your views below.:

No string view.

Consultation Question 38: 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?

Please share your views below.:

None that I think important.

Response ID ANON-PT57-RUBD-W

Submitted to Law Commission Consultation: Review of the Arbitration Act 1996
Submitted on 2022-12-14 20:35:53

About you

What is your name?

Name:

[REDACTED]

What is the name of your organisation?

Enter the name of your organisation:

Travers Smith LLP

Are you responding to this consultation in a personal capacity or on behalf of your organisation?

Response on behalf of organisation

If other, please state::

What is your email address?

Email:

[REDACTED]

What is your telephone number?

Telephone number:

[REDACTED]

If you want the information that you provide in response to this consultation to be treated as confidential, please explain to us why you regard the information as confidential. As explained in our privacy notice, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

Please explain to us why you regard the information as confidential:

Consultation questions

Consultation Question 1: 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?

Other

Please share your views below.:

The Law Commission will no doubt have received a range of views on this topic and there is no obvious and perfect answer. We agree that it will be difficult to draft and define an exhaustive list of exceptions to the general rule of confidentiality. We also agree that the list would, in any case, need to change and evolve over time.

However, given the importance that we find our clients and the market gives to confidentiality, we do wonder whether any revised act might benefit from an express rule on confidentiality with some non-exhaustive exceptions. Parties can of course agree provisions around confidentiality and not all jurisdictions have express provisions on confidentiality, so English law is not materially deficient in this regard. However, particularly for international users not as familiar and confident with the common law, we wonder whether express provisions on confidentiality might give comfort and clarity to those using London as a seat.

The position is of course balanced and, notwithstanding what we say above, express provisions on confidentiality in the act is unlikely to be a material factor in parties' choice of seat. However, given the Act is being amended in any event, we are marginally in favour of including an express rule on confidentiality and setting out a list of non-exhaustive exceptions to the rule. The exceptions could reflect the current common law, but, being non-exhaustive, could be subject to further judicial development (as required).

Consultation Question 2: We provisionally conclude that the Arbitration Act 1996 should not impose a duty of independence on arbitrators. Do you agree?

Agree

Please share your views below.:

We agree that the Act should not impose a duty of independence and that impartiality is the key concept. Strict independence can be difficult to achieve. In particular, for industries where there is a smaller pool of arbitrators, a duty of independence based on a lack of prior connection may cause considerable practical difficulties.

Consultation Question 3: 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. Do you agree?

Agree

Please share your views below.:

We agree that the Act should provide that arbitrators have a continuing duty to disclose circumstances which might reasonably give rise to justifiable doubts as to their impartiality. Whilst a prior connection is not necessarily a factor which would affect an arbitrator's impartiality, it may do so and should therefore be disclosed. We think it is important that arbitrators are given clarity and comfort as to how and when they can make such disclosures. Therefore, although there is some guidance in the case law, we consider that the Act should provide express guidance on the balance between this duty of disclosure and the duty of confidentiality, particularly in circumstances where those who are owed a duty of confidentiality do not expressly consent to the disclosure. It would be helpful for the Act to provide guidance to arbitrators on (i) whether express or inferred consent to the disclosure is required, (ii) if inferred consent is sufficient, what amounts to inferred consent, (iii) the extent of information that would be required to be disclosed and, potentially (iv) when an arbitrator may need to refuse an appointment based on the duty of confidentiality overriding the duty of disclosure.

Consultation Question 4: Should the Arbitration Act 1996 specify the state of knowledge required of an arbitrator's duty of disclosure, and why?

Yes

Please share your views below.:

We are of the view that the Act should specify the level of knowledge required so that the extent of the duty is clear to arbitrators.

Consultation Question 5: 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?

Other

Please share your views below.:

We consider that the duty should be an objective standard and require the arbitrator to make reasonable enquiries. This will ensure consistency with the standard stipulated by the IBA Guidelines on Conflicts of Interests in International Arbitration (2014) General Standard 7(d) which many arbitrators will already be accustomed to.

Consultation Question 6:

More broadly justified

Please share your views below.:

The principle of party autonomy and choice is fundamental to arbitration and should be respected insofar as is possible. Although it is important that arbitration avoids discrimination and is inclusive, there do seem to be legitimate grounds for requiring a protected characteristic that fall short of being "necessary". Imposing a "necessary" threshold seemingly transfers judgement to the Court as to who may be an appropriate arbitrator above the assessment of the parties, who may be taken to have a deeper understanding of the arbitrator characteristics that may be most appropriate for their dispute and that may result in an arbitrated outcome that is respected by all parties. On that basis, the broader approach of the Supreme Court appears to be the most appropriate.

Consultation Question 7:

Agree

Please share your views below.:

We agree with the formulation proposed, particularly as to the threshold for being able to require the arbitrator to have a particular protected characteristic (i.e. "proportionate means of achieving a legitimate aim"). We also agree that section 4 of the Equality Act is sufficient for the definition of a "protected characteristic".

Consultation Question 8: Should arbitrators incur liability for resignation at all, and why?

Other

Please share your views below.:

It seems improper for arbitrators to be liable in circumstances where their resignation is required through no fault of their own (illness etc). Our view is that reform of the Act will balance the need to uphold the efficacy of the arbitral process with the need to avoid discouraging arbitrators from resigning in circumstances where it is reasonable to do so. Therefore, we consider that liability should only be incurred if the resignation is "unreasonable". Given the difficulty in predicting all of the circumstances that might give rise to a "reasonable" resignation, it seems best to leave this test to development under the case law.

Consultation Question 9: Should arbitrators incur liability for resignation only if the resignation is proved to be unreasonable?

Yes

Please share your views below.:

Yes. Please refer to our response to Consultation Question 8.

Consultation Question 10: 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. Do you agree?

Agree

Please share your views below.:

We agree with this proposal on the basis that an application to court to remove an arbitrator is made by reference to the way in which the arbitrator has discharged their functions, which falls within the immunity granted by section 29 of the Act.

Consultation Question 11: 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. Do you agree?

Agree

Please share your views below.:

We agree that the revised Act 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 issue. The recent amendments to institutional rules (such as LCIA) have been very welcomed in this regard – i.e. to give arbitrators comfort that they may use such procedures. However, we think confirming this in the Act will be helpful and will exclude any residual 'due process paranoia' that arbitrators may have (particularly where parties have not chosen institutional rules that expressly permit such procedures).

For the avoidance of doubt though, we think it is very important to permit such procedures on an "opt-out" basis. We doubt they would be disappplied by parties regularly, but it important that parties may do so if they wish.

Consultation Question 12: 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. Do you agree?

Other

Please share your views below.:

We agree that the procedure to be adopted should be a matter for the Tribunal. Even where the parties may have agreed a particular approach, that may not (a) fit the dispute in hand; or (b) be appropriate in view of the Tribunal.

We are a little concerned by what is meant (or rather what might be construed) by "in consultation with the parties". For instance, does that mean obtaining active engagement from each of the parties, or merely offering the opportunity to comment. If the former, we think this is problematic where one party does not engage (i.e. whether they could effectively block any summary procedure through their recalcitrance).

Consultation Question 13: We provisionally propose that the Arbitration Act 1996 should stipulate the threshold for success in any summary procedure. Do you agree?

Agree

Please share your views below.:

If party autonomy is prioritised, one might disagree that the Act should stipulate the threshold for success. For instance, the parties may wish to utilise summary procedures, but only in the strongest/clearest of cases. However, we think it is extremely important that there is clarity, predictability and consistency (for users and, perhaps more importantly, arbitrators) on the test to be applied in any summary procedure. Therefore, we think that the Act should stipulate the relevant threshold. The difficulty here comes in what that test should be, and how it should interact with the tests in any institutional rules (see our following answers).

Consultation Question 14: 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. Do you agree?

Agree

Please share your views below.:

We agree that the Act should adopt the “no real prospect of success” and “no other compelling reason” test. The benefit of doing so is that the Act can import the existing common law in relation to this test, which will be greatly beneficial to users and arbitrators.

As for our response to Question 13, we do see some complications caused by having different tests and have recommend not permitting parties to depart from the threshold stipulated in the Act. Doing this would cause a problem in relation to any different test adopted by any institutional rules. In view of this, we did consider whether the Act might be better to try and align with existing rules (for instance, the “manifestly without merit test” in the LCIA Rules). However, as above, we think it is far more beneficial to adopt the “no real prospect of success” and “no other compelling reason” test in order to obtain the benefit of the existing case law on how these tests are to be construed and applied.

This will cause an obvious conflict with the institutions, but we think that they may just have to adjust and amend their rules as appropriate. We think this is better than the Act adopting the less established tests currently in those rules.

Consultation Question 15: 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. Do you agree?

Agree

Please share your views below.:

We agree with the Law Commission’s conclusion that there is no good reason to offer choice in how to obtain a witness summonses. For the reasons given in the consultation paper (namely that the drafters of the Act must have intended there to be a distinction between s43, which deals with witness summonses, and s44, which potentially deals with both witness summonses and depositions) we agree that s44(2)(a) should be amended to refer to the giving of witness evidence by deposition.

Consultation Question 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?

No

Please share your views below.:

We do not think there should be a “one size fits all” approach in confirming that section 44 applies to third parties. Therefore, we suggest that the Law Commission should be reluctant to amend the Act in this regard; the scope of section 44’s applicability should be left for determination by the courts.

Given that third parties have not consented to be party to an arbitration, they should only be required to participate in an arbitration (non-consensually) in limited circumstances. For section 44(2)(a) (witness evidence), if only the parties to an arbitration themselves were susceptible to court orders for providing witness evidence, this would invariably cause problems in obtaining witness evidence. The same is not true of the other provisions, which have a practical effect even when confined to arbitral parties alone. Provisions 44(2)(b)-(e) require a greater level of interference in third party rights, including their rights in jurisdictions other than England & Wales, than sub-section (a).

We consider the current interpretation provided in the caselaw strikes the right balance. On this basis, we consider that it is better to leave it to the courts to consider this nuanced area, and make relevant adjustments, incrementally.

Consultation Question 17: 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. Do you agree?

Agree

Please share your views below.:

We agree that section 44(7), which requires leave from the first instance court to appeal its decision, should apply only to the (proposed) arbitral parties, not third parties. It is correct to say that a non-party has not agreed to the finality and promptness of arbitral decision-making in the way that a party to that arbitration has done. Third parties should not have their rights so confined.

Consultation Question 18: We provisionally conclude that the provisions of the Arbitration Act 1996 should not apply generally to emergency arbitrators. Do you agree?

Other

Please share your views below.:

We agree that the existing provisions of the Act are not well suited generally to emergency arbitrators. Elements of the Act, such as procedures for Court intervention in the case of the failure of the procedure for the appointment of an arbitrator, are not well-suited to emergency arbitration procedures. However, the fact that the general application of the Act to emergency arbitrators seems inappropriate does not mean that the Act should not be amended to accommodate and support emergency arbitrators.

Consultation Question 19: 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?

Agree

Please share your views below.:

We are inclined to agree with the Law Commission in that the courts may not be well-suited to administering a scheme of emergency arbitrators. However, if parties have not chosen institutional rules that allow them to appoint an emergency arbitrator, and that becomes required, they could be left lacking. However, section 44 enables the court to perform an emergency function to some extent. Although, we note that the Law Commission concludes that the s44 scheme and an emergency arbitrator scheme are compatible, we do not think the Act should include provisions for a court to administer a scheme of emergency arbitrators.

Consultation Question 20: Do you think that section 44(5) of the Arbitration Act 1996 should be repealed, and why?

No

Please share your views below.:

We disagree that section 44(5) should be repealed. A key feature of the Act is that it sets out rules of construction and points of principle – the most notable example being the general principles set out in Section 1. Section 44(5), which provides that the court should interfere with the workings of the tribunal to the minimum extent necessary (only if the tribunal with power to grant remedies "has no power or is unable for the time being to act effectively"), is a further example of this approach. While we concede that s44(5) does not add anything much beyond what the courts already know, it is a helpful reminder of the approach the court should take when deciding whether or not to intervene. The judicial references to this provision in the caselaw suggest it informs decision-making.

We are also not convinced by the argument that the "urgency" stipulations in ss44(3)-(4) make 44(5) redundant. We think this analysis confuses the issue: these provisions describe when and how the court should act in relation to the substantive issue under consideration by the tribunal (whether it is time sensitive, and what the impact of a failure to intervene might be). Conversely, the stipulation in s44(5) describes how the court should act in relation to the tribunal itself, apart from the substantive issue, (i.e. it states that the court must act only where the tribunal has no power to do so). This is a different kind of limitation: were it to be repealed, we think the courts would lose an important, and conceptually self-contained, item of statutory guidance.

Consultation Question 21:

Permission under section 44

Please share your views below.:

We agree with the Law Commission's conclusion that, if there is to be an emergency arbitration regime, the second option is best: it is both more streamlined and more in keeping with the purpose of s44 as the supportive regime of last resort to accommodate emergency arbitrators (and their orders) by using the existing s44(4) mechanism, albeit amended to empower emergency arbitrators to grant permission to apply as well as the tribunal.

Consultation Question 22:

Other

Please share your views below.:

We note that pure appeals under section 67 would mark a major departure from international consensus. As the consultation paper acknowledges, countries including the UK, France, Singapore, Hong Kong, Australia, and Canada, provide for de novo jurisdictional hearings. The availability of a full rehearing may well be a factor that weighs in commercial parties' minds when deciding on the seat of arbitration, but we are not convinced this is a

material factor. Therefore, the Law Commission should not feel that it cannot amend section 67 on that basis.

Therefore, the question of whether to amend seems to be one of substance and pragmatism. We can see benefits of both limiting section 67 to appeals and also maintaining the de novo basis.

Indeed, within our firm there are a number of different views. Some want to maintain the do novo basis of section 67 on the basis that jurisdiction is fundamental to arbitration and therefore should be scrutinised at its fullest. Whereas, others take the view that a full rehearing undermines the finality of arbitration and allows parties a chance to refine their claims and try again (as the Law Commission recognises).

Consultation Question 23: 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?

Yes

Please share your views below.:

We think there should be consistency between the approach to, and basis of, sections 67 and 32. An inconsistency would lead to parties seeking to engineer challenges under the most beneficial regime.

Consultation Question 24: We provisionally conclude that our proposed change to section 67 of the Arbitration Act 1996 would not require any similar change to section 103. Do you agree?

Agree

Please share your views below.:

We agree that the proposed change to section 67 would not require a similar change to section 103. For the reasons given above, and because of the existing safeguards, there should be no procedural limitation on s103.

Consultation Question 25: 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. Do you agree?

Agree

Please share your views below.:

We agree that section 67(3) should be amended to provide the court may declare the arbitral award to be of no effect. We recognise, as the consultation paper points out, that the wording of s67(1)(b) plainly contemplates the existence of this remedy, and agree that its addition makes practical and logical sense.

Consultation Question 26: 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?

Agree

Please share your views below.:

Yes, we agree with the proposal for the reasons given by the Commission.

Consultation Question 27: 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?

Agree

Please share your views below.:

We agree with the Law Commission's provisional conclusion. For the reasons given in the consultation paper, we think section 69 strikes the right balance and we are in favour of it being retained.

Consultation Question 28: Do you think that section 7 of the Arbitration Act 1996 (separability of arbitration agreement) should be mandatory, and why?

No

Please share your views below.:

We view section 7 as an important provision of the Act. However, our view is that reform is not required. The current non-mandatory provisions will apply in the majority of cases but also give the parties flexibility to disapply section 7, for example by agreeing a foreign law to govern the arbitration agreement.

Consultation Question 29: 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?

Agree

Please share your views below.:

We agree that there appears to be a drafting error and this should be amended as part of this reform for consistency with other sections of the Act that do expressly provide for an appeal.

Consultation Question 30: 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?

Other

Please share your views below.:

We do not have strong views about the proposed reforms to sections 32 and 45 of the Act. Where the parties agree or the tribunal provides permission, it seems sensible that the Act should allow for an application to court without any further requirements being met. The court can then use its discretion to refuse inappropriate applications. However, the current provisions do not appear to obstruct legitimate applications and it is likely that the courts will nonetheless consider in some form the current criteria set out in sections 32 or 45 when exercising their discretion.

Consultation Question 31: 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?

Yes

Please share your views below.:

The arbitration market is now far more comfortable with the use of remote hearings and electronic documents, particularly in view of these being referenced in recent revisions to institutional rules. It seems to us unlikely that a failure to expressly address these points in the Act will lead parties to think they are not permitted. However, in circumstances where other provisions in the Act are being amended, we think it would be helpful to provide confirmation beyond any doubt (particularly in the context of enforcement of English arbitral awards in other countries – i.e. to ensure there is absolutely no scope for challenge).

Consultation Question 32: Do you think that section 39 of the Arbitration Act 1996 should be amended to refer to “orders” (rather than “awards”), and why?

Yes

Please share your views below.:

We agree that section 39 should refer to “orders” to ensure that the provisional relief is not subject to challenge under sections 67 and 69 of the Act.

Consultation Question 33: Do you think that section 39(1) of the Arbitration Act 1996 should be amended to refer to “remedies” (rather than “relief”), and why?

Yes

Please share your views below.:

We see the reference to “relief” as a minor point with real no difference. However, if the Act is being amended then why not ensure consistency (to avoid, absolutely, any question as to why the language/terminology is different).

Consultation Question 34: 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?

Agree

Please share your views below.:

Yes, we agree with the proposal to amend section 70(3). This seems sensible and codifies the existing common law.

Consultation Question 35: 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?

Agree

Please share your views below.:

Even if not used very often, we think section 70(8) of the Act provides a helpful mechanism for protecting parties that are subject to an appeal. We agree that section 70(8) relates to appeals against sections 67 – 69. We think it would be helpful to clarify this in the amended Act.

Consultation Question 36: We provisionally propose that sections 85 to 87 of the Arbitration Act 1996 (on domestic arbitration agreements) should be repealed. Do you agree?

Agree

Please share your views below.:

We agree that sections 85 – 87 of the Act should be repealed. We do not see the value of those provisions and can see no policy for reason for distinguishing between domestic and foreign arbitrations.

Consultation Question 37: Do you think that any of the suggestions discussed in Chapter 11 needs revisiting in full, and if so, why?

Please share your views below.:

The only suggestion that we think needs revisiting is that in paragraphs 11.8 - 11.2 of the consultation paper (Law governing the arbitration agreement). We refer to the discussion of this issue at the Brick Court Annual Commercial Conference on 13 October 2022.

We agree that that the effects of *Enka v Chubb* should be amended, such that, in the absence of an explicit choice by the parties, the law governing the arbitration agreement should be that applicable to the seat of the arbitration rather than the law applicable to the main contract. These issues were fully discussed at the Brick Court Conference and we expect that the Law Commission will receive extensive submissions from the relevant members of those chambers.

However, we agree that applying the choice of substantive law (as distinct from the London seat) has a real risk of disrupting the pro-arbitration approach of England & Wales (for instance, on arbitrability and scope). We also agree that there is a practical risk that foreign law will be more regularly required on issues relating to the arbitration agreement.

Consultation Question 38: 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?

Please share your views below.:

We have no additional topics for consideration.

Response to the Law Commission of England and Wales Consultation on the Review of the Arbitration Act 1996

(December 2022)

This response is provided by a working group of the Centre for Commercial Law and Centre for Private International Law at the University of Aberdeen. The working group is coordinated by Dr Gloria M Alvarez, FCI Arb and Dr Nevena Jevremovic and consists of Dr Patricia Zivkovic, Rahul Donde, Qusai Alshawan, Ilias Kazeem, Helen Ibiere Jumbo, Baffour Yiadom-Boakye, Aysu Baser, and Konstantina Kalaitsoglou with comments from Professor Justin Borg Barthet, Dr Burcu Yüksel Ripley, and Professor Derek P Auchie.¹

¹¹ The Dispute Resolution Network is a professional network with further expertise, established by the University of Aberdeen, School of Law. More information can be found here: <https://www.abdn.ac.uk/law/research/dispute-resolution-professional-network-1221.php>

TABLE OF CONTENTS

I. EXECUTIVE SUMMARY	1
II. ABBREVIATIONS.....	1
III. THE RESPONSES.....	3
CHAPTER 2: Confidentiality.....	3
CHAPTER 3: Arbitrator Independence and Disclosure	4
CHAPTER 4: Discrimination.....	7
CHAPTER 5: Arbitrator Immunity	8
CHAPTER 6: Summary Disposal	9
CHAPTER 7: Section 44 (Court Powers Exercisable in Support of Arbitral Proceedings)....	12
CHAPTER 8: Challenging Jurisdiction under Section 67.....	16
CHAPTER 9: Appeal on a Point of Law	18
CHAPTER 10: Minor Reforms	19
CHAPTER 11: Other Stakeholder Suggestions not Short-Listed for Review	24
IV. ANNEXES	26

I. EXECUTIVE SUMMARY

The School of Law at the University of Aberdeen is thankful for the opportunity to respond to the Law Commission's extensive and clear review of the Arbitration Act 1996. We note that, while the Arbitration Act 1996 extends to England, Wales and Northern Ireland, the Act is of utmost importance in Scotland given the ample number of stakeholders and industry users who choose London as seat of arbitral proceedings. It is in this sense of plurality, we consider this contribution can provide intra-UK perspectives to the domestic and international approach the Consultation already presents.

In Chapter 2, we agree that the Arbitration Act 1996 should not include a provision dealing with confidentiality and this is best addressed by the courts on a case-by-case basis. In Chapter 3, we propose that the standards of independence and impartiality are complementary standards. We agree that prescribing the state of knowledge required of an arbitrator's duty of disclosure under the Arbitration Act 1996 would prevent late and trivial challenges.

In Chapter 3, we are of the view that the Arbitration Act 1996 should provide equal statutory treatment for both the duty of independence and impartiality, notwithstanding the differences in practical implications. We are further of the view that the arbitrators should have a continuing duty to disclose any circumstances which might reasonably give rise to justifiable doubts as to their independence and impartiality. We agree that the Arbitration Act 1996 should specify the state of knowledge required of an arbitrator's duty, and that such duty should be based upon what an arbitrator ought to know after making reasonable inquiries.

In Chapter 4, in respect of protected characteristics in an arbitrator, we consider these should be enforceable only if necessary. In Chapter 5, we agree that arbitrators should be held liable for resignation, unless they prove that the resignation was reasonable and such resignation could be reasonable due to *force majeure* and other circumstances which are beyond the control of an arbitrator. Arbitrator immunity should extend to the costs of court proceedings arising out of the arbitration, such as applications to remove an arbitrator; we consider the language of section 29 of the Arbitration Act 1996, as currently articulated, to be broad enough to protect an arbitrator against costs of court proceedings.

In Chapter 6, about summary disposal, we agree that the Arbitration Act 1996 should make provision for early determination, but the terminology to be employed should be 'early determination' or 'early disposition' rather than 'summary disposition' or 'summary determination'. The procedure to be adopted should be determined by the tribunal in consultation with the parties and having regard to the circumstances of each case. The threshold for an application for early determination/disposition should be manifest lack of merit without other compelling reason for full merits hearing. Tribunals should be empowered to assess the costs.

In Chapter 7, we recognise the need for section 44 to confirm that orders made under its authority can be made against third parties, adding further strength in the role of domestic courts to support arbitration proceedings. We also agree with the further amendments to section 44 to ensure that consent to an appeal should only apply to parties to the arbitration process. On the question of Arbitration Act 1996 and emergency arbitrators, we highlight that orders rendered either by the established tribunal or the emergency arbitrators serve an identical purpose, which is the assessment of parties' positions on law and fact and require enforceability.

In Chapter 8, we agree on the importance of clarifying the effects of section 67 in order to protect the principles of fairness and finality, as well underscoring the importance of aligning the Arbitration Act 1996 with the objectives of the New York Convention.

In Chapter 9, we answer that an appeal on a point of law should be an opt-in mechanism for international arbitrations and an opt-out mechanism for domestic arbitration.

In Chapter 10, we agree that the doctrine of separability should be mandatory, as well as underscoring the importance of clear requests for sections 32 and 45. We also agree with the proposal that the Arbitration Act 1996 should make explicit mention of remote hearings. We also deal with section 39 question to clarify the difference between award and orders. In terms of remedies, we also agree that section 39(1) should be amended to refer to remedies.

Lastly, in Chapter 11, we considered the other points for reform should include third-party funding and an expansion of the tribunal's power. The latter includes the tribunal's power to amend statements for closely related new issues and the power to decide whether to use remote hearings.

II. ABBREVIATIONS

Article	Art.
Articles	Arts.
England and Wales	E&W
et cetera	etc.
Euro	EUR
exempli gratia	e.g.
ibidem	Ibid.
id est	i.e.
paragraph	para
paragraphs	paras
United Kingdom	UK
United States of America	US or USA
versus	v

Arbitration Institute of the Stockholm Chamber of Commerce	SCC
Arbitration Rules of the SCC	SCC Rules
Convention for the Protection of Human Rights and Fundamental Freedoms	ECHR
The European Court of Human Rights	ECtHR

Convention on the Settlement of Investment Disputes between States and Nationals of Other States	ICSID Convention
English Arbitration Act 1996	Arbitration Act 1996
HKIAC Administered Arbitration Rules	HKIAC Rules
Hong Kong International Arbitration Centre	HKIAC
IBA Guidelines on Conflicts of Interest in International Arbitration 2014	IBA Guidelines 2014
IBA Rules on the Taking of Evidence in International Arbitration	IBA Rules on Evidence
ICC Rules of Arbitration	ICC Rules
ICSID Institution Rules	ICSID Rules
International Centre for Settlement of Investment Disputes	ICSID
International Chamber of Commerce	ICC
Law Commission Consultation Paper 257, Review of the Arbitration Act 1996, September 2022	Consultation Paper
LCIA Arbitration Rules	LCIA Rules
London Court of International Arbitration	LCIA
New York Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958	New York Convention
Swiss Rules of International Arbitration	Swiss Arbitration Rules
UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006	UNCITRAL Model Law

III. THE RESPONSES

CHAPTER 2: Confidentiality

Question 1

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?

Yes, we agree. Codification of the law of confidentiality will infringe the level of party autonomy in arbitration and increase uncertainty. Parties are free to determine the procedure, including confidentiality aspects. The relevant court can deal with issues of confidentiality on case-by-case basis considering specific circumstances, making comprehensive statutory codification challenging and potentially leading to uncertainty in application. The Consultation Paper identifies the complexity of this issue and there are dangers inherent in trying to legislate in a complex area, especially given the international disparities. Although a default rule followed by robust exceptions could be developed, there is a danger that this will inject uncertainty in a flexible area where there are no major issues, and the correct interpretation of such provisions will take a long time to develop.

CHAPTER 3: Arbitrator Independence and Disclosure

Question 2

We provisionally conclude that the Arbitration Act 1996 should not impose a duty of independence on arbitrators. Do you agree?

No, we do not agree. Standards of independence and impartiality are complementary, and taken together, are essential for the integrity and legitimacy of arbitration. The Arbitration Act 1996 should provide equal statutory treatment for both, notwithstanding the differences in practical implications discussed in the Consultation Paper. This approach would align the Arbitration Act 1996 with international arbitral practice and prevent uncertainty and unnecessary challenges in the first place.² Moreover, as Lord Hodge clarified in *Halliburton*, independence is an implied term of the arbitrators' appointment contract that exists notwithstanding a statutory provision in the Arbitration Act 1996.³ Such an important feature of the arbitral process should not be left to implication; instead it should be expressed. The lack of an express provision for independence led to the (in our view undesirable) need for the Supreme Court to have to define the law. The law in this area will need to be further clarified, and this process will be more certain if carried out against the background of an express legislative test rather than on a piecemeal basis in case law. Lastly, independence and impartiality are elements of the right to a fair trial under Art. 6 ECHR and Section 6(1) UK Human Rights Act, which courts in England and Wales must consider.⁴

² In the context of international commercial arbitration, Art. (12)2 of the UNCITRAL Model Law imposes this element, which was adopted by many national arbitration laws.

³ *Halliburton Company (Appellant) v Chubb Bermuda Insurance Ltd* [2020] UKSC 48, [76] (Lord Hodge). Lord Hodge commented: 'Those statutory duties give rise to an implied term in the contract between the arbitrator and the parties that the arbitrator will so act.'

⁴ *Beg S.P.A v Italy* App no 5312/11 (ECtHR, 20 May 2021). This case is an illustrative example of such approach. The case involved an arbitration carried out between a power generation company, and the State for the distribution of energy from a hydro-electric dam and generator being built in Albania. In this case, the arbitrator appointed to hear the proceedings was also acting as a lawyer, in a different set of arbitral proceedings, for the respondent company. Therefore, there was a clear conflict of interests, but the arbitrator failed to disclose that conflict. Despite this, after the commencements of proceedings in Italy to challenge the award made against them, all of the applicant's claims were dismissed by the Italian courts. Before the ECtHR, the respondent, Italy, asserted that Article 6(1) ECHR was not in fact engaged, on the basis that by electing to proceed to arbitration, the applicant had waived their right to a fair trial. The ECtHR rejected the argument, pointing out that the Italian state owed the applicant a duty under its national law to ensure a right to a fair trial, independence and impartiality of the arbitration proceedings in accordance with Italian arbitration law. The ECtHR ruled the Italian state owed the applicant a duty under its national law to ensure a right to a fair trial, independence and impartiality of the arbitration proceedings in accordance with Italian arbitration law. Ultimately, Italy was fined 15,000 EUR because of their failure to protect the applicant's Art. 6(1) right.

Question 3

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. Do you agree?

Yes, we agree. First, such an approach would bring the Arbitration Act 1996 into line with international arbitral practice. Second, it would recognise disclosure as an ongoing legal and contractual duty,⁵ complementing the duty of independence and impartiality. Consequently, it would remedy the inequality of knowledge between the parties, paving the way for an informed exercise of the parties' right of waiver, as waiver could not occur when there is no disclosure.⁶ Lastly, an ongoing duty to disclose is consistent with principles of natural justice.⁷ Conversely, lack of ongoing disclosure would prompt further litigation concerning matters raised in *Halliburton* again, and would increase uncertainty, challenges, and breach 'an implied term' of disclosure under the contract of appointment. Again, the expression of a duty as important as this in legislation is, for certainty reasons, better than leaving this to the development of the common law.

Question 4

Should the Arbitration Act 1996 specify the state of knowledge required of an arbitrator's duty of disclosure, and why?

Yes, it should. Expressing the state of knowledge required of an arbitrator's duty of disclosure under the Arbitration Act 1996 would prevent late and trivial challenges, uncertainty and doubts regarding the arbitrator's impartiality and independence. Further, we propose that the duty of disclosure and state of knowledge should capture the pre-arbitrator appointment stage (i.e., the stage before the formation of the arbitrator's contract) to align with the reasoning in *Halliburton*.⁸

⁵ *Halliburton case* [2020] UKSC 48, [75] – [76] (Lord Hodge).

⁶ *Ibid*, [130] (Lord Hodge).

⁷ See for example Lord Hope's reasoning concerning the principle of tribunal impartiality and independence in *Pinochet Ugarte (No.2)* [2000] 1 A.C. 119 [140] (Lord Hope).

⁸ [2020] UKSC 48, [169] (Lord Hodge).

Question 5

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?

The duty to specify knowledge should be based upon what an arbitrator ought to know after making reasonable inquiries. First, international arbitration practice, such as the IBA Guidelines 2014, supports a duty to make reasonable inquiries, as there might be situations in which an arbitrator is, in the absence of such inquiries, unaware of links or connections with the participants in the arbitration. The duty to make reasonable inquiries would further prevent any accidental absence of the arbitrator's actual knowledge which might lead to scenarios as seen in *Halliburton's* case⁹ and the case of *A v B*.¹⁰ From the perspective of arbitrators' contracts of appointment, this would offer some protection to arbitrators from a claim by the parties under English contract law, as is now more likely following the *Halliburton* decision.

⁹ [2020] UKSC 48, [39] (Lord Hodge).

¹⁰ The courts clarified that the arbitrator's non-disclosure was accidental. *A and Others v B, X* [2011] EWHC 2345 (Comm), [70] (Mr Justice Flaux).

CHAPTER 4: Discrimination

Question 6

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 by the House of Lords)?

We think that the requirement of a protected characteristic in an arbitrator should be enforceable only if it is necessary in the context of arbitration. Otherwise, it would lead to discriminatory effects that are not aligned with the nature of the quasi-judicial position of arbitrators, and the legitimate aim of arbitration to provide access to justice. The avoidance of discrimination is part of important public policy considerations in UK law and culture, (as demonstrated by the breadth and impact of the Equality Act 2010) as well as in many international legal cultures. We should take any step that can reinforce this important legal culture.

Question 7

We provisionally propose that: (1) (2) the appointment of an arbitrator should not be susceptible to challenge on the basis of the arbitrator's protected characteristic(s); and 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. Do you agree?

Yes, we agree with the default rule of prohibiting challenge of arbitrators based on protected characteristics. In terms of the legal consequence of such an agreement, we think that the formulation as it stands now is not sufficiently clear.

First, we suggest that 'any agreement between the parties in relation to the arbitrator's protected characteristics' does not specify whether it refers to the whole arbitration agreement or the relevant part. Hence, by applying the validation principle, we suggest specifying 'any part of the arbitration agreement between the parties in relation to the arbitrator's protected characteristics' to avoid potential different interpretations and lack of legal certainty.

Second, we suggest that the legal consequence of such contracting would be invalidation of the relevant part of the arbitration agreement, instead of unenforceability. This is more aligned with the text of the New York Convention that speaks about the validity (full or partial) of arbitration agreements and would be better suited for enforceability purposes.

CHAPTER 5: Arbitrator Immunity

Question 8

Should arbitrators incur liability for resignation at all, and why?

Yes, arbitrators should incur liability for resignation. This would be consistent with the hybrid theory of arbitration inherent to the Arbitration Act 1996, the status of the arbitrator's office, and the contractual nature of their appointment. Arbitrators should be held liable for the resignation as a default rule, unless they prove the resignation was reasonable (see our response to *Question 9*, below). This approach would be aligned with the *Halliburton* decision, which calls for resignation in the case of post-appointment disclosure, as it would serve as an incentive for the increase of transparency, pre-appointment disclosure, and rejection of appointment due to lack of consent of the parties from previous arbitrations.¹¹ Such a provision should also be mandatory so that the parties cannot be asked to waive it in advance by means of a contract, and, consequently, to avoid any undue influence and adverse consequences for the party that does not wish to waive this liability norm.

Question 9

Should arbitrators incur liability for resignation only if the resignation is proved to be unreasonable?

Yes, we agree with this approach. However, the burden of proof should be on the arbitrators to prove that the resignation was reasonable. Whereas the liability of arbitrators for resignation should be a default rule, we suggest having an *indicative* list of circumstances in which such resignation is to be found reasonable and justified, such as an event of *force majeure*, and other circumstances which are beyond the arbitrator's control, such as illness, bereavement, public commitments, and similar.

Question 10

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. Do you agree?

Yes, we agree with this approach, as reflected in the hybrid theory of arbitrators' position adopted in the Arbitration Act 1996. This proposal would confirm the status of arbitrators as decision-makers, and it would prevent any undue influence when it comes to the delivery of justice. We also note that it would not be fair for arbitrators to bear such costs in situations where they are not legally required to carry insurance. However, it is important to note that this general rule on immunity would not prevent any future claims by the party for contractual liability due to the breach of arbitrator's contract and any consequences stemming from that breach, as was provided for in *Halliburton*.

¹¹ *Halliburton* [2020] UKSC 48, [79], [88] (Lord Hodge) and [188] (Lady Arden).

CHAPTER 6: Summary Disposal

Question 11

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. Do you agree?

Yes, we agree, in principle, but we propose that the terminology to be employed should be ‘early determination’ or ‘early disposition’ of a claim, a defence, or an issue. The term ‘summary disposition’ may wrongly suggest that the claim or issue to be determined using the procedure will deprive a party an opportunity to present its case, thereby breaching the standards of section 33(1)(a) of the Arbitration Act 1996 and Art. V(1)(b) of the New York Convention.¹² The legal literature and case law dismiss the criticisms and due process concerns as unfounded.¹³

The procedure provides a reasonable opportunity to be heard and it gives the tribunal ample opportunity of attention and scrutiny required. The only difference between the procedure and full merits hearing is that issues or claims are disposed of at the earliest opportunity, thereby enhancing the efficiency of arbitration. To reflect this understanding of the procedure, we propose that the terminology to be employed should be ‘early disposition/determination’ rather than ‘summary disposition/determination.’

Many arbitral institutions have adopted approach of having expedited decision processes for unfounded claims, including ICSID, LCIA, SCC and ICC.¹⁴ Consequently, we find that the procedure of early determination has been prominently recognised and established in arbitration practice. An express provision in the Arbitration Act 1996 would enhance the use of the procedure, in keeping with academic and judicial opinion in its favour and allaying due process concerns.¹⁵

¹² Ibid 836 – 837.

¹³ David L. Wallach, ‘The Emergence of Early Disposition Procedures in International Arbitration’ (2021) 37 *Arbitration International* 835. See also Leighla Bruton, ‘Summary Judgment in International Arbitrations Seated in England: Recent Developments and Future Perspectives’ in Gregory Roy Fullelove and others (eds), *International Arbitration in England: Perspectives in Times of Change* (Kluwer Law International 2022) 169.

¹⁴ It was introduced into the ICSID system for the first time in 2006, through the 2006 Arbitration Rules, and it has been retained in the 2022 amendments. See further Julien Fouret, Remy Gerbay, Gloria M. Alvarez and Denis Parchajev (eds), *The ICSID Convention, Regulations and Rules: A Practical Commentary* (Edward Elgar 2019) 1190. ICSID Arbitration Rules 2022, r 41.

¹⁵ Leighla Bruton, ‘Summary Judgment in International Arbitrations Seated in England: Recent Developments and Future Perspectives’ in Gregory Roy Fullelove and others (eds), *International Arbitration in England: Perspectives in Times of Change* (Kluwer Law International 2022) 169.

Question 12

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. Do you agree?

Yes, we agree, and suggest in addition that, under the Arbitration Act 1996, an applicant should be obliged to propose a suitable procedure in its application for early disposition/determination. Some institutional rules take this approach, such as the SCC Arbitration Rules 2017 and the HKIAC Arbitration Rules 2018.¹⁶ Such an approach reflects sound practice: even though the tribunal will ultimately decide the procedure to follow, in consultation with the parties, the suggestion of an applicant may be helpful.

Question 13

We provisionally propose that the Arbitration Act 1996 should stipulate the threshold for success in any summary procedure. Do you agree?

Yes, we agree, and we add that the tribunal should have the power to assess costs, to disincentivise parties from filing frivolous applications. We agree that stipulating the threshold for success of an application for early determination/disposition would prevent the procedure from being susceptible to abuse. Also, empowering the tribunal to assess costs upon the determination of an application for early determination/disposition may disincentivise parties from filing frivolous applications.¹⁷

Question 14

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. Do you agree?

We disagree with the proposed threshold. As noted in the Consultation Paper, the standard of ‘*real prospect of success*’ has been used in English case law. Substantively, it is the same as the standard of ‘*manifest lack of merit*’ adopted by many arbitral institutions. We propose the adoption of the standard of *manifest lack of merit*, without other compelling reason for full merits hearing. This approach would align the Arbitration Act 1996 with international arbitration practice, as the standard of *manifest lack of merit* enjoys widespread usage in the arbitration community.

¹⁶ SCC Arbitration Rule 2017 art 39(3). See also HKIAC Arbitration Rules 2018, art 43.4(c- d).

¹⁷ David L. Wallach, ‘The Emergence of Early Disposition Procedures in International Arbitration’ (2021) 37 *Arbitration International* 835, 850.

The terminology, or its variants, is present in numerous institutional rules. For example, SCC Arbitration Rules provide for ‘*manifestly unsustainable*’ points of facts or law;¹⁸ ICSID Arbitration Rules provide for ‘*manifestly without legal merit*’;¹⁹ HKIAC Arbitration Rules provides for ‘*manifestly without merit*’;²⁰ and LCIA Arbitration Rules provide for ‘*manifestly without merit*’.²¹ The standard in the arbitration rules has also received consideration by tribunals, especially in ICSID arbitration cases. Notable examples include *Trans-Global Petroleum Inc v Hashemite Kingdom of Jordan*²² and *MOL Hungarian Oil and Gas Company Plc v Republic of Croatia*.²³ The *Trans-Global Petroleum Inc v Hashemite Kingdom of Jordan* case stands as the first case in which the tribunal considered the point and it is the *locus classicus* case that triggered the transposition of early determination procedure from ICSID to international commercial arbitration reforms.²⁴ Beyond investment arbitration context, subsequent tribunals in commercial arbitration cases have also applied early determination procedure in arbitration in one form or another.²⁵

England, particularly London, is seen as a global forum for arbitration and it is generally a preferred choice of seat for international arbitration.²⁶ The Arbitration Act 1996 should embrace the established practice of international arbitration and avoid any impression of delocalised approach, i.e. an impression that it has strong attachment to English case law in the choice of terminology.²⁷

¹⁸ SCC Arbitration Rules 2017, art 39(2)(i).

¹⁹ ICSID Arbitration Rules 2022, art 41(1).

²⁰ HKIAC Arbitration Rules 2018, Art. 43.1(a).

²¹ LCIA Arbitration Rules 2020 Art. 22.1(viii).

²² ICSID Case No. ARB/07/25, Decision on the Respondent’s Objection under Rule 41(5) of the ICSID Arbitration Rules (12 May 2008).

²³ ICSID Case No. ARB/13/32, Decision on the Respondent’s Objection under Rule 41(5) of the ICSID Arbitration Rules (2 December 2014).

²⁴ Aren Goldsmith, ‘Trans-Global Petroleum: ‘Rare Bird’ or Significant Step in the Development of Early Merits-Based Claim-Vetting?’ (2008) 26(4) ASA Bulletin 667.

²⁵ See for example *Uttam Galva Steels Ltd v Gunvor Singapore Pte Ltd* [2018] EWHC 1098 (Comm). See also ICC Case No 11413/2001 (2010) 21 ICC Ct Bull 34, First Interim Award. See also ICC Case No 12297/2003 (2011), Procedural Order of 22 August 200, as cited in Leighla Bruton, ‘Summary Judgment in International Arbitrations Seated in England: Recent Developments and Future Perspectives’ in Gregory Roy Fullelove and others (eds), *International Arbitration in England: Perspectives in Times of Change* (Kluwer Law International 2022) 169.

²⁶ Lucia Raimanova and Lucia Dulovicova, ‘Recent Publications, Excursus: Brexit and Arbitration’ in Christian Klausegger and others (eds), *Austrian Yearbook on International Arbitration 2018* (MANZ’sche Verlag Wien 2018) 196. See also Fulya Teomete Yalabik, ‘The Impact of the Seat of Arbitration on Judicial-interference: Do Sections 67, 68 and 69 of the English Arbitration Act 1996 regarding Challenges of Awards Make London An Attractive Hub?’ (2021) 70 *Annales de la Faculte de Droit d’Istanbul* 253.

²⁷ See for example Erik Marid, ‘Oral Presentation of Evidence and the Application of Parol Evidence in International Arbitration’ (2013) 24(2) *The American Review of International Arbitration* 325.

CHAPTER 7: Section 44 (Court Powers Exercisable in Support of Arbitral Proceedings)

Question 15

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. Do you agree?

No, we do not agree that such an amendment is needed. As noted in the Consultation Paper, section 44 delineates court powers support of arbitral proceedings.²⁸ In relation to taking of the evidence of witnesses, this may encapsulate witness summons and depositions before a court or a court order for witness summons and depositions before an arbitral tribunal. Section 44 is optional and subject to parties' agreement. This approach does not result in redundancy of section 43. First, section 43 sets out a procedural framework for a party to seek court assistance to secure attendance of witnesses before the tribunal. While there are conditions in exercising this right, it is not optional as in the case of section 44. Even if the parties choose not to use section 44, they can still use section 43 to secure attendance of witnesses for the purpose of oral testimony. Therefore, section 43 and 44 do not give two simultaneous options to obtain witness summons, as noted in Consultation Paper (para. 7.21). Although section 44 has its roots in domestic civil litigation, its application in the context of the Arbitration Act 1996 should reflect the understanding that courts' support of arbitration is a key consideration for parties in choosing their arbitral seat.

Question 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?

Yes, we agree that such 'textual' clarification is necessary. The parties should have the opportunity to resort to courts in support of arbitration proceedings, especially if the tribunal lacks power against third parties. The law should also be clear that the court can make its orders against foreign and domestic third parties.

²⁸ Please see Christopher Kee and Gloria Alvarez, 'Role of State Courts in Supporting Arbitration' in Stefan Kröll, Andrea Bjorklund, and Franco Ferrari (eds), *Cambridge Compendium of International Commercial and Investment Arbitration*, (Cambridge University Press 2023).

Question 17

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. Do you agree?

Yes, we agree and propose additional amendments. First, the matter on appeal by third parties is closely related to arbitration proceedings and may impact its efficiency and the outcome, such appeal should be treated as an expedited proceeding. Second, since the tribunal does not have power over third parties, section 44(6) does not apply to the relationship between the court order against third parties and the tribunal's powers in the proceedings. Thus, an additional amendment should clarify the relationship between the court order against third parties and the tribunal's powers in the proceedings.

Question 18

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

No, we disagree. The tribunal interim relief orders and the emergency arbitrator's decision serve an identical purpose, include assessment of parties' positions on law and fact, and require enforceability. Therefore, notwithstanding the parties' agreement on this matter, emergency arbitration should fall under the regime of the Arbitration Act 1996 with a tailored approach to accommodate its unique nature and purpose.²⁹ In relation to specific points of concern set out in the Consultation Paper (paras. 7.43 – 7.46) we note that instead of excluding emergency arbitrators from the Arbitration Act 1996's scope, alternative approaches are available.

First, the default rules on appointment can include a shorter timescale and a more expedited court process for appointment of emergency arbitrators. The solution is appropriate to demonstrate the courts' support of arbitration. The risk of disturbing the status quo is low, as institutional rules typically provide for a default appointment procedure in relation to emergency arbitrators, so parties will likely seldom need to resort to the courts for support. Second, the court ability to grant interim measures and the court's power to appoint emergency arbitrators are two distinct powers. We see little to no grounds for possible confusion.³⁰ Where the parties agree (implicitly or explicitly) on emergency arbitrators, the courts in the seat should support the enforcement of such a choice. Simply put, the courts should be able to appoint an emergency arbitrator if no other option is available. Requesting the court to do so should bar the parties from asking the court to order interim relief in the same matter, since they have already opted for tribunal ordered interim measures. Where the parties did not choose an emergency arbitrator scheme, they can resort to courts for that purpose. Third, we agree that the court should not enter emergency arbitrators' decision as a final judgment.

²⁹ Ibid 6; 'Fundamentally the possibility of emergency arbitrators has not changed the supporting role courts can play in these matters. Courts will either be called upon to enforce interim measures issued by the tribunal or to consider and grant those measures themselves.'

³⁰ Ibid.

However, we believe that there should be a provision addressing the enforceability of emergency arbitrators' decision in the same manner as enforceability of tribunals' interim orders.

Question 19

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?

Yes, we agree with the proposed approach outlined in the Consultation Paper.

Question 20

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

We believe that section 44(5) should not be repealed as we do not see redundancy between sections 44(5) and 44(3)-(4). The standards of urgency and necessity in sections 44(3) and 44(4) guide the parties as to when and where they should apply for an interim relief.³¹ Section 44(5) delineates the relationship between the courts and the tribunals in general, safeguarding the balance between support to arbitration proceedings and intervening with the procedure.³² Therefore, while we agree that further guidance is necessary concerning what constitutes an urgent or necessary request, we believe that such need for clarity does not per se constitute a redundancy between the relevant sections.

Additionally, we do see the need for reform in other aspects of the Arbitration Act 1996 to enhance the function of sections 44(3) - 44(5). First, to avoid confusion between section 44 and emergency arbitration, the definition of an arbitral tribunal should encompass emergency arbitrators (alongside other points addressed in our response to Question 18). That would ensure a consistent reading of the scope of the tribunal's power to grant interim relief. Second, to allow the parties the full benefit of the tribunal's power to grant interim measures, section 38 should explicitly recognise that the tribunal has the power to grant interim measures even in the absence of parties' agreement.

³¹ Ibid 18.

³² In relation to the points in paras 7.67 – 7.72 of the Consultation Paper, see Ibid 18, elaborating that the language in the UNCITRAL Model Law is a way to ensure that the application for interim relief before the national courts does not constitute a waiver of the arbitration agreement; such an interpretation is the majority view in international commercial arbitration.

Question 21

Which of the following ways of accommodating the orders of any emergency arbitrator do you prefer, and why? (1) (2) A provision which empowers an emergency arbitrator, whose order has been ignored, to issue a preemptory order, which, if still ignored, might result in the court ordering compliance. 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.

We propose a different approach that, in allowing a court to consider use of either remedy, a better balance is achieved between the need for efficiency and enforceability, without disturbing the current mechanisms of the Arbitration Act 1996. First, as discussed in our responses to other questions in this Chapter, we propose to treat the emergency arbitrator in the same manner as the arbitral tribunal, noting the different scope of their jurisdiction and power. Second, the emergency arbitrator order does not bind the tribunal in any way and is subject to the tribunal's review.³³

Consequently, the emergency arbitrator may issue a preemptory order to ensure the enforceability of its initial decision, if the circumstances require it. For example, preemptory orders may be issued if the tribunal has yet to be constituted and the emergency arbitrator has made an award with which the party did not voluntarily comply. Otherwise, the emergency arbitrator's decision will be subject to review by the tribunal.

In the case where a tribunal confirms the emergency arbitrator's decision; the tribunal can issue a preemptory order to ensure its enforceability. In case the tribunal does not confirm the order, but decides to amend it, revoke it, or otherwise change it, it will effectively issue interim relief and the outcome would fall under the current rules in section 41.

³³ See, e.g., LCIA Rules, Art. 9B, para. 9.11; ICC Rules, Art. 29, para 3.

CHAPTER 8: Challenging Jurisdiction under Section 67

Question 22

We provisionally propose that: (1) where a party has participated in arbitral proceedings and has objected to the jurisdiction of the arbitral tribunal; and (2) 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. Do you agree?

Yes, we agree it is important to clarify the effects of section 67. The effect of a rehearing is to hear new evidence, and section 67 should not be seen as a new route to do so, as this would contravene the principles of procedural fairness, efficiency, and competence-competence. Instruments such as the Commercial Court Guide, while useful, are not sufficient, particularly when international disputing parties are resorting to English courts, due to an English seated proceeding. This amendment will (1) make clear that a challenge to the tribunal's jurisdiction is not a new opportunity to submit new evidence to a new judicial body (i.e., courts) and (2) clarify that within the Arbitration Act 1996 there are already in place other systems of 'jurisdictional' control, including sections 32 and 72, as well as the New York Convention.

Question 23

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?

The threshold in section 32 is much higher than that of the section 67 given the permission requirements. While this reform seems to be urgent for section 67, it might not be case for section 32. Section 32 is mainly addressed to the court and the requirements needed for the court to review a jurisdictional objection. In contrast, section 67 is a provision addressed to the disputing parties, mainly the dissatisfied party seeking to activate courts proceedings. However, for the sake of consistency, it should be also clarified what are effects of the jurisdictional objection under section 67 with the aim of limiting the type of assessment conducted by the court.

Question 24

We provisionally conclude that our proposed change to section 67 of the Arbitration Act 1996 would not require any similar change to section 103. Do you agree?

Yes, as mentioned in our response to Question 22, section 103 is the right 'control' mechanism to review a tribunal's decision on jurisdiction, which is aligned with the New York Convention and general practice in international arbitration.

Question 25

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. Do you agree?

Yes, we agree with the proposal and explanation given in the Consultation Paper.

Question 26

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?

Yes, we agree with this proposal, as it would be consistent with the competence-competence doctrine, according to which an arbitration tribunal has the competence to decide on its own jurisdiction. Costs associated with that decision should also fall under the tribunal's competence. This is also in line with the general practice to foster procedural efficiency.

CHAPTER 9: Appeal on a Point of Law

Question 27

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?

The balance between finality and efficiency in domestic arbitration is slightly different to that in international arbitration. In domestic arbitration (i.e., domestic parties, subject matter, and law), disputing parties benefit from an opt-out appeal system under section 69. Therefore, in the context of domestic arbitrations, we do not propose any changes. In international arbitrations, the option under section 69 (alongside other examples mentioned in the Consultation Paper) is an exception compared to the approach in UNCITRAL Model Law jurisdictions. Moreover, analysis of users' preferences shows no deference to the possibility of an appeal on the point of law. Instead, users are more interested in the efficiency and finality of the award.³⁴ As a result, parties would typically consider the appeal an opt-in mechanism insofar as it meets their needs. Therefore, we suggest that section 69 ought to be available as an opt-in mechanism for international arbitrations.

³⁴ See e.g., Queen Mary, *2018 International Arbitration Survey: The Evolution of International Arbitration* (Report, 2018) and Queen Mary, *2021 International Arbitration Survey: Adapting Arbitration to a Changing World* (Report, 2021).

CHAPTER 10: Minor Reforms

Question 28

Do you think that section 7 of the Arbitration Act 1996 (separability of arbitration agreement) should be mandatory, and why?

Yes, we think that section 7 should be mandatory. This is because recognition of the separability principle will be an exercise in recognising what is already established in common law for seated proceedings under the Arbitration Act 1996. *Fiona Trust* was just the first of many subsequent cases, establishing the importance of the principle of separability with the aim of safeguarding the remaining contractual rights and obligations of the disputing parties.³⁵ Section 7 being mandatory means that the arbitration agreements will be *de facto* treated as distinct agreements. In relation to this amendment, four significant consequences can be foreseen.

First, arbitration tribunals will have the competence to determine and issue an award on the formation, validity, and the scope of the arbitral agreements. In case the autonomy of an arbitration agreement is not supported by the above-mentioned mandatory condition, the basis of section 30 would be vague.

Second, the consensus on the invalidity of the main contract having no effect on the validity of the arbitration agreement will also be adopted. Thus, uncertainties and discussions over the limits of separability would be clarified. Moreover, inconsistent, and contradictory awards on this issue would be precluded.

Third, section 7 has crucial importance in terms of designating the applicable law to arbitration agreements. The general principle is that if there is no explicit or implied choice of law specified in the arbitration agreement, the governing law is either the law in the main contract, the law of the seat, or the most closely connected law. On the other hand, in *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb & Ors* the Court of Appeal held that the separability of arbitration agreement signifies that a choice of law provision in the main contract does not directly extend to the arbitration agreement.³⁶ From this point of view, counting arbitration agreement as an extension of the main contract and applying to the main contract for reference will not always be the most rational solution or practice.

Finally, with this amendment, arbitration agreements will be safeguarded from challenges caused by idiosyncratic or discriminatory rules of national law which usually constitutes the main purpose and the origin of the ‘arbitration’ concept itself. We believe that section 7 being mandatory will reinforce the arbitration agreement and serve the main objectives of its existence.

³⁵ *Fiona Trust v Privalov* [2015] EWHC 527 (Comm).

³⁶ [2020] EWCA Civ 574.

Question 29

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?

Yes, with a caveat. We agree that a limited right of appeal should be available under section 9. We do not agree with a complete reversal of the *status quo*. We propose that the option to appeal be limited by a mechanism similar or identical to the one in section 32(6), which limits the type of decisions that may be appealed. We are inclined towards a restrictive approach because allowing such appeals would result in scope for tactical claims and unduly prolonged proceedings. Further, amending section 9 to include a blanket right to an appeal, when no right to appeal was available previously at that stage of the arbitration, could be perceived as reducing the pro-arbitration status of the jurisdiction.

Question 30

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?

Yes, for two main reasons, there is a need to streamline the requirements established in these two sections. First, it is well-established in arbitration practice that once parties have agreed to arbitration, they have conferred to the arbitration tribunal the powers and authority to decide their case. Therefore, it is not necessary to add a ‘second-lock’ to the tribunal’s permission as their powers have been already given by agreement of the parties. Second, courts can moderate in a case-by-case analysis the requirements on costs and timings; what is important is that the Arbitration Act 1996 gives clarity across its different sections on the different application requirements. In other words, costs and delay are already addressed and supervised elsewhere in the Arbitration Act 1996 (i.e., sections 61, 63 and 73) and these do not need to be duplicated in sections 32 and 45.

Question 31

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?

Yes, there should be an explicit mention of remote hearings. Arbitral practice has treated decisions regarding the format of hearings as a procedural matter that has been largely dealt with by having regard to the wishes of the parties. Being clearly classed as such via an express provision would enable the tribunal to consider this issue more efficiently during proceedings. It is proposed that a similar formulation to Article 27(2) of the Swiss Arbitration Rules 2021 would be the most effective. This reads as follows: ‘*Article 27(2). Any hearings may be held in person or remotely by videoconference or other appropriate means, as decided by the arbitral tribunal after consulting with the parties.*’

In the alternative, we call for the review of section 34(2), which could be amended to include the power of the tribunal to decide whether to make use of remote proceedings. Such change would reflect arbitral practice and technological advancement. A recent empirical study by the International Council for Commercial Arbitration suggested that it is within the inherent procedural powers of the tribunal to decide the mode of proceedings (physical, remote or hybrid) in commercial arbitration.³⁷ Further, the same research concluded that the tribunal's power to enforce a remote hearing is not, in principle, in breach of the parties' right to a fair trial.³⁸ Finally, arbitral institutions have experienced a significant increase in arbitrations held fully or partially remotely.³⁹ The above points are a strong indication of the increasingly important role of remote hearings in the conduct of international arbitrations. Acknowledging the tribunal's inherent power to decide on the mode of hearings in section 34 would resolve any uncertainty surrounding the topic for arbitrations with a seat in E&W.

There remain procedural questions surrounding remote hearings, such as ensuring procedural fairness in their course. However, the Arbitration Act 1996 does not need to make express provision regarding these questions at this stage, since to do so could be overly restrictive of the arbitral tribunal's authority to manage process in accordance with the needs of the parties and the case. Due process requirements, already embodied in the Arbitration Act 1996, and the arbitral practice (both domestic and international) are apt to effectively govern these issues.

Question 32

Do you think that section 39 of the Arbitration Act 1996 should be amended to refer to "orders" (rather than "awards"), and why?

Yes. Academic commentary suggests, persuasively in our view, that the term 'award' should be reserved only for tribunal decisions demonstrating **all** the following qualities:

1. The tribunal is exercising its authority to render the decision.
2. The decision disposes wholly or partially of a dispute of the arbitration.
3. The dispute is substantive and is being resolved in a final manner.⁴⁰

³⁷ Giacomo Rojas Elgueta, James Hosking, and Yasmine Lahlou, 'General Report' in James Hosking, Yasmine Lahlou and Giacomo Rojas Elgueta (eds) *Does a Right to a Physical Hearing Exist in International Arbitration? Investigating the Legal, Conceptual and Practical Implications of Remote Hearings in International Arbitration* (ICCA Reports No 10, 2022), 25 < <https://www.arbitration-icca.org/icca-reports-no-10-right-to-a-physical-hearing-in-international-arbitration>> 14 December 2022.

³⁸ Maria Beatrice Deli, 'Remote Hearings and the Right to a Fair Hearing in Public International Law' in *Ibid* 123.

³⁹ Giacomo Rojas Elgueta and Benedetta Mauro, 'Remote Hearings: The Arbitral Institutions' Perspective' in *Ibid* 253-254.

⁴⁰ For further discussion on the distinction between tribunal decisions including 'awards,' 'orders' and 'interim awards,' see Konstantina Kalaitoglou, 'Exploring the concept of arbitral awards under the New York Convention' (2021) 5(1-2) *Journal of Strategic Contracting and Negotiation* 99.

Section 39 refers to tribunal decisions granting relief on a provisional basis, which might be reversed or amended before or in the rendering of the arbitral award. The nature of this type of tribunal decision is in line with our academic understanding of a tribunal ‘order,’ which possesses element (i) referred to above but does not possess elements (ii) & (iii), especially finality. Further, section 39(1), in its current formulation refers to ‘provisional awards,’ whose precise meaning and scope are contested and vary amongst jurisdictions. Accordingly, amending section 39 to refer to ‘orders’ is a step towards clarification of the taxonomy and terminology of tribunal decisions while continuing to serve the purpose of the provision.

Question 33

Do you think that section 39(1) of the Arbitration Act 1996 should be amended to refer to “remedies” (rather than “relief”), and why?

Yes, we agree. Common law already gives the user a wide appreciation on the types of remedies that can be granted in E&W, and which, therefore, are part of the arbitration practice for seated proceedings under the Arbitration Act 1996. The difference between remedy and relief is often based on doctrinal notions rather than a fundamental ‘problem’ in the arbitration practice. More specifically, relief is a notion associated with pecuniary compensation, while a remedy can include a declaratory outcome on a disputed issue or to order specific performance. Therefore, the concept of remedy is broader and encompasses further matters. We are of the view that this amendment will be helpful, especially for the international user coming from another legal culture.

Question 34

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?

Yes, we agree that this provision should be amended as proposed. It is fair that an applicant/appellant awaits the outcome of the process of correction or additional award under section 57 if the correction or additional award is material to their application or appeal. We note that this approach aligns with the standard in the UNCTRAL Model Law (Article 34(3)) and the Arbitration (Scotland) Act 2010 (Schedule 1, Rule 71). We also note that it is aligned with case law, especially on the materiality of the correction or additional award to the proposed appeal or application. The point on materiality will likely prevent an abuse of the provision for frivolous application for correction or additional awards to gain more time for appeal or application against the award. In addition, section 57(7) of the Arbitration Act 1996 provides that any correction of an award shall form part of the award. This is a clear indication that an award which is under review for correction is not yet complete, especially on the point(s) or portion(s) to be corrected. As for additional awards, this logic also applies, although section 57 is silent on the point. This is because the need to render additional award implies that the existing award is not yet complete by itself. We believe that this is an additional reason for which streamlining section 70(3) with section 57 is fair. It will ensure that an award is complete before the time for an application or appeal to challenge it begins to run.

Question 35

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?

Yes, we agree that section 70(8) of the Arbitration Act 1996 should be retained. This is because section 70(8) relates to an appeal emanating from challenging an award on grounds of substantive jurisdiction and serious irregularity, or an appeal on a point of law. In such applications, the Arbitration Act 1996 permits the court in which the decision was made in sections 67(4), 68(4) and 69(8) the power to grant leave to appeal. For a party to appeal such decisions the court in which a decision is made may decide to permit an appeal subject to the satisfaction of conditions concerning security for costs or payments into court. Therefore, section 70(8) of the Arbitration Act 1996 recognises the importance of security for costs or payments into court in appeals emanating from challenges based on grounds of substantive jurisdiction and serious irregularity, or an appeal on a point of law.

Question 36

We provisionally propose that sections 85 to 87 of the Arbitration Act 1996 (on domestic arbitration agreements) should be repealed. Do you agree?

Yes, we agree that sections 85 to 87 of the Arbitration Act 1996 should be repealed. Sections 85 to 87 of the Arbitration Act 1996 recognise that there may be differences between international arbitration and domestic arbitration. This approach is taken in, for example, Switzerland and France. The Arbitration Act 1996 has applied to both international and domestic arbitration without sections 85 to 87 being in force and has not occasioned any problems or affected the use of the Arbitration Act 1996 for domestic arbitration. Therefore, a distinction between international and domestic arbitration is not relevant in the context of the Arbitration Act 1996. The distinction between international arbitration and domestic arbitration is diminishing, as recognised in Hong Kong and Belgium where the UNCITRAL Model Law, which is of international character, applies to international and domestic arbitration. The provisions in the Arbitration Act 1996 should apply to international and domestic arbitration.

CHAPTER 11: Other Stakeholder Suggestions not Short-Listed for Review

Question 37

Do you think that any of the suggestions discussed in Chapter 11 needs revisiting in full, and if so, why?

Yes, we think that (1) third party funding (TPF) and (2) tribunal's power to amend statements need further revision.

First, the disclosure of TPF should be mandatory with a view to safeguarding the whole arbitral procedure. This would address concerns regarding the independence and impartiality of arbitral tribunals. As stated in the IBA Guidelines 2014 General Standard 6(b), third party funders in relation to the dispute may have a direct economic interest in the award, and as such may be considered to be the equivalent of the party. It follows that non-disclosure of TPF may result in undesirable consequences, including potential challenges to the appointed arbitrator, or even the arbitral award being set aside or annulled. Even though it may seem like disclosure of TPF causes redundant applications for security for cost, TPF is not determinative in deciding on such applications. In fact, in investment treaty practice an application for security for costs was rejected when the application is solely based on TPF involvement.⁴¹

Second, section 34 (c) allows parties to amend statements but there is no explicit expression of extent to which these amendments can be made. We suggest that section 34 should empower the tribunal to make amendments for closely related but new issues. This solution could preclude the challenge of the award under section 68, as seen in *PBO v (1) Donpro and others* (2021) EWHC 1951(Comm).⁴² For this reason, we submit that discretion of the tribunals should be identified in deciding whether the new claims or reference matters should be brought into the jurisdiction.

Question 38

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?

Yes, the review of section 19 might be necessary. If the approach suggested in the Working Group's answer to Question 7 of this Consultation Paper, it is logical that section 19 should be

⁴¹ See, for example, *EuroGas Inc and Belmont Resources Inc v Slovak Republic* (ICSID Case No. ARB/14/14) (Procedural Order No 3) (23 June 2015); *South American Silver Ltd (Bermuda) v Bolivia* (UNCITRAL) (PCA Case No 2013-15) (Procedural Order No 10) (11 January 2016); *Julio Miguel Orlandini-Agreda and another v Bolivia* (PCA Case No 2018-39) (Decision on the Respondent's Application for Termination) (Trifucation and Security for Costs) (9 July 2019); *Bay View Group LLC and another v Republic of Rwanda* (ICSID Case No ARB/18/21) (Procedural Order No 6) (28 September 2020).

⁴² The Commercial Court found that the tribunal's refusal to permit the claimant to amend its statement of case, and the fact that the tribunal had reached the conclusion without providing the claimant to address matters which the claimant party considered to be several new grounds of appeal, caused serious irregularity in arbitral proceedings. The court found that the tribunal was not complying with its duties under section 33 resulting in procedural irregularity in the proceedings which led to substantial injustice.

amended for consistency.⁴³ Accordingly, ‘in deciding whether to exercise, and in considering how to exercise, any of its powers under section 16 (procedure for appointment of arbitrators) or section 18 (failure of appointment procedure),’ the court would need to apply the non-discrimination standard discussed in Chapter 4 of this Consultation.

⁴³ Please see page 7 of this Consultation Paper.

A response to the Law Commission’s consultation paper *Review of the Arbitration Act*

Executive summary

In response to the Law Commission’s Consultation Paper *Review of the Arbitration Act*, we offer responses to questions 7, 14, 16, 27, 31 and 36, and some thoughts on third party funding. Our views are as follows.

- Adopt the provisions on non-discrimination (Q7)
- Adopt the ‘manifestly without merit language’ in relation to summary awards (Q14)
- Consider adopting express rules on court orders against third parties (Q16)
- Exclude treaty arbitrations from the scope of s 69 (Q27)
- Keep open the issue as to the validity of electronic signatures (Q31)
- Keep open the issue of the particular needs of consumer and SME arbitrations (Q36), and
- Consider provisions on disclosure of third party funding (paras 11.13-17)

Response authors

Dr Stephanie Law, Professor Andrea Lista, Dr Michail Risvas, Ece Selim Yetkin and Dr Johanna Hjalmarsson (corresponding author)

Southampton Law School, University of Southampton

Citation

Law et al (2022), *A response to the Law Commission’s consultation paper Review of the Arbitration Act*¹

Responses to Questions

Question 7

In principle, yes, the provisions on anti-discrimination should be adopted. The 2011 judgment of the UKSC in *Hashwani v Jvraj* [2011] UKSC 40 established that as an arbitrator could not be understood to be appointed through an employment contract, employment law precluding discrimination – equality law – do not apply to that relationship. The proposal aims to ensure that anti-discrimination rules apply to the appointment of arbitrators and challenges to arbitral appointments. The lack of diversity in international

¹ Note the individual authorship of certain sections. Suggested format for citation: ‘Law et al (2022), *A response... per Risvas*’. All authors agree with the points made in individually attributed segments.

arbitration is well documented² and the aim of the proposal is to promote diversity through a non-discrimination provision.

As regards wording, the proposal could have introduced an express provision precluding appointments which discriminate based on protected characteristics. This however is not the approach adopted. Instead, the proposal, on the one hand, precludes the appointment of an individual being challenged on the basis of that individual's protected characteristics. On the other, it establishes that any agreement between the parties concerning the protected characteristics of the arbitrator to be appointed is unenforceable unless that agreement can be deemed to constitute a "proportionate means of achieving a legitimate aim". It seems that this body of exceptions will need to be developed on a case by case or ad hoc basis.

Aligning protected characteristics for the purposes of the Arbitration Act with those identified under Section 4 of the Equality Act 2010 may be problematic. It has been noted that the limited scope of the 2010 Act (ie its limited application to specific contexts, namely employment, public services, public transport, club and associations, provision of services) and domestic nature may clash with the international character of arbitration seated in England (foreign parties, foreign applicable law).³ That is to say, it has been suggested that requiring foreign parties and arbitrators to comply with the duties established by the 2010 Act would undermine the "opt in/opt out ethos" of the Arbitration Act.⁴ It would seem however that rules against discrimination may – to draw an analogy – constitute a body of rules similar to public policy⁵ or "overriding mandatory provisions" in private international law, from which parties cannot derogate when choosing the applicable (substantive) law.⁶

While aligning the protected characteristics under the Arbitration Act with those established in section 4 of the 2010 Act may generate coherence, and allow for the engagement of the case law of the latter, section 4 has been criticised. The Equality Act 2010 aimed to consolidate existing legislation on non-discrimination and equality and has come to be recognised as a key piece of legislation. Its section 4 however has been

² Cross-Institutional Task Force on Gender Diversity in Arbitral Appointments and Proceedings, 'ICCA Reports No. 8: Report of the Cross-Institutional Task Force on Gender Diversity in Arbitral Appointments and Proceedings' (2022); 2022 Update available at: <https://www.arbitration-icca.org/icca-reports-no-8-report-cross-institutional-task-force-gender-diversity-arbitral-appointments-and>

³ N King, 'Equality and Non-Discrimination in International Arbitration: Recent Developments in the English Context', *Opinio Juris* (April 2022); available at: <https://opiniojuris.org/2022/04/04/equality-and-non-discrimination-in-international-arbitration-recent-developments-in-the-english-context/>

⁴ N King, 'Equality and Non-Discrimination in International Arbitration: Recent Developments in the English Context', *Opinio Juris* (April 2022); available at: <https://opiniojuris.org/2022/04/04/equality-and-non-discrimination-in-international-arbitration-recent-developments-in-the-english-context/>

⁵ Eg Art 21 Rome I Regulation.

⁶ Eg Art 9(1) Rome I Regulation.

criticised in that it establishes a closed list of protected characteristics. Thus, it does not offer scope for expanded protections for characteristics that do not fall within this closed list. In particular, the protection afforded to trans people has been criticised⁷ as has the absence of a characteristic into which gender-fluid, non-binary or intersex persons may fall.

Thus, to the extent that the Law Commission proposes to introduce anti-discrimination provisions to the ends of increasing diversity and promoting a just society, alignment with developing societal norms is necessary.

Question 14

At 6.35, the Law Commission tentatively opts for ‘no reasonable prospects of success’ over ‘manifestly without merit’ as the threshold to issue a summary award. As the Law Commission also notes, in many sectors arbitrations are conducted by experienced professionals (‘commercial men’) as opposed to legally trained arbitrators. With this in mind, it may be preferable not to burden the Act with a concept replete with legal meaning, causing an expectation that the arbitrator should interpret and abide by extensive case law. An idiosyncratic concept may be the better option, even if upon appeal it comes to be somewhat assimilated to the threshold for summary judgment.

Question 16: court orders in support of arbitral proceedings

According to section 44 of the Act, the court has the power to make orders in support of arbitral proceedings. The Law Commission raises the possibility of provisions for courts to make orders against third parties (those not party to the arbitration).

The reference to the power of courts to make order against third parties under section 44 is arguably best made explicit. This is because: a) the involvement of third parties in the arbitration of international commercial disputes (e.g. maritime disputes) is a frequently occurring scenario; and b) the explicit reference to the power of courts to make orders against third parties would add certainty and reduce the possibility of challenges and other procedural inefficiencies.

⁷ In particular, as regards the uncertainty in the definition of gender reassignment (whether the protection only applies to those undergoing a medical process). See *Ms R Taylor v Jaguar Land Rover Ltd* (England and Wales : Sex Discrimination) [2020] UKET 1304471/2018 (14 September 2020), in which it was provided that the medical process was not necessary.

Although as the Law Commission recognises, the court already has implicit power under s 44 to issue orders against third parties in appropriate cases, it is our opinion that the reform process should make the possibility of the court issuing orders against third parties explicit in the Act.

Question 27

by Dr Michail Risvas

Appeals on points of (customary public international) law under section 69 of the Arbitration Act 1996 and awards rendered by arbitral tribunals constituted on the basis of international investment treaties.

1. The Law Commission is of the view that in treaty “cases involv[ing] London arbitration, the courts seem content with the workings of the Arbitration Act 1996 as usual” and, therefore, the Law Commission is “not currently persuaded that there is any lack which needs reform”.⁸
2. Section 69 is one of the most famous (or infamous, depending on the perspective) idiosyncratic features of the English Arbitration Act 1996. It provides that “[u]nless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings”.
3. In general, the position of the Law Commission is persuasive; however, for reasons set out below, it is suggested that, while Section 69 remains in the Arbitration Act (as the Law Commission recommends), appeals on customary international law, in particular, in relation to investment treaty awards, should be excluded from its scope of application.
4. Given that certain institutional arbitration rules such as the ICC Rules,⁹ and the LCIA Rules¹⁰ contain a broad waiver regarding any form of appeal, their choice excludes the application of Section 69.
5. Section 69 is not limited to a particular type of arbitral proceedings. Although comprehensive statistical data are not available, it seems that the majority of Section 69 cases are shipping cases.¹¹

⁸ Law Commission, Consultation Paper 257, Review of the Arbitration Act 1996 (September 2022), para 11.26.

⁹ ICC Rules (2021), Article 35(6): “Every award shall be binding on the parties. By submitting the dispute to arbitration under the Rules, the parties undertake to carry out any award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made”. See also *Lesotho Highlands Development Authority v Impregilo SpA* [2005] UKHL 43.

¹⁰ LCIA Rules (2020), Article 26.8: “Every award (including reasons for such award) shall be final and binding on the parties. The parties undertake to carry out any award immediately and without any delay (subject only to Article 27); and the parties also waive irrevocably their right to any form of appeal, review or recourse to any state court or other legal authority, insofar as such waiver shall not be prohibited under any applicable law.”

¹¹ M Marshall, “Section 69 almost 20 years on...” (24 June 2015), available at <http://arbitrationblog.kluwerarbitration.com/2015/06/24/section-69-almost-20-years-on/>

6. Except for awards rendered by ICSID¹² tribunals,¹³ Section 69 applies to awards rendered by tribunals constituted pursuant to international investment treaties as well. The vast majority of non-ICSID treaty arbitrations are conducted on the basis of the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules. According to the United Nations Conference on Trade and Development (UNCTAD) database, out of 1190 investment treaty arbitrations in total, 369 were UNCITRAL arbitrations and 644 were ICSID arbitrations.¹⁴ Contrary to several institutional arbitration rules (mentioned in para 4 above), the UNCITRAL Arbitration Rules do not contain a waiver excluding the right to appeal, and, therefore, the application of Section 69.
7. The scope of application of Section 69 extends to questions of public international law, to the extent that the relevant rules of customary international law are part of English law,¹⁵ given that Section 82 of the Arbitration Act 1996 provides that “question of law” means— (a) for a court in England and Wales, a question of the law of England and Wales”. This should change by excluding from the scope of application of Section 69 questions of customary international law (which might arise in the context of challenging an investment treaty award).
8. Even those in favour of adopting less strict requirements for appeals on points of law, argue that the main advantage would be the development of common law, in particular in the fields of commercial law and contract law – not public international law.¹⁶ Contrary to contract-based arbitrations (usually between private parties), where the applicable law is domestic law (English law, if Section 69 is to be applied), in investment treaty arbitrations the applicable law is the international treaty and customary international law. As a result, the main advantage of Section 69,

¹² The International Centre for the Settlement of Investment Disputes (ICSID) established by 1966 ICSID Convention (or commonly known as the Washington Convention).

¹³ See the Arbitration (International Investment Disputes) Act 1966 implementing the ICSID Convention in the domestic law of the United Kingdom. See also *Micula and others v Romania* [2020] UKSC 5, para 68: “The provisions of the 1966 Act must be interpreted in the context of the ICSID Convention and it should be presumed that Parliament, in enacting that legislation, intended that it should conform with the United Kingdom’s treaty obligations. It is a notable feature of the scheme of the ICSID Convention that once the authenticity of an award is established, a domestic court before which recognition is sought may not re-examine the award on its merits. Similarly, a domestic court may not refuse to enforce an authenticated ICSID award on grounds of national or international public policy. In this respect, the ICSID Convention differs significantly from the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958”.

¹⁴ See <https://investmentpolicy.unctad.org/investment-dispute-settlement>

¹⁵ See *The Republic of Serbia v Imagesat International NV* [2009] EWHC 2853 (Comm); *Republic of Ecuador v Occidental Exploration and Production Co* [2005] EWCA Civ 1116.

¹⁶ See Lord Thomas, “Developing commercial law through the courts: rebalancing the relationship between the courts and arbitration” (9 March 2016) available at <https://www.judiciary.uk/wp-content/uploads/2016/03/lcj-speech-bailli-lecture-20160309.pdf>

the need to ensure the uniform and correct application of English law, does not apply to investment treaty arbitrations.¹⁷

9. Finally, as the Law Commission recognizes, “[t]he UNCITRAL Model Law contains no provision for an appeal from an arbitral award to a court on a point of law. Thus, the availability of an appeal on a point of law is not widespread internationally.”¹⁸ The exceptional nature of Section 69 speaks in favour of its restrictive application to question of English law (excluding questions of public international law).

Question 31 - Remote hearings and electronic documentation as procedural matters

The reform process has not considered the opportunity to introduce provisions in the Act explicitly referring to remote hearings and electronic service of documents. Although the consultation paper states that the Act is already adapted to modern technologies in light of section 34 which grants tribunals the right to agree any procedural matter (including the possibility of giving procedural directions for remote hearings and electronic documentation), this might have represented an opportunity for the Act to explicitly embrace modern technology (like arbitration Acts in foreign jurisdictions, e.g. the Netherlands).

Considering that electronic documents and signatures have become widespread and are widely used instead of handwritten signatures, it is worth considering the addition of a provision to the Act, for example in s 52, to the effect that ‘An electronic signature also bears all the legal consequences of a handwritten signature and its legal effect cannot be denied solely on the ground that it is in electronic form.’ Such provisions are present in legislation in other jurisdictions.¹⁹ While the eIDAS Regulation²⁰ appears for the time being to be retained law in UK following Brexit through the *Electronic Identification and Trust Services for*

¹⁷ See also Taner Dedezade, “Are you in? or are you out? an analysis of Section 69 of the English Arbitration Act 1996: Appeals on a Question of Law” (2006) *International Arbitration Law Review* 56, 58: “This argument, of course, presupposes that the courts are in a better position to apply the law than the arbitrators. Such a proposition may well be true if the English courts are applying questions of domestic law. It is not so persuasive when the English courts are required to interpret international law”.

¹⁸ Law Commission, Consultation Paper 257, Review of the Arbitration Act 1996 (September 2022), para 9.19.

¹⁹ In the USA, the *Electronic Signatures in Global and National Commerce Act – An Act To facilitate the use of electronic records and signatures in interstate or foreign commerce* from 2000 provides: ‘General intent (1) a signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form; and (2) a contract relating to such transaction may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation.’

²⁰ *Regulation (EU) No 910/2014... on electronic identification and trust services for electronic transactions in the internal market...* recital (49): ‘This Regulation should establish the principle that an electronic signature should not be denied legal effect on the grounds that it is in an electronic form or that it does not meet the requirements of the qualified electronic signature. However, it is for national law to define the legal effect of electronic signatures, except for the requirements provided for in this Regulation according to which a qualified electronic signature should have the equivalent legal effect of a handwritten signature.’

Electronic Transactions (Amendment etc.) (EU Exit) Regulations 2018, it may be necessary to keep an eye on parliamentary processes to ensure that this continues to be the case, and if not ensure that suitable amendments are made to the Arbitration Act 1996.

Question 36

Whether the law works well for international commercial arbitration where the parties have significant resources and access to legal advice is a very different question to that of whether it works in a small scale, domestic context where one party is an SME or a natural person, and the other is a large corporation or also a natural person. In the latter case, an arbitration between natural persons of limited means may become unwieldy and confusing for all involved. If a large corporation is involved, there may be a deficiency in the equality of arms. Whether the Act as is or as amended works well in such cases is cannot be answered solely on the basis of the predominantly doctrinal report. It is suggested that empirical research is needed to explore this, and that openness should be maintained as to the need for a Domestic Arbitration Act where appropriate provision could be made for the principles of equality of arms and procedural effectiveness. For example, the Singapore Domestic Arbitration Act is specifically designed to cater for the property market, where the use of constructions specialists as adjudicators may result in errors on points of law and a more generous appeals mechanism is appropriate.²¹ The repeal of sections 85-87 as proposed in Question 36 would seem to necessitate such empirical research to see if they might be useful and should be brought into force instead of repealed.

Third Party funding

The Law Commission's consultation paper does not request consultees' views on the issue of whether the Act should contain a mandatory disclosure obligation in case a party has secured third party funding.²² As third party funding is becoming increasingly common, it is submitted that mandatory disclosure of third party funding would be a welcome addition to the Act. This would avoid applications for disclosure and challenges to tribunals' independence and impartiality which may stem out of a third party funding scenario. Arbitration institutions such as the ICC, SIAC and the HKIAC have incorporated a mandatory disclosure requirement in their arbitral rules, and the consultation process arguably closes the door to the opportunity to seek views on this aspect.

²¹ See to this effect Law Com 9.24.

²² Paras 11.13-17.

Response ID ANON-PT57-RURM-P

Submitted to Law Commission Consultation: Review of the Arbitration Act 1996
Submitted on 2022-12-08 15:15:17

About you

What is your name?

Name:

[REDACTED]

What is the name of your organisation?

Enter the name of your organisation:

Gilberto José Vaz Advogados

Are you responding to this consultation in a personal capacity or on behalf of your organisation?

Response on behalf of organisation

If other, please state::

What is your email address?

Email:

[REDACTED]

What is your telephone number?

[REDACTED]

[REDACTED]

If you want the information that you provide in response to this consultation to be treated as confidential, please explain to us why you regard the information as confidential. As explained in our privacy notice, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

Please explain to us why you regard the information as confidential:

Consultation questions

Consultation Question 1: 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?

Agree

Please share your views below.:

Consultation Question 2: We provisionally conclude that the Arbitration Act 1996 should not impose a duty of independence on arbitrators. Do you agree?

Disagree

Please share your views below.:

Consultation Question 3: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 4: Should the Arbitration Act 1996 specify the state of knowledge required of an arbitrator's duty of disclosure, and why?

No

Please share your views below.:

Consultation Question 5: 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?

Actual knowledge

Please share your views below.:

Consultation Question 6:

More broadly justified

Please share your views below.:

Consultation Question 7:

Agree

Please share your views below.:

Consultation Question 8: Should arbitrators incur liability for resignation at all, and why?

No liability for resignation

Please share your views below.:

Consultation Question 9: Should arbitrators incur liability for resignation only if the resignation is proved to be unreasonable?

Yes

Please share your views below.:

Consultation Question 10: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 11: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 12: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 13: We provisionally propose that the Arbitration Act 1996 should stipulate the threshold for success in any summary procedure. Do you agree?

Disagree

Please share your views below.:

Consultation Question 14: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 15: 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. Do you agree?

Disagree

Please share your views below.:

Consultation Question 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?

Yes

Please share your views below.:

Consultation Question 17: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 18: We provisionally conclude that the provisions of the Arbitration Act 1996 should not apply generally to emergency arbitrators. Do you agree?

Agree

Please share your views below.:

Consultation Question 19: 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?

Agree

Please share your views below.:

Consultation Question 20: Do you think that section 44(5) of the Arbitration Act 1996 should be repealed, and why?

Not Answered

Please share your views below.:

Consultation Question 21:

Peremptory order

Please share your views below.:

Consultation Question 22:

Agree

Please share your views below.:

Consultation Question 23: 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?

Yes

Please share your views below.:

Consultation Question 24: We provisionally conclude that our proposed change to section 67 of the Arbitration Act 1996 would not require any similar change to section 103. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 25: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 26: 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?

Agree

Please share your views below.:

Consultation Question 27: 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?

Agree

Please share your views below.:

Consultation Question 28: Do you think that section 7 of the Arbitration Act 1996 (separability of arbitration agreement) should be mandatory, and why?

No

Please share your views below.:

Consultation Question 29: 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?

Agree

Please share your views below.:

Consultation Question 30: 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?

Yes

Please share your views below.:

Consultation Question 31: 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?

No

Please share your views below.:

Consultation Question 32: Do you think that section 39 of the Arbitration Act 1996 should be amended to refer to "orders" (rather than "awards"), and why?

Yes

Please share your views below.:

Consultation Question 33: Do you think that section 39(1) of the Arbitration Act 1996 should be amended to refer to "remedies" (rather than "relief"), and why?

Yes

Please share your views below.:

Consultation Question 34: 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?

Agree

Please share your views below.:

Consultation Question 35: 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?

Agree

Please share your views below.:

Consultation Question 36: We provisionally propose that sections 85 to 87 of the Arbitration Act 1996 (on domestic arbitration agreements) should be repealed. Do you agree?

Not Answered

Please share your views below.:

Consultation Question 37: Do you think that any of the suggestions discussed in Chapter 11 needs revisiting in full, and if so, why?

Please share your views below.:

Consultation Question 38: 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?

Please share your views below.:

Response ID ANON-PT57-RUK1-K

Submitted to Law Commission Consultation: Review of the Arbitration Act 1996
Submitted on 2022-12-15 23:53:50

About you

What is your name?

Name:
Glenda Vencatachellum

What is the name of your organisation?

Enter the name of your organisation:

Member of London branch CIArb Committee.
Members of the London branch committee working party including me were involved in the pre-consultation process.
Some members felt they had already made their points known.

Are you responding to this consultation in a personal capacity or on behalf of your organisation?

Personal response

If other, please state::

What is your email address?

Email:
[REDACTED]

What is your telephone number?

Telephone number:
[REDACTED]

If you want the information that you provide in response to this consultation to be treated as confidential, please explain to us why you regard the information as confidential. As explained in our privacy notice, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

Please explain to us why you regard the information as confidential:

Consultation questions

Consultation Question 1: 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?

Agree

Please share your views below.:

Consultation Question 2: We provisionally conclude that the Arbitration Act 1996 should not impose a duty of independence on arbitrators. Do you agree?

Agree

Please share your views below.:

I found the definitions re confidentiality and even independence difficult as these days such definitions take on different meanings in ordinary parlance and in an international context.
Agree as per para 3.4.

Consultation Question 3: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 4: Should the Arbitration Act 1996 specify the state of knowledge required of an arbitrator's duty of disclosure, and why?

Not Answered

Please share your views below.:

Consultation Question 5: 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?

What they ought to know

Please share your views below.:

Consultation Question 6:

Not Answered

Please share your views below.:

Consultation Question 7:

Agree

Please share your views below.:

Consultation Question 8: Should arbitrators incur liability for resignation at all, and why?

Not Answered

Please share your views below.:

Consultation Question 9: Should arbitrators incur liability for resignation only if the resignation is proved to be unreasonable?

Other

Please share your views below.:

If the resignation is capricious

Consultation Question 10: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 11: 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. Do you agree?

Agree

Please share your views below.:

Though it may have been better put in secondary legislation.

Consultation Question 12: 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. Do you agree?

Agree

Please share your views below.:

although I say I agree again this may be better if it were set out set out out in arbitral rules

Consultation Question 13: We provisionally propose that the Arbitration Act 1996 should stipulate the threshold for success in any summary procedure. Do you agree?

Agree

Please share your views below.:

Consultation Question 14: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 15: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 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?

Not Answered

Please share your views below.:

Consultation Question 17: 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. Do you agree?

Agree

Please share your views below.:

This questions has been oddly phrased as the usual process is to ask for permission.

Consultation Question 18: We provisionally conclude that the provisions of the Arbitration Act 1996 should not apply generally to emergency arbitrators. Do you agree?

Agree

Please share your views below.:

Consultation Question 19: 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?

Agree

Please share your views below.:

Consultation Question 20: Do you think that section 44(5) of the Arbitration Act 1996 should be repealed, and why?

No

Please share your views below.:

Consultation Question 21:

Not Answered

Please share your views below.:

Consultation Question 22:

Agree

Please share your views below.:

Consultation Question 23: 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?

Not Answered

Please share your views below.:

Consultation Question 24: We provisionally conclude that our proposed change to section 67 of the Arbitration Act 1996 would not require any similar change to section 103. Do you agree?

Agree

Please share your views below.:

Consultation Question 25: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 26: 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?

Agree

Please share your views below.:

Consultation Question 27: 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?

Agree

Please share your views below.:

Consultation Question 28: Do you think that section 7 of the Arbitration Act 1996 (separability of arbitration agreement) should be mandatory, and why?

Yes

Please share your views below.:

For the reasons given in 10.8

Consultation Question 29: 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?

Not Answered

Please share your views below.:

Consultation Question 30: 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?

Not Answered

Please share your views below.:

Consultation Question 31: 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?

Yes

Please share your views below.:

Re remote hearings whilst this is covered by rules it is the important that parties do not have surreptitious help. Setting out matters would make the gravity of obtaining help clear to all.

The CI Arb rules outline this.

Some tribunals ask for a sweep of the whole room.

Consultation Question 32: Do you think that section 39 of the Arbitration Act 1996 should be amended to refer to "orders" (rather than "awards"), and why?

Yes

Please share your views below.:

Consultation Question 33: Do you think that section 39(1) of the Arbitration Act 1996 should be amended to refer to “remedies” (rather than “relief”), and why?

Yes

Please share your views below.:

Consultation Question 34: 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 appellants was notified of the result of that request. Do you agree?

Agree

Please share your views below.:

Consultation Question 35: 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?

Not Answered

Please share your views below.:

Consultation Question 36: We provisionally propose that sections 85 to 87 of the Arbitration Act 1996 (on domestic arbitration agreements) should be repealed. Do you agree?

Agree

Please share your views below.:

Consultation Question 37: Do you think that any of the suggestions discussed in Chapter 11 needs revisiting in full, and if so, why?

Please share your views below.:

Re para 11.9 Enka v Chubb

I agree with the opinion put forward [REDACTED] that there needs to be a statutory rule that the law of the seat will govern the arbitration agreement save where an agreement to the contrary has been made in the arbitration agreement.

Institutional rules do not alleviate the conundrum.

Only a clear statutory rule can deal with this issue.

Consultation Question 38: 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?

Please share your views below.:

Response ID ANON-PT57-RUKM-F

Submitted to Law Commission Consultation: Review of the Arbitration Act 1996
Submitted on 2022-12-13 15:11:38

About you

What is your name?

Name:
Rebecca Warder

What is the name of your organisation?

Enter the name of your organisation:
Hausfeld

Are you responding to this consultation in a personal capacity or on behalf of your organisation?

Personal response

If other, please state::

What is your email address?

Email:
[REDACTED]

What is your telephone number?

Telephone number:
[REDACTED]

If you want the information that you provide in response to this consultation to be treated as confidential, please explain to us why you regard the information as confidential. As explained in our privacy notice, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

Please explain to us why you regard the information as confidential:

Consultation questions

Consultation Question 1: 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?

Agree

Please share your views below.:

The current position is satisfactory and it would be difficult to codify the common law. Doing so might also introduce undue rigidity, whereas the courts can respond appropriately to novel situations.

Consultation Question 2: We provisionally conclude that the Arbitration Act 1996 should not impose a duty of independence on arbitrators. Do you agree?

Agree

Please share your views below.:

It is not clear to me that there is any real difference between impartiality and independence, given that lack of independence is only a true issue where it affects impartiality.

It is very important that changes to the legislation do not adversely impact arbitration in sectors where arbitrator industry experience is key, such as shipping, commodities and sport. Given the relatively small number of industry players and the large numbers of back to back contracts it would potentially be very difficult for the shipping arbitration if a duty of independence were included in the Act.

Consultation Question 3: 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. Do you agree?

Disagree

Please share your views below.:

I think it would be very difficult to codify the Supreme Court's Halliburton judgment, which I think may be what is intended here. This was a nuanced judgment which set out the boundaries of the disclosure duty and reflected the different practices in different types of arbitration.

It is very important that changes to the legislation do not adversely impact arbitration in sectors where arbitrators are repeatedly appointed by a small number of players, such as shipping, commodities and sport.

Consultation Question 4: Should the Arbitration Act 1996 specify the state of knowledge required of an arbitrator's duty of disclosure, and why?

No

Please share your views below.:

I don't think the disclosure duty should be statutory.

Consultation Question 5: 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?

Other

Please share your views below.:

I don't think the disclosure duty should be statutory.

Consultation Question 6:

More broadly justified

Please share your views below.:

Consultation Question 7:

Agree

Please share your views below.:

Consultation Question 8: Should arbitrators incur liability for resignation at all, and why?

Liability for resignation

Please share your views below.:

Consultation Question 9: Should arbitrators incur liability for resignation only if the resignation is proved to be unreasonable?

Yes

Please share your views below.:

Consultation Question 10: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 11: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 12: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 13: We provisionally propose that the Arbitration Act 1996 should stipulate the threshold for success in any summary procedure. Do you agree?

Agree

Please share your views below.:

Consultation Question 14: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 15: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 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?

Yes

Please share your views below.:

Consultation Question 17: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 18: We provisionally conclude that the provisions of the Arbitration Act 1996 should not apply generally to emergency arbitrators. Do you agree?

Agree

Please share your views below.:

Consultation Question 19: 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?

Agree

Please share your views below.:

Consultation Question 20: Do you think that section 44(5) of the Arbitration Act 1996 should be repealed, and why?

Other

Please share your views below.:

Consultation Question 21:

Permission under section 44

Please share your views below.:

Consultation Question 22:

Agree

Please share your views below.:

Consultation Question 23: 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?

Other

Please share your views below.:

Consultation Question 24: We provisionally conclude that our proposed change to section 67 of the Arbitration Act 1996 would not require any similar change to section 103. Do you agree?

Other

Please share your views below.:

Consultation Question 25: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 26: 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?

Agree

Please share your views below.:

Consultation Question 27: 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?

Agree

Please share your views below.:

I respond from the perspective of a solicitor who has in the past been instructed to appeal an award under s69.

This provision is an important check and balance measure which is working well. There are few s69 appeals annually and no more than a handful of successful appeals.

It is important to have this safeguard for parties instructing non-lawyer arbitrators. While non-lawyer arbitrators (for example in shipping) generally produce excellent awards, it is right that there is a review by the courts in case of serious error.

Those selecting ad hoc arbitration, for example under the LMAA Terms, do so in the knowledge that serious errors of law can be appealed. Given the huge popularity internationally of LMAA arbitration seated in London (over 1,000 new cases filed annually) it is clear that many users want this option.

As s69 is non-mandatory, there is no need for amendment, because parties already have a choice in this regard. If parties want to opt out of appeals they can do so, either by selecting institutional arbitration where s69 appeal is excluded (such as LCIA and ICC arbitration), or by making an appropriate provision in their arbitration agreement.

There is accordingly no need to amend s69 and doing so would weaken the statutory arbitration framework in England & Wales.

Consultation Question 28: Do you think that section 7 of the Arbitration Act 1996 (separability of arbitration agreement) should be mandatory, and why?

Yes

Please share your views below.:

Consultation Question 29: 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?

Agree

Please share your views below.:

Consultation Question 30: 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?

Other

Please share your views below.:

Consultation Question 31: 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?

No

Please share your views below.:

Consultation Question 32: Do you think that section 39 of the Arbitration Act 1996 should be amended to refer to “orders” (rather than “awards”), and why?

Other

Please share your views below.:

Consultation Question 33: Do you think that section 39(1) of the Arbitration Act 1996 should be amended to refer to “remedies” (rather than “relief”), and why?

Other

Please share your views below.:

Consultation Question 34: 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?

Agree

Please share your views below.:

Consultation Question 35: 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?

Agree

Please share your views below.:

Consultation Question 36: We provisionally propose that sections 85 to 87 of the Arbitration Act 1996 (on domestic arbitration agreements) should be repealed. Do you agree?

Other

Please share your views below.:

Consultation Question 37: Do you think that any of the suggestions discussed in Chapter 11 needs revisiting in full, and if so, why?

Please share your views below.:

Consultation Question 38: 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?

Please share your views below.:

Response ID ANON-PT57-RU1M-N

Submitted to Law Commission Consultation: Review of the Arbitration Act 1996
Submitted on 2022-11-06 17:48:48

About you

What is your name?

Name:
Allan W Wood

What is the name of your organisation?

Enter the name of your organisation:
Allan W Wood Limited

Are you responding to this consultation in a personal capacity or on behalf of your organisation?

Personal response

If other, please state::

What is your email address?

Email:
[REDACTED]

What is your telephone number?

Telephone number:
[REDACTED]

If you want the information that you provide in response to this consultation to be treated as confidential, please explain to us why you regard the information as confidential. As explained in our privacy notice, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

Please explain to us why you regard the information as confidential:

Consultation questions

Consultation Question 1: 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?

Agree

Please share your views below.:

Consultation Question 2: We provisionally conclude that the Arbitration Act 1996 should not impose a duty of independence on arbitrators. Do you agree?

Agree

Please share your views below.:

Consultation Question 3: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 4: Should the Arbitration Act 1996 specify the state of knowledge required of an arbitrator's duty of disclosure, and why?

No

Please share your views below.:

This would be very difficult to precisely define. Also, it appears any prescribed provisions would be subjectively considered by arbitrators.

Consultation Question 5: 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?

What they ought to know

Please share your views below.:

Consultation Question 6:

Only if necessary

Please share your views below.:

Consultation Question 7:

Agree

Please share your views below.:

Consultation Question 8: Should arbitrators incur liability for resignation at all, and why?

No liability for resignation

Please share your views below.:

Consultation Question 9: Should arbitrators incur liability for resignation only if the resignation is proved to be unreasonable?

No

Please share your views below.:

Consultation Question 10: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 11: 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. Do you agree?

Agree

Please share your views below.:

However, I think it would be rarely used in arbitral matters in the UK

Consultation Question 12: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 13: We provisionally propose that the Arbitration Act 1996 should stipulate the threshold for success in any summary procedure. Do you agree?

Agree

Please share your views below.:

Consultation Question 14: 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. Do you agree?

Agree

Please share your views below.:

Preferable wording is "No real prospect of success".

Consultation Question 15: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 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?

Yes

Please share your views below.:

Consultation Question 17: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 18: We provisionally conclude that the provisions of the Arbitration Act 1996 should not apply generally to emergency arbitrators. Do you agree?

Agree

Please share your views below.:

Consultation Question 19: 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?

Agree

Please share your views below.:

Consultation Question 20: Do you think that section 44(5) of the Arbitration Act 1996 should be repealed, and why?

No

Please share your views below.:

Consultation Question 21:

Permission under section 44

Please share your views below.:

Consultation Question 22:

Agree

Please share your views below.:

Consultation Question 23: 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?

Yes

Please share your views below.:

Consultation Question 24: We provisionally conclude that our proposed change to section 67 of the Arbitration Act 1996 would not require any similar change to section 103. Do you agree?

Agree

Please share your views below.:

Consultation Question 25: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 26: 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?

Agree

Please share your views below.:

Consultation Question 27: 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?

Agree

Please share your views below.:

Consultation Question 28: Do you think that section 7 of the Arbitration Act 1996 (separability of arbitration agreement) should be mandatory, and why?

Yes

Please share your views below.:

Consultation Question 29: 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?

Agree

Please share your views below.:

Consultation Question 30: 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?

No

Please share your views below.:

Consultation Question 31: 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?

Yes

Please share your views below.:

Consultation Question 32: Do you think that section 39 of the Arbitration Act 1996 should be amended to refer to "orders" (rather than "awards"), and why?

Yes

Please share your views below.:

Consistency

Consultation Question 33: Do you think that section 39(1) of the Arbitration Act 1996 should be amended to refer to "remedies" (rather than "relief"), and why?

Yes

Please share your views below.:

Consultation Question 34: 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?

Agree

Please share your views below.:

Consultation Question 35: 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?

Agree

Please share your views below.:

Consultation Question 36: We provisionally propose that sections 85 to 87 of the Arbitration Act 1996 (on domestic arbitration agreements) should be repealed. Do you agree?

Agree

Please share your views below.:

Consultation Question 37: Do you think that any of the suggestions discussed in Chapter 11 needs revisiting in full, and if so, why?

Please share your views below.:

Consultation Question 38: 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?

Please share your views below.:

Submitted to Law Commission Consultation: Review of the Arbitration Act 1996
Submitted on 2022-10-07 14:19:49

About you

What is your name?

Name:
TIMOTHY YOUNG KC

What is the name of your organisation?

Enter the name of your organisation:

Twenty Essex (Chambers)

Are you responding to this consultation in a personal capacity or on behalf of your organisation?

Personal response

If other, please state::

[REDACTED]

What is your email address?

Email:

[REDACTED]

What is your telephone number?

Telephone number:

[REDACTED]

If you want the information that you provide in response to this consultation to be treated as confidential, please explain to us why you regard the information as confidential. As explained in our privacy notice, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

Please explain to us why you regard the information as confidential:

Consultation questions

Consultation Question 1: 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?

Other

Please share your views below.:

I do basically agree with the provisional conclusion, but it might possibly help if the Act could state a default position (ie arbitration is confidential but that can be altered by either the court or a relevant arbitration tribunal or the parties' agreement.

There is a tension between appeals under s.69 which are dominantly on questions of law of general importance on which the relevant trade would be assisted by a decision on a point - ie publicity - and the general principle of confidentiality.

One of the great strengths of English law is its ability to provide authorities on which parties may rely. That requires an important element of publicity. There is a further point that arises repeatedly in 'string' arbitrations where one party in a string seeks to rely on confidentiality as a ground for resisting disclosure. Tribunals do sometimes feel themselves hobbled by this point.

I suggest that the identification of courts/ tribunals who can override confidentiality (or impose qualifications) might be of assistance. But I do not think that restricting them as the bases for an order lifting confidentiality limits need to be spelled out in the Act. Perhaps 'if it appears just and convenient so to do' would be enough. As I say below the 'just and convenient' test is a well known one and has a good record of working sensibly

Consultation Question 2: We provisionally conclude that the Arbitration Act 1996 should not impose a duty of independence on arbitrators. Do you agree?

Agree

Please share your views below.:

Impartiality is all that is needed.

Consultation Question 3: 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. Do you agree?

Agree

Please share your views below.:

I might add the duty to disclose circumstances 'which come to their attention'. As per my answer below, I am not keen on introducing some sort of duty to inquire.

Consultation Question 4: Should the Arbitration Act 1996 specify the state of knowledge required of an arbitrator's duty of disclosure, and why?

Yes

Please share your views below.:

It should be limited to 'matters of which the arbitrator is or is made aware'. I think a duty to inquire would impose an unnecessary and potentially very difficult burden, likely only to generate satellite litigation

Consultation Question 5: 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?

Actual knowledge

Please share your views below.:

If a party wishes to raise a particular issue, then so be it. The arbitrator in question is aware of it and can consider it, but to impose an open-ended duty to investigate (with no limiting criteria) would be onerous and ultimately likely to produce unnecessary disputes and costs.

Consultation Question 6:

More broadly justified

Please share your views below.:

Consultation Question 7:

Agree

Please share your views below.:

Consultation Question 8: Should arbitrators incur liability for resignation at all, and why?

No liability for resignation

Please share your views below.:

Arbitrators resign for all manner of reasons - discovered conflicts, health, availability. It would be intolerable to place the risk of litigation in their way of they think resignation is appropriate.

I accept that there may possibly be occasions of 'bad faith' resignations, although I suspect that this is more theoretical than real.

If one were to insert a 'bad faith' qualification to the principle that would probably suffice in all real cases.

One might remember that arbitrators who resign can end up losing the ability to charge for accrued fees. They do not, in my experience, usually want this result and that reduces the real risk of resignation.

Consultation Question 9: Should arbitrators incur liability for resignation only if the resignation is proved to be unreasonable?

No

Please share your views below.:

As above I think the issue should be one of bad faith not unreasonable conduct which imposes an objective criterion and one which I think would be inappropriate.

Consultation Question 10: 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. Do you agree?

Agree

Please share your views below.:

The court will always have a residual power to make third party costs orders in appropriate (egregious) cases. I see no reason to make provision in the Act.

Consultation Question 11: 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. Do you agree?

Agree

Please share your views below.:

Just to make it clear to tribunals, some of whom are a bit reluctant to take such a course.

Consultation Question 12: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 13: We provisionally propose that the Arbitration Act 1996 should stipulate the threshold for success in any summary procedure. Do you agree?

Disagree

Please share your views below.:

Whilst

Consultation Question 14: 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. Do you agree?

Agree

Please share your views below.:

Whilst I can see some advantage in stipulating a threshold, I think most tribunals would be really very unlikely to grant summary judgment in other than very clear cases. But, that being said, I see no harm in adopting a test derived from an analogy with the powers of the court in litigation. I suspect that would become the norm in any event.

And, if a tribunal were to grant a summary award in an inappropriate case, it would be open to appeal or even, I suppose, a s.68 challenge.

Consultation Question 15: 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. Do you agree?

Disagree

Please share your views below.:

There would be considerable debate about what 'deposition' entails. I think it should be left open as it is.

Consultation Question 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?

Yes

Please share your views below.:

Tribunals can often need the evidence of third parties in reaching a proper conclusion (remembering that 'third parties' can be affiliated companies) but have no jurisdiction over them. They really do need the assistance of the court to compel relevant assistance, not to mention the enforcement powers that the court has, which tribunals lack. Contempt of court is not readily resorted to but it is an essential arrow in the quiver.

Consultation Question 17: 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. Do you agree?

Agree

Please share your views below.:

Third parties should not be improperly prejudiced if they find themselves drawn into a dispute between others.

Consultation Question 18: We provisionally conclude that the provisions of the Arbitration Act 1996 should not apply generally to emergency arbitrators. Do you agree?

Disagree

Please share your views below.:

Plainly there are some provisions that should not apply to emergency arbitrators - eg as to appointment, but there are others which really should - eg ss. 33, 41, 44, 49, 59, 67-69, 101-103.

It must be remembered that emergency arbitrators are nearly always appointed pursuant to institutional rules and those rules may have their own particular provisions. I would suggest that the Act should apply to emergency arbitrators but subject always to the parties' agreement, which would involve agreement to institutional rules, of course.

Consultation Question 19: 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?

Agree

Please share your views below.:

If there is an emergency of the contemplated sort, the court should act on its own and not need to spend time and cost appointing an emergency arbitrator - the delay in such a process would be quite counter to the ethos of emergencies.

I think s. 44(3) is the right mechanism although (as below) I would suggest removing the inhibitions on the court's power to assist found in s.44(4)(95). It is my experience that that subsection generates unnecessary difficulties.

I would greatly prefer an amendment empowering the court to exercise s.44(3) powers whenever it appears just and convenient so to do, thereby embracing the test in s.37 of the Senior Courts Act - a test which has worked well for many years and is well understood.

Added to that, it might be noted that some emergency court orders are much more valuable than arbitrators' orders - take the Freezing Order, which works only because of the attendant contempt of court jurisdiction.

Consultation Question 20: Do you think that section 44(5) of the Arbitration Act 1996 should be repealed, and why?

Yes

Please share your views below.:

See my answer above. The 'just and convenient' criterion would plainly apply if a court thought that a tribunal were the better one to make an order

Consultation Question 21:

Other

Please share your views below.:

The powers of tribunals in the event of breaches of their orders (peremptory or otherwise) are currently very circumscribed. Thus, for example a tribunal cannot make a 'default award' in the event of such a breach but can only make an award on the materials then available to it. I would suggest that it be made clear that events of breach can lawfully result in a default award made without consideration of the merits of the case.

Consultation Question 22:

Agree

Please share your views below.:

I wholly agree that parties who participate should be limited in their right to have a second substantive bite.

But I would go further and propose that a party who fails to participate for no sound reason should also be limited. This would place the burden on a party to put his case where it would be reasonable to expect him to do so. If he does not wish to participate, he should have a good reason and should be able to make it out to the satisfaction of the court. This would be a limitation on the right of recalcitrant parties wishing to delay matters.

Those who have sound reasons for non-participation would not be in any way adversely affected and their rights under s.67 would be maintained in all their glory.

I do have one major qualification - the reference to an 'appeal' should not (in my view) be understood to be a reference to a s.69 appeal. That would impose an unfair limit (questions of law of public importance of obviously wrong and the filter of leave to appeal). I think it is important to make plain that the contemplated appeal is to an appeal as contemplated more generally under the CPR. Questions of fact can be appealed and the questions of law can be discrete to the parties.

Consultation Question 23: 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?

Yes

Please share your views below.:

I refer to my answer above.

ON A DIFFERENT FRONT

I note that there is no apparent consideration of appeals to the Court of Appeal on these matters (the same is true of both s.67 and 69) and I cannot find reference in para 11 of the Paper.

I believe very strongly that there should be scope for appeals to the CA under both ss.67 and 69 with the leave (or 'permission') capable of being given by the CA and not just the judge at first instance. The provisions of s.67(4) and 69(8) mean the judge in effect marks his/her own homework and that has created considerable problems in the past. I have known that this element is a reason why some arbitrators do not regard themselves as bound by first instance judgments and that undermines the principle that s.69 in particular is to provide clarity and certainty in general law.

Consultation Question 24: We provisionally conclude that our proposed change to section 67 of the Arbitration Act 1996 would not require any similar change to section 103. Do you agree?

Agree

Please share your views below.:

Consultation Question 25: 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. Do you agree?

Agree

Please share your views below.:

Consultation Question 26: 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?

Agree

Please share your views below.:

The present position can create palpable absurdities

Consultation Question 27: 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?

Agree

Please share your views below.:

I repeat the major comment above, namely : I believe very strongly that there should be scope for appeals to the CA under both ss.67 and 69 with the leave (or 'permission') capable of being given by the CA and not just the judge at first instance. The provisions of s.67(4) and 69(8) mean the judge in effect marks his/her own homework and that has created considerable problems in the past. I have known that this element is a reason why some arbitrators do not regard themselves as bound by first instance judgments and that undermines the principle that s.69 in particular is to provide clarity and certainty in general law.

There is one small point which can be of major importance - s.69 speaks of 'awards' and some tribunals avoid giving 'awards' by making 'orders' or 'rulings', but such orders/rulings can be of major importance and may involve ss.68.69 issues and yet fall outside those sections. Perhaps it might be said that 'award' includes a ruling or an order even if not in the form of an 'award'

Consultation Question 28: Do you think that section 7 of the Arbitration Act 1996 (separability of arbitration agreement) should be mandatory, and why?

Yes

Please share your views below.:

After Fiona Trust, the presumption of one stop adjudication means that all disputes where parties have agreed arbitration should be decided before one single tribunal. At present there are an ill-assorted assembly of cases where some disputes as to the existence of binding contracts are arbitrable and some are not. This is unsatisfactory and illogical.

I think reinforcing s.7 is essential even to the point of providing expressly that disputes about the existence, validity or binding character of agreements should be referred to arbitration if it is shown that the parties agreed to arbitration of differences between them.

Consultation Question 29: 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?

Agree

Please share your views below.:

Consultation Question 30: 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?

Yes

Please share your views below.:

The insertion of a further filter in the form of the court's discretion is just cumbersome and ultimately unhelpful of the parties or the tribunal actually want help.

Consultation Question 31: 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?

No

Please share your views below.:

Procedural matters like that are already in the hands of tribunals and I have never known them to be the cause of problems.

But will such a provision do any harm? No, I do not suppose so.

Consultation Question 32: Do you think that section 39 of the Arbitration Act 1996 should be amended to refer to "orders" (rather than "awards"), and why?

Yes

Please share your views below.:

S.30(2) does, after all, include 'orders' and it seems silly not to reflect that fact. Perhaps 'rulings' might also be added - see above

Consultation Question 33: Do you think that section 39(1) of the Arbitration Act 1996 should be amended to refer to "remedies" (rather than "relief"), and why?

Other

Please share your views below.:

why not have 'relief or remedy' ?

Consultation Question 34: 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?

Agree

Please share your views below.:

Consultation Question 35: 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?

Agree

Please share your views below.:

Oddly this section does not limit 'court' in so many terms to the first instance court, but (as above) it might be added that the court' includes the court at first instance and the Court of Appeal

Consultation Question 36: We provisionally propose that sections 85 to 87 of the Arbitration Act 1996 (on domestic arbitration agreements) should be repealed. Do you agree?

Agree

Please share your views below.:

All arbitrations should be treated alike

Consultation Question 37: Do you think that any of the suggestions discussed in Chapter 11 needs revisiting in full, and if so, why?

Please share your views below.:

Just in case I missed it, I think ss.67(4) and 69(8) need to be revisited to permit the CA also to give leave (or 'permission').

On that front, the Act speaks of 'leave' but most judges give 'permission' . There is no substantive difference but the linguistic oddity is still present. Perhaps al the 'leaves' should be replaced with 'permissions'?

Consultation Question 38: 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?

Please share your views below.:

I have added my desultory comments, where I though appropriate, above.

There remains but one - There is not infrequently a problem of effective service of court process issued in respect of arbitrations where a party has been legally represented. Sometimes such representatives deny they have authority to accept service of the relevant court process. This is nearly always for 'tactical ' reasons and is a cause of unnecessary expense and difficulty, I propose that, 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.