



**Law  
Commission**  
Reforming the law

# **Review of the Arbitration Act 1996**

## **Responses to Second Consultation Paper**

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## Response ID ANON-44ZW-8XFU-4

Submitted to Law Commission second consultation on the Arbitration Act 1996  
Submitted on 2023-05-15 13:01:12

### About you

What is your name?

Name:

[REDACTED]

What is the name of your organisation?

Enter the name of your organisation:

Acorn Rural Property Consultants 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::

United Kingdom

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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.

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### Proper law

Consultation Question 1

Yes

Please give your reasons::

### Section 67

Consultation Question 2

Yes

Please give your reasons::

We agree with the Law Commission analysis.

Consultation Question 3

Yes

Please give your reasons::

We agree with the Law Commission analysis.

### Discrimination

#### Consultation Question 4

Yes

Please give your reasons::

We agree with the Law Commission analysis.

#### Consultation Question 5

No

Please give your reasons::

The proposal to introduce provisions in the Arbitration Act (AA) to prohibit discrimination generally in an arbitration context proceeds on the basis that the current state of the law is such that there is no existing legal obligation against active discrimination in an arbitration context. That does not appear to be the case.

As noted in the second consultation document, a reading of the Equality Act 2010 (EA) suggests that, notwithstanding the lack of a specific reference to arbitration or arbitrators, Part 3 (Services and public functions) applies to appointing arbitral bodies and Part 10 (Contracts, etc.) applies to commercial contracts, including to arbitration agreements.

Given the applicability of the EA to arbitration agreements and to appointing arbitral bodies (as well as to barristers and to the judiciary which provides a similar function to arbitrators) it does not appear obvious that arbitration practices that have a discriminatory effect can be perceived as fully legitimate (as per the quotation from the CI Arb published in the second consultation paper) or that they are out of reach of the current laws that prevent discrimination and promote equality.

The case of *Jivraj v Hashwani* started its journey through the courts in 2008. That was nearly two years before the commencement of the EA and, which may now have some relevance, twelve years before Brexit at a time when the legal matrix that Mr Hashwani was seeking to apply to allow his appointment of Sir Anthony Colman contrary to the terms of the arbitration agreement was contained within EU employment law regulations. It is easy to see that a case on similar terms now would be argued against a different legal matrix and may well come to a different conclusion.

Apart from the potential for the application of the law around discrimination in the context of arbitration already to have developed as a result of societal and attitudinal change since 2008, there are (as also referred to in the second consultation paper) existing provisions within the AA that parties who consider that the process or conduct of an arbitration has been discriminatory can use to address those concerns.

The first general principle at section 1. (a) of the AA is that the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense. Section 33 of the AA imposes an obligation on the arbitral tribunal 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, and 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 determined. Section 68 states that a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award.

In addition to the above, section 24 of the AA gives the court the power to remove an arbitrator where, inter alia, "circumstances exist that give rise to justifiable doubts as to his impartiality". Where the court exercises that power, "it may make such order as it thinks fit with respect to his entitlement (if any) to fees or expenses, or the repayment of any fees or expenses already paid."

It is very difficult to see how an arbitrator who has acted in a discriminatory manner can be shown not to be in breach of sections 1 and 33 of the AA and therefore susceptible to the sanctions of section 24. Similarly, if an arbitration award is itself discriminatory it will be open to challenge under section 68.

It follows from the above that both the EA and the AA already provide various remedies in the event of the presence of discrimination in an arbitration context. In particular, the remedies that are already available under the AA allow the court a wide discretion and should be sufficient.

Given the fact that the majority of arbitrations are non-statutory and therefore occur as a matter of private contract, there are wider questions that would flow from an amendment to the AA to introduce a general prohibition against discrimination in the context of arbitration. For example, it is not inevitable that an arbitrator who is appointed under the terms of a discriminatory contract or procedure will perpetrate discrimination in the conduct of an arbitration or in their awards. What, then, should be the consequences where there has been a discriminatory appointment that has resulted in an otherwise exemplary process and award? It would seem perverse for there to be sanctions visited on the parties, the arbitrator or the appointing arbitral body in those circumstances, or that the exemplary arbitration award should be upset.

A similar point arises where there has been an arbitration award as a result of a discriminatory appointment and/or discriminatory conduct that has not been challenged by any of the parties. That could arise, for example, because the parties got the arbitrator that they required and/or because they were satisfied with the award. Would that award then be enforceable in the court if it became necessary for one or more parties to make an application to enforce it, or would it be open to the court (in whichever jurisdiction) to determine that it was unenforceable because it did not comply with the new general prohibition against discrimination in the context of arbitration?

These scenarios and questions only arise in the context of the possible amendment of the AA in an attempt to provide a new statutory mechanism to address discrimination. Statute law can be a blunt instrument that requires interpretation of meaning, purpose and application by the courts. It is easy to see that a new provision to prohibit discrimination generally in an arbitration context could be a very blunt instrument and may not sit easily alongside or within the existing statutory and case law framework.

Quite apart from that, the AA is about the process and conduct of arbitrations and not about the prevention of discrimination. It is possible to advance an argument that the introduction of provisions in the AA that address discrimination is a distraction from the purpose of the AA and that preventing discrimination should be the job of other statutes – such as the EA which, as discussed above, already applies to some aspects of arbitration.

There is also the argument that the wide provisions and powers that the AA already contains are more than adequate for the job of preventing discrimination if they are employed for that purpose and that the introduction of new standalone statutory provisions that would operate separately from those of the EA are unnecessary and that it would be unwise to create new law in these circumstances.

There are views expressed in the second consultation document that the suggested reform is necessary and that "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." That view is reflected in the quotation from the CI Arb that "There is no doubt that creating a legal obligation against active discrimination on the basis of protected characteristics is the moral thing to do". It is also reflected in the Law Commission's response to a suggestion that that the better approach, rather than legislating, is to educate parties to make non-discriminatory choices, where it says "We think that education cannot be the sole answer to all

morally objectionable behaviour which goes against the public interest. We also think that the suggestion rings hollow when some institutions or sectors have failed to advance diversity despite decades of changing cultural values.”

It is important to distinguish between direct discrimination (which is the concern here) and the advancement of diversity. Given that Part 3 of the EA appears to apply to appointing arbitral bodies the appointment of panel members on a discriminatory basis is already actionable under the EA. It does, of course, remain incumbent on appointing arbitral bodies to have appropriate measures in place to drive diversity in their panel appointments but inserting new provisions in the AA to prohibit discrimination in an arbitration context will not bite and is the wrong lever to achieve that. In our view, the existing statutory tools of the AA and the EA are sufficient to deal with discrimination in an arbitration context and there is no reason why they should not, and every reason why they should, be used for that purpose. The better approach to additional parallel statutory provisions in the AA is to allow the courts to continue to interpret and apply the existing law around discrimination to the arbitration process and to the conduct of arbitrators, arbitral bodies and the parties.

#### Consultation Question 6

Please give your answer::

Please see above. The existing remedies under the AA and EA are sufficient.

# REVIEW OF ARBITRATION ACT 1996

## SECOND CONSULTATION

Response by E.J.C. Album, MA, FCI Arb, Solicitor and Arbitrator

Dated 19<sup>th</sup> May 2023

This response refers to the Second Consultation Document which, very helpfully, deals with three specific items which have been the subject of detailed consideration and comments by consultees.

I take the subjects separately as follows:

### (A) LAW GOVERNING THE ARBITRATION AGREEMENT

#### 1. Preliminary Considerations

As referred to in previous communications with the Law Commission, attention needs to be paid to the rules or regulations of the various arbitration bodies which are customarily appointed within the main or underlying contract. This is usually in a separate clause which is referred to as the “Arbitration Agreement”. I have previously submitted a list of the relevant Rules from some of the main arbitration organisations, namely, ICC, LCIA, Singapore, GAFTA, LME and LMAA. A copy of the document concerned is attached to this submission.

It should also be remembered that there are many provisions for arbitration which simply refer to the appointment of arbitrators by, for example, the Law Society or the Royal Institution of Chartered Surveyors.

The wording of the Rules is relevant in deciding what the Seat of the arbitration is. The organisations themselves may be located, like the ICC, in a particular capital city but they may or may not have provisions relating to the governing law to be applied. In some cases this is not laid down but is to be decided subsequently by the appointed tribunal. In the case of the ICC, this may also be subsequently decided by the branch of the ICC which is appointed to conduct the arbitration.

Having regard to the above, if there are any provisions to be drafted regarding the governing law of the Arbitration Agreement, I would submit that it is not sufficient to simply say “unless otherwise specifically provided in the main contract”. It would be necessary to provide wording on the following lines, “unless otherwise specified by or pursuant to the Rules or Regulations of the arbitration organisation nominated to conduct the arbitration or by the tribunal appointed by the nominated organisation”.

#### 2. Governing Law

An important factor, which has not been considered in detail by the Law Commission, is what I would describe as the “Reach” or “Extent” of the governing law. It is submitted that the governing law should relate only to the procedure adopted by the tribunal together with rules which deal with appeals and similar matters relating to the conduct of the arbitration.

There is a further category of issues which would also have to be decided by the appointed tribunal. These concern primarily the validity of the main contract itself or the organisation or individuals entitled to take part in the arbitration or be subject to its decisions. The latter point is dealt with in the *Kabab – Ji* case. The other points would concern important issues affecting validity such as public policy, frustration and misrepresentation.



It is submitted that the governing law to be applied by the tribunal to these issues should be the law of the main contract. In other words, if a decision on misrepresentation is to be decided by an ICC Tribunal in Paris it should not be French Law but the law of the main contract, although the arbitrators making the decision would be those appointed under the rules. It is submitted that these issues should have regard to the law of the main contract even though they are decided by arbitrators from another jurisdiction because they concern the main contract and would usually have no connection with the Seat.

As an additional comment on the above, I should say, from my own experience, that it is common for arbitrators from one jurisdiction to have to consider the requirements of another country's law. This is dealt with usually by expert evidence. Arbitrators, as well as judges, are familiar with the process. I give an example of a case I dealt with as Chair of a Tribunal. The case was governed by English Law and the rules of the London Metal Exchange. However, a question arose about an issue of Canadian tax law, specifically the law of Quebec. We had to deal with submissions from experts on this issue and it was considered a normal part of the arbitration process.

### 3. Proposal as to the Governing Law

Based on the comments above, it would be reasonable to provide that the governing law for arbitration should be that of the Seat of the arbitration but provide that this is to apply except as otherwise provided in the main contract or by or pursuant to the rules of the organisation nominated in the arbitration clause. It would be also relevant to state that the law governing the issues such as validity in paragraph 2 above should (unless provided for in the rules) be that of the main contract when considered by the appointed tribunal.

### 4. Default Provision

In the even that it is not clear what is the Seat of the arbitration or what is the governing law specified, it is submitted that the governing law should be that of the main contract, either as stated or as implied in the main contract or as determined in accordance with international rules of law. These would refer to the country with which the contract has the closest connection.

## **(B) APPEALS ON JURISDICTION**

My personal view, based also on my discussions with the commodity market representatives, is that there is no objection to your proposed amendment. I would just slightly amend item (2) to state the following, "the evidence, including expert evidence, will not be reheard save in individual cases as determined by the Court in the interests of justice".

## **(C) DISCRIMINATION**

### 1. Basic Considerations

This is a most difficult topic and has been carefully reviewed by the Law Commission. I have also had the advantage of a discussion with members of the commodity markets but I am not to be taken as representing their individual views.

The problem, as I have previously mentioned to you, is that the arbitration panels from which arbitrators are chosen in the commodity markets and also by the London Maritime Arbitrators' Association, are limited by the requirement that the individuals concerned must have a serious knowledge and understanding of the market concerned, as well as knowledge of arbitration law and practice. It would, in my view, open up to judicial review and litigation issues of discrimination simply based on the

personal background of the arbitrators concerned. In the case of the LME, where there is a dispute regarding trading on the Ring or in LME commodities, the arbitrator from the Panel is likely to be associated with a company which has traded with all the other major traders in the same market. This cannot be avoided if the arbitrator is to have the necessary expertise. I have personally made it a practice to draw attention to this fact in preliminary procedural rules but I do not consider it necessary to do so as this fact would be well known to the parties.

I therefore draw attention to Paragraphs 4.22 and 4.23 of the Consultation Document and I believe that the remedies available referred to in those paragraphs are sufficient, particularly with the availability of Section 68 of the Act.

## 2. Proposal

I would support your proposal regarding the right to appoint arbitrators from a neutral country but would take no further action in regard to discrimination, relying on the general law and the specific provisions you have highlighted.

I trust the above is helpful but I would be happy to answer further questions, if required.

Edward Album  
19<sup>th</sup> May 2023

## BY EMAIL

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22 May 2023

Dear Law Commissioners,

### **Allen & Overy LLP response to the Law Commission’s second consultation paper entitled “Review of the Arbitration Act 1996”**

1. We refer to our letter of 15 December 2022, containing our response to the Law Commission’s first consultation paper entitled “Review of the Arbitration Act 1996” (the **First Consultation Paper**).
2. Allen & Overy LLP is an international law firm with approximately 5,500 staff and over 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.
3. Further to our previous correspondence, we are grateful for this opportunity to respond to the various issues raised in this second consultation paper (the **Second Consultation Paper**) on the Law Commission’s review of the Arbitration Act 1996 (the **Act**). In producing this response, we have sought the views of our UK-based arbitration lawyers. This letter sets out the views of the majority of those who expressed an opinion.
4. We note that Consultation Questions 2 to 6 consider topics that the Law Commission previously referred to and discussed in some detail in its First Consultation Paper. In places, we therefore refer to our response to the First Consultation Paper.

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**Consultation Question 1. We provisionally propose that a new rule be included in the Arbitration Act 1996 to the effect that the law of the arbitration agreement is the law of the seat, unless the parties expressly agree otherwise in the arbitration agreement itself. Do you agree?**

5. As we outlined in our response to Consultation Question 38 of the First Consultation Paper, there are good policy and practical arguments in favour of a default rule that the law of the seat applies as the governing law of the arbitration agreement in the absence of a choice by the parties. We therefore agree with this proposal for the reasons set out in our earlier response and those enumerated by the Law Commission in its Second Consultation Paper.
6. In respect of the language set out in Consultation Question 1, it is important that the exception to the default rule is clearly stated in the amendment to the Act. As the Law Commission recognises, party agreement on the proper law of the arbitration agreement should operate to trump the default rule.
7. It is our view that the exception to the new default rule set out in Consultation Question 1 (i.e. “*unless the parties expressly agree otherwise in the arbitration agreement itself*”), should be framed more widely, along the following lines: “...*unless the parties agree that another law should apply to the arbitration agreement*”. This is for two reasons.
8. First, the exception to the default rule should encompass circumstances where parties have agreed on the governing law of the arbitration agreement, but have not included this agreement “*in the arbitration agreement itself*”. There is no good reason for restricting the ability of parties to displace the default rule in this manner, nor for making a tribunal/court focus solely on one clause/part of the parties’ contract (i.e. the arbitration agreement). It should be equally possible for parties to delineate their choice of law elsewhere, for example in a governing law clause or a side letter or another transaction document or by separate oral agreement. If the inclusion of the language “*in the arbitration agreement itself*” is to seek to avoid the effect of *Enka v Chubb* [2020] UKSC 38 (as paragraph 2.44 of the Second Consultation Paper appears to suggest), this will in any event be achieved by the alternative language we propose (“... *that another law should apply to the arbitration agreement*”).
9. Second, we pose the question of whether it is necessary to restrict the exception to circumstances where parties have “expressly” agreed to a particular governing law for the arbitration agreement. The exception should, perhaps, also cover implied agreements in circumstances where such an implied agreement can be found, other than solely by reference to the choice of the law of the matrix contract, as appears to be acknowledged at paragraph 2.16 of the Second Consultation Paper. This is because drawing a distinction between express and implied choices of law in this context could cause arbitrariness. It would also be inconsistent with the general scheme of English law. Specifically:
  - Where references to party agreement are made elsewhere in the Act, there is no suggestion that agreement must be “express” (see, for example, s.4(5)).
  - The general English law rules on the construction of contracts do not necessarily require “express” agreement in order to create binding obligations – implied agreement may be sufficient. As the Supreme Court noted in *Enka v Chubb* (and as quoted in the Second Consultation Paper at p.5, footnote 4), an implied choice is as much a choice as an express choice.
  - Removing a requirement for an “express” agreement removes scope for a debate as to whether this requirement has been met. Inelegantly drafted arbitration agreements are commonplace. For example, would a provision that “*this arbitration shall be governed by French law*” amount to an express choice of another law for the arbitration agreement?
  - From a conflicts of laws perspective, Article 3(1) of the Rome I Regulation (as it now forms part of English law) recognises that a choice of law to govern a matrix contract may be made expressly or “*clearly demonstrated by the terms of the contract or the circumstances of the case*”.

- The common law conflict of laws rules on the law governing arbitration agreements currently provide that an arbitration agreement is *prima facie* governed by the law expressly or impliedly chosen by the parties (*Dicey, Morris & Collins on The Conflict of Laws*, 16th Edition, Rule 65(1)(a)).
10. However, we recognise that the drawbacks of taking into account implicit agreement are that: (i) this could give rise in some cases to a more complex analysis than would exist without reference to implicit agreement; and (ii) there is a risk of being unable to move on beyond the rule in *Enka* (a concern that is expressed at paragraphs 2.44 and 2.47 of the Second Consultation Paper).
11. We also acknowledge that in practice, most implicit choices of law may in fact be derived from the parties' choice of seat. This could be the case where the choice of seat is connected with the operations of a local trade exchange or association with specific expertise; or where the parties' choice of seat was because they also desired the application of a neutral law to their agreement.<sup>1</sup> In such circumstances, the new default rule would in any case result in the law of the seat being applicable as the governing law of the arbitration agreement, removing the need to consider whether or not such an agreement was *implied* through the parties' choice of seat.
12. If the Law Commission comes to the view that it ought to delete the word "expressly" in its proposed amendment, the language of the amendment could be drafted to make clear what is, or is not, sufficient to amount to implicit agreement. For example, it could be provided that:
- any agreement that another law should apply must either be made expressly or clearly demonstrated by the terms of the arbitration agreement or the matrix contract or the circumstances of the case;<sup>2</sup> and
  - a choice of law to govern the substantive obligations of the matrix contract will not, without more, amount to an implied choice of law to govern the arbitration agreement.<sup>3</sup>
13. We have two additional points:
- In our view, thought should be given to the applicability of the validation principle. If there are circumstances where applying the new default rule would render an arbitration agreement invalid, it may still be appropriate to have recourse to: (i) the governing law of the matrix contract; or (ii) English law as the *lex fori*. This would give effect to the validation principle, and retain the parties' presumed intention that their arbitration agreement will be valid and effective. Assuming that the new default rule is intended to be a complete statutory code (an approach which we support), you may wish to consider whether it would be appropriate to include some reference to the validation principle in any amendment that is made to the Act.
  - If a new rule is included in the Act in relation to the law governing an arbitration agreement, we suggest that thought is given to whether such a rule applies retrospectively to all arbitration agreements, irrespective of the date on which such agreements may have been made, or whether the rule should instead apply only to arbitration agreements entered into after the date on which the Act is amended. Our current understanding is that, following the default position set out in s.84 of the Act, the new rule is intended to apply to arbitral proceedings commenced on or after the date the amendment to the Act comes into force, regardless of when the arbitration agreement was made, unless any statutory commencement provisions provide otherwise.

<sup>1</sup> *Dicey, Morris & Collins on the Conflict of Laws*, 16th Edition, at para. 16-019.

<sup>2</sup> This wording is taken from Article 3(1) of EC Regulation No. 593/2008 on the law applicable to contractual obligations (the Rome I Regulation), as it now forms part of English law.

<sup>3</sup> This wording is inspired by the principle found in s.2(2) of the State Immunity Act 1978, which provides that "A State may submit after the dispute giving rise to the proceedings has arisen or by a prior written agreement; but a provision in any agreement that it is to be governed by the law of the United Kingdom is not to be regarded as a submission."

**Consultation Question 2. We provisionally propose the following approach to a challenge under section 67 of the Arbitration Act 1996. Where an objection has been made to the tribunal that it lacks jurisdiction, and the tribunal has ruled on its jurisdiction, then in any subsequent challenge under section 67 by a party who has participated in the arbitral proceedings:**

- (1) the court will not entertain any new grounds of objection, or any new evidence, unless even with reasonable diligence the grounds could not have been advanced or the evidence submitted before the tribunal;**
- (2) evidence will not be reheard, save exceptionally in the interests of justice;**
- (3) the court will allow the challenge where the decision of the tribunal on its jurisdiction was wrong.**

**Do you agree?**

14. In summary:

- On the first proposal, we find it uncontroversial that a court will not entertain any new ground of objection or new evidence unless it could not with reasonable diligence have been advanced or submitted before the tribunal.
- On the second proposal, it remains our view that it is best left to the courts to control the scope of evidence in the context of a s.67 challenge. As such, if a change to the s.67 procedure is to be made, it is preferable that the change is implemented in a manner that affords the courts some degree of flexibility when applying the new requirements. We therefore agree with the proposal to implement changes through rules of court. However, we would not limit the circumstances in which a court may rehear evidence to “exceptional” cases. We would suggest a more flexible standard, such as when rehearing evidence is in the interest of justice. As we read it, this reflects the court’s approach in *Azov*.
- On the third proposal, we agree that the language of “appeal” and “rehearing” is largely unhelpful in this context. We are content with your revised proposal for the substantive standard in a s.67 case, i.e. whether the decision on jurisdiction was wrong. However, we would not understand this to imply any deference on the part of the court to the tribunal’s decision. Nor do we agree that the principle of competence-competence carries any implication of deference; it empowers the tribunal to rule on jurisdiction but does not give the tribunal any superiority over the court. On the contrary, our majority view remains (as stated in our response to the First Consultation Paper) that the court must decide in a s.67 case whether the tribunal had jurisdiction. While the tribunal’s decision on jurisdiction is a logical starting point – justifying a statutory standard of whether that decision was “wrong” – the court should not show deference; rather, it should decide the question of jurisdiction for itself.

15. Below, we set out our views on the three rules proposed by the Law Commission in Consultation Question 2 in further detail.

***(1) The court will not entertain any new grounds of objection, or any new evidence, unless even with reasonable diligence the grounds could not have been advanced or the evidence submitted before the tribunal***

(a) New grounds

16. Under s.73 of the Act, if a party fails to object promptly to a tribunal’s substantive jurisdiction, it may not raise any objection later “*unless he shows that, at the time he took part or continued to take part in the proceedings, he did not know and could not with reasonable diligence have discovered the grounds for the objection*”. We explained in our response to the First Consultation Paper that s.73 is

an important restriction that is relevant to whether the parties are likely, as a matter of tactics, to hold back arguments from the tribunal.

17. In our view, restating this position in rules of court is unobjectionable. However, we would suggest that the language used in s.73(1) is replicated to avoid any confusion that might arise between the different use of language in s.73(1) and the rules of court (i.e. the use of “*advanced*” as opposed to “*know*” and “*discovered*”).
- (b) New evidence
18. In our view, the current wording of the proposed new rule at paragraph 3.6(2) of the Second Consultation Paper strikes an appropriate balance. However, we find the Law Commission’s discussion of this proposal at paragraphs 3.105 to 3.106 of the Second Consultation Paper to be, with respect, slightly unclear.
19. It appears that the intention is for the principles set out in *Ladd v Marshall* [1954] 1 WLR 1489 to apply equally to s.67 challenges. This would align with the position for s.68 challenges, where similar principles have been held to operate (*DDT Trucks of North America Ltd v DDT Holdings Ltd* [2007] EWHC 1542 (Comm)).
20. However, the proposed new rule set out at paragraph 3.6(2) of the Second Consultation Paper only mentions the first limb of the test in *Ladd v Marshall* (i.e. that the new evidence could not have been obtained with reasonable diligence for use at trial). In our view, it is only this first limb that should apply, for the following reasons:
  - First, the introduction of new evidence is grouped with the introduction of new grounds of objection to the tribunal’s jurisdiction in the proposed new rule. It would be confusing to incorporate the additional criterion set out in *Ladd v Marshall* in relation to new evidence, but not in relation to new grounds of objection. We suggest that in order to align the proposed restriction on introducing new evidence with the existing restriction set out in s.73 of the Act, any new evidence should be required to satisfy only the first limb of the test in *Ladd v Marshall*.
  - Second, as we stated in our response to the First Consultation Paper, 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 is appropriate that its ability to adduce new evidence is not regulated quite as closely as it would be in an appeal or a s.68 challenge.
  - Third, we agree with the view set out in Merkin and Flannery (*Merkin & Flannery on the Arbitration Act 1996*, 6th Edition, p.799), that the essence of such cases is “*whether the so-called new evidence really is ‘new’ or whether with some effort it could have been produced in time.*” Accordingly, there is no real need to impose the other two limbs of the test in *Ladd v Marshall* upon s.67 applicants.

**(2) Oral evidence will not be reheard, save exceptionally in the interests of justice**

21. We agree with this proposed new rule, except that we would suggest that the word “exceptionally” is dropped from the proposal.
22. This proposal seems to be partly aimed at limiting the scope of the decision in *Azov Shipping Co v Baltic Shipping Co* [1998] CLC 1240. In that case, Rix J (as he then was) drew a distinction between s.67 challenges where “*there is simply an issue as to the width of an arbitration clause*”, and cases where “*there are substantial issues of fact as to whether a party has made the relevant [arbitration]*

*agreement in the first place*” (p.1243). In the former scenario, any s.67 challenge is likely to be a limited affair. In the latter, Rix J found that the court should not be placed in a worse position than the arbitrator for the purposes of determining that challenge, and permitted oral evidence to be reheard before the court.

23. In our view, when deciding whether to rehear oral evidence in a s.67 challenge, the court will already be guided by the “*interests of justice*”. Indeed, in *Azov* itself, the “*interests of justice*” were decisive in Rix J’s decision to allow the application (at p.1243):

“[A]lthough there may be some prejudice to the expeditious and economical disposal of the application by permitting oral evidence, it seems to me that the justice of the matter requires that I accede to Azov’s application. Ultimately a question of justice, where it conflicts with a modest prejudice to expedition or increase in cost, must be given greater weight. For these reasons I accede to Azov’s application, that, in what would in any event be a weighty application, oral evidence should be permitted.”

24. Therefore, given that the “*interests of justice*” already constitute a guiding factor in the court’s assessment of this issue, we are broadly supportive of the proposed new rule.
25. However, in our view, the rule as currently drafted sets the bar for rehearing oral evidence too high. Whether the “*interests of justice*” are “*exceptional*” enough in the circumstances will likely be difficult to determine. We are in favour of maintaining or increasing, rather than limiting, the court’s discretion in assessing whether to hear evidence, new or otherwise.
26. The Law Commission suggests that this threshold would be imposed by analogy with the Civil Procedure Rules, in particular CPR 52.51 (paragraph 3.107 of the Second Consultation Paper). However, CPR 52.21 states that “*every appeal will be limited to a review of the decision of the lower court, unless [...] in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing.*” The word “*exceptionally*” is not present in CPR 52.21, and it does not appear that such a threshold has ever been applied by the courts (see, for example, *Audergon v La Baguette Ltd* [2002] EWCA Civ 10 at para. 83).
27. Overall, we suggest that the “*in the interests of justice*” standard would provide the courts with a sufficient degree of flexibility, whilst still acting as a practical restriction on the rehearing of oral evidence. Such a standard would also be in accordance with the existing test for appeals set out in CPR 52.21, and the decision in *Azov*.

**(3) *The court will allow the challenge where the decision of the tribunal on its jurisdiction was wrong***

28. The Law Commission has suggested that the crux of this proposal involves the court “*giv[ing] deference to the decision of the tribunal.*” (paragraph 3.108 of the Second Consultation Paper). As set out in our response to the First Consultation Paper, we were, on balance, unsupportive of changing the s.67 procedure from a rehearing to a review/appeal in order to give more deference to the decision of the tribunal.
29. In our view, the court should not begin its assessment of the tribunal’s decision on jurisdiction from a position of deference, nor should it assume that the decision of the tribunal is *prima facie* correct. We also disagree with the Law Commission’s suggestion that the principle of “*competence-competence*” “*acknowledges a measure of deference to the tribunal*” (paragraph 3.60 of the Second Consultation Paper). As set out by Devlin J in *Christopher Brown Ltd v Genossenschaft Oesterreichischer Waldbesitzer Holzwirt-Schaftsbetriebe Registrierte Genossenschaft mit Beschränkter Haftung* [1954] 1 QB 8, at pp. 12-13, the ability of an arbitral tribunal to consider its own jurisdiction is:



“... not for the purpose of reaching any conclusion which will be binding upon the parties ... but for the purpose of satisfying themselves as a preliminary matter whether they ought to go on with the arbitration or not.”

30. On this basis, whilst the wording of this proposal is not objectionable *per se*, we are concerned that the associated commentary provided by the Law Commission will result in the courts assigning too much deference to the decision of the tribunal.
31. In our view, the correct question for the court to ask is simply whether or not the tribunal has jurisdiction. We can see that this may, in substance, mean the same thing as whether the “*decision of the tribunal on its jurisdiction was wrong*”, but to the extent that this involves a presumption that the decision of the tribunal is correct, we would disagree with this proposed new rule.

**Consultation Question 3. We provisionally propose that the Arbitration Act 1996 be amended to confer the power to make rules of court to implement the proposals in CQ2 above. Do you agree?**

32. We agree with this proposal.

**Consultation Question 4. We provisionally propose that it should be deemed justified to require an arbitrator to have a nationality different from that of the arbitral parties. Do you agree?**

33. Yes. As we stated in our response to the First Consultation Paper, it is commonplace and legitimate to include appropriately drafted requirements as to arbitrator nationality in an arbitration clause. Indeed, a number of sets of widely used arbitration rules contain such provisions. We welcome the Law Commission’s recognition that it is not just neutrality, but also the *perception* of neutrality that is important in this context.

**Consultation Question 5. Do you think that discrimination should be generally prohibited in the context of arbitration?**

34. As we stated in our response to the First Consultation Paper, improper discriminatory practices in the arbitration context should not be tolerated. In our experience, in the commercial context, it is extremely rare for arbitration clauses to impose requirements as to protected characteristics other than nationality. However, we recognise that the problem in this area may not necessarily be discriminatory arbitration *agreements*, but discriminatory arbitral *appointments*. We also recognise the potential for this issue to extend beyond the appointment of arbitrators, and permeate the conduct of arbitration more generally, e.g. in relation to the assessment of oral evidence.
35. However, the proposal for a general prohibition on discrimination in the context of arbitration raises delicate and complex considerations. Yet it is difficult to comment on this proposal in the absence of a detailed explanation in the Second Consultation Paper as to why such a provision is required, what specific mischiefs it would deal with, how it would fit with the law in this area more generally and how it might be framed.
36. Moreover, there is uncertainty regarding the jurisdictional scope of a general prohibition. For example, it is not clear whether (or how) it could apply to actors in English-seated arbitrations even if they were not present in England & Wales. Equally, it is not clear whether it would apply only to London-seated arbitrations, or whether it would extend further to activities in other arbitrations taking place in England & Wales, perhaps in accordance with the jurisdictional scope of the Equality Act 2010 (the **Equality Act**).
37. On balance, we take the view that, in the absence of a more developed proposal, it cannot be concluded that a general prohibition is appropriate. Based on the proposal as made in the Second Consultation Paper, we consider that it is unlikely to be the right way to proceed. We are also unaware of any

similar pieces of legislation in other fields that contain such a broad and general prohibition on discrimination.

38. In our view, a more appropriate response to these issues would target discrete areas for reform in circumstances where: (a) there is a material risk of discrimination; and (b) that risk has not already been legislated against either by the provisions of the Arbitration Act itself, or under the Equality Act. Any reform of the Act should therefore be incremental and focus on filling gaps in the law, rather than providing protections that may be duplicative of those that exist elsewhere. Such a reform should also rely on existing remedies, rather than fashioning new ones. In this respect, we would make the following four points:

- First, the Act already contains several safeguards against discrimination. As the Law Commission recognises at paragraph 4.22 of its Second Consultation Paper, if “*circumstances exist that give rise to justifiable doubts as to [an arbitrator’s] impartiality*” (s.24(1)(a) of the Act) the arbitrator may *already* be liable to removal by the court under s.24 of the Act. Discriminatory conduct by an arbitrator is also likely to constitute a breach of the general duty to act fairly and impartially (s.33(1)(a) of the Act). A failure to be fair on discriminatory grounds could also constitute a serious irregularity, meaning that any resulting award rendered could be challenged under s.68 of the Act. The “remedies” for discrimination perpetrated by an *arbitrator* are therefore already contained within the scheme of the Act, and, as these particular provisions are mandatory for all English-seated arbitrations, parties are unable to derogate from these statutory safeguards. It is not immediately apparent, therefore, that reform of the manner in which the Act counteracts discrimination by an arbitrator is required.
- Second, we believe that some types of discrimination that arise in the context of an arbitration may already be covered by the Equality Act. For example, in our view it is likely that Part 3 of the Equality Act (relating to the provision of services) already applies to the provision of arbitration services by arbitral institutions. If this is the case, arbitral institutions (as “service-providers” under s.29 of the Equality Act) are already prohibited from, among other things:
  - discriminating against a person requiring the service by not providing the person with the service (s.29(1));
  - discriminating against a person as to the terms on which the service is provided (s.29(2)(a));
  - discriminating against a person by terminating the provision of the service (s.29(2)(b)); and
  - discriminating against a person by subjecting them to any other detriment (s.29(2)(c)).

The remedies for a breach of the Equality Act include any remedy that could be granted by the High Court in a tort claim, or in a judicial review. An award of damages may also include compensation for injured feelings (s.119(4)). Accordingly, we think that the relevant provisions of the Equality Act *do* generally apply to arbitral institutions that are within the jurisdictional scope of the Equality Act, and, subject to our ‘third’ point below, the introduction of a general prohibition into the Act could create conflict with these provisions. Conflating the remedial regimes of the Equality Act and the Arbitration Act could also create issues relating to immunities that have been otherwise established or foregone within the arbitration context. Therefore, to ensure adequate delineation between the two regimes, we suggest that prohibitions on discrimination (and the associated remedies) are better suited within the framework of the Equality Act, rather than the Arbitration Act.

- Third, the Law Commission’s proposal for a general prohibition on discrimination seems to be directed towards discriminatory arbitral appointments. One way to address this issue would be by extending the scope of the “Employment” provisions set out in Part 5 of the Equality Act to include the appointment of arbitrators. The Law Commission recognised the potential for such a reform at paragraph 4.18 of its First Consultation Paper, by analogy with s.47(6) of the Equality Act, which prohibits discrimination in the context of instructing barristers. In our experience, the process that a party and its counsel goes through when appointing an arbitrator is somewhat equivalent to the process of instructing a Barrister. It is, therefore, perhaps reasonable to pose the question of whether a similar safeguard should apply to the appointment of arbitrators. The principal remedies for a breach of Part 5 of the Equality Act are a declaration (s.124(2)(a)), compensation (s.124(2)(b)), or an appropriate recommendation (s.124(2)(c)).

However, whilst this potential reform does seem to offer an incremental and targeted adjustment to the statutory regime, whilst utilising an existing remedial framework under the Equality Act, further consultation will of course be required as to whether such a reform is practicable. We have identified two issues in this respect:

- First, contravention of Part 5 of the Equality Act attracts the jurisdiction of an employment tribunal: it would need to be considered whether this particular forum is appropriate for discrimination that has occurred in a confidential arbitration context.
  - Second, it is unclear what the jurisdictional scope of such a reform might be. Whilst barristers are likely to be resident in England & Wales, arbitrators that are appointed in London-seated arbitrations are frequently drawn from an international pool, and therefore may not be domiciled or resident in England & Wales.
- Fourth, parties’ counsel are usually closely involved in the selection and appointment of arbitrators. In this connection, any discrimination perpetrated by law firms, solicitors or barristers in England & Wales is explicitly prohibited by the SRA Code of Conduct (paragraph 1.1),<sup>4</sup> and the Bar Standards Board Code of Conduct (Core Duty 8). Any identifiable discrimination carried out by a party’s counsel would therefore be a professional misconduct matter, which may result in regulatory action being taken against the law firm or individual in question. In our view, this regime already provides an appropriate response mechanism to discrimination that is carried out by legal professionals in England & Wales.

**Consultation Question 6. What do you think the remedies should be where discrimination occurs in the context of arbitration?**

39. We find it difficult to comment on what the precise remedies should be for breach of a general prohibition on discrimination, due to the unclear and incredibly broad scope of the proposal. We further note that it would also be necessary to consider where jurisdiction would lie to hear any claim based on breach of such a discrimination provision, bearing in mind that employment tribunals appear already to have jurisdiction in respect of certain arbitration-related matters under the Equality Act. Further again, as discussed in Consultation Question 5, we take the view that any reform to the Act should rely on existing remedies, rather than fashioning new ones. If anti-discrimination legislation were to be introduced into the Act, a good deal of further thought would be required on these matters.

**Allen & Overy LLP**

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<sup>4</sup> The SRA Code of Conduct also applies to Registered European Lawyers and Registered Foreign Lawyers.

## Response ID ANON-44ZW-8X65-M

Submitted to Law Commission second consultation on the Arbitration Act 1996  
Submitted on 2023-04-04 13:11:26

### About you

What is your name?

Name:  
Dr Simon Allison

What is the name of your organisation?

Enter the name of your organisation:  
Curtin Law School, Curtin University

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]  
[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.

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### Proper law

Consultation Question 1

Yes

Please give your reasons::

Dear Commission,

#### INTRODUCTION

I am an Associate Lecture at the Curtin Law School, with an established research interest in transnational dispute resolution clauses. My PhD dissertation completed at the University of Cambridge explored, inter alia, the role of international arbitration-based dispute resolution clauses within the supply chain and the potential for those mechanisms to play a role in protecting international human rights.

#### EXECUTIVE SUMMARY

Firstly, the reopening of the UK Law Commission reform process concerning the Arbitration Act 1996 is a most welcome development. I believe this is a wise decision, and I was hoping to make submissions about this in the first consultation paper. I appreciate the information provided about the current position of arbitration and its significant role in both domestic and international settings. The Arbitration Act 1996 provides a significant framework for international arbitration seated in England and Wales and Northern Ireland and plays a significant role in the provision of stays for domestic proceedings, recognition and enforcement of foreign arbitral awards, and as well as the granting of anti-suit injunctions in protection of arbitral or curial processes in England and Wales. I am pleased to see that the Law Commission is consulting again, taking the opportunity to revisit two issues covered in the first consultation and address the topic of the proper law of the arbitration agreement. I believe this is a topic that requires discussion and potentially reform, following the Supreme Court decision in *Enka v Chubb*.

I hope that as many interested parties as possible will respond to the consultation, and the responses of consultees to this second consultation paper will inform the final report and recommendations. Thank you again for your efforts in ensuring that the Act remains fit for purpose and that the UK continues to be a leading destination for commercial arbitrations. I appreciate the complexities involved in identifying the proper law of an arbitration agreement, particularly because it is usually a clause in a main contract and may have different governing laws from the matrix contract. Moreover, the law of the matrix contract and arbitration agreement may or may not align with the law of the seat, which is where the arbitration is legally deemed to occur. I am grateful for the Law Commission's efforts in ensuring that the proposals are provisional and subject to formal consultation exercises. I hope that many interested parties respond to the consultation, and their responses will inform the final report and recommendations. Thank you for the opportunity to share my views on this important topic.

THE FOLLOWING SUBMISSION IS IN RESPONSE TO CONSULTATION QUESTION 1 OF THE REVIEW OF THE ARBITRATION ACT 1996 SECOND CONSULTATION PAPER. THAT QUESTION READS AS FOLLOWS:

Consultation Question 1: We provisionally propose that a new rule be included in the Arbitration Act 1996 to the effect that the law of the arbitration agreement is the law of the seat, unless the parties expressly agree otherwise in the arbitration agreement itself. Do you agree?

In response to this question, I submit that the primary concern for policymakers is to review the Arbitration Act 1996 (UK) holistically, and not just section by section, as it is the inconsistencies between various provisions and provisions such as Section 37 of the Senior Courts Act 1981 (UK) that are problematic. To retain its status as an attractive, world-leading destination for arbitration, it is important that a consistent approach is taken by English courts to the overall substantive issues, and to not take varying approaches based on which section of the Arbitration Act 1996 (UK) or the Senior Courts Act 1981 (UK) is at issue. This would provide no certainty for businesses and their legal representatives. Interpretive approaches to parts of the Arbitration Act 1996 such as the ss 100-104 provisions and those in sections 67 and 9, in addition to inconsistencies with the application of Section 37 of the Senior Courts Act 1981 (UK), do not make England an attractive place for arbitration. Or, put another way, they weaken its standing as a world-class location for international arbitration. This review has significant consequences beyond the UK, including for the New York Convention and UNCITRAL Model Law. It is an incredible opportunity to set an example for best practice and contribute to global uniformity, rather than further fragmentation.

WITH THAT IN MIND I MAKE THE FOLLOWING RECOMMENDATION:

Recommendation 1: That a rule be included in the Arbitration Act 1996 to the effect that the law of the arbitration agreement is the law of the seat, unless the parties expressly agree otherwise in the arbitration agreement itself.

#### INTERNATIONAL UNIFORMITY

The default rule of the seat of arbitration being the default rule for determining the *lex arbitri* has historically been one of the few aspects of international arbitration where there was a considerable level of uniformity and consensus. This uniformity provided predictability and legal certainty for parties engaging in international arbitration, as they could reasonably expect the law of the seat to govern the arbitration agreement in the absence of an express or implied choice to the contrary. I strongly support the proposal to include a new rule in the Arbitration Act 1996 that would make the law of the seat the law governing the arbitration agreement, in the absence of an express or implied choice by the parties. I agree that unless the parties expressly agree otherwise in the arbitration agreement itself, is a sound approach. The law of England and Wales is generally considered to be generous in terms of arbitrability, scope, and confidentiality. Therefore, if an arbitration agreement is governed by a foreign law that is less generous in these aspects, the parties may lose the ability to arbitrate and the siting of that dispute resolution process in England and Wales.

Attached is a preprint of the article, 'Party Crashers: Issues in Identifying Parties and Others Bound by Arbitration Agreements' (Party Crashers) co-authored with Kanaga Dharmananda SC published last year in the 38th edition of *Arbitration International* for your consideration. That article was aimed at bringing to light these issues in relation to the ongoing consultation on the reform of the Arbitration Act 1996. As the article argued, recent developments in arbitral case law, such as *Enka*, *Kabab-Ji*, and *Lifestyle Equities*, have undermined this uniformity and raised concerns about the consistency and predictability of the seat-based approach. As the abstract reads:

'The determination of the law governing arbitration agreements has been the subject of recent close attention. The relationship of third parties to arbitration agreements is sensitive to an increasingly unwieldy array of factors, including the subject matter of a dispute, the nature of the purported basis for the transfer of an arbitration agreement, and the wording of the original instrument containing the arbitration clause. A rising question is whether third parties are to be considered parties or non-parties otherwise bound by arbitration agreements. In addition, there is an issue of timing: when are the arbitration agreements or relevant awards to be impugned, and does the third-party issue pertain to the validity or just the scope of an arbitration agreement. This article seeks to address these issues'

A few select extracts also include:

'It seems fundamental to be able to recognize a counterparty to a transaction and, by extension, a party to any arbitration agreement covering disputes that may arise from the transaction. It is a vital aspect of the capacity to discern relevant parties to know which law to apply to the question. It will be important to appreciate how that law treats non-signatories and when such non-signatories could be held to be parties or otherwise bound by the arbitration agreement. Against these desirable objectives, there is the need to grapple with the position in the UK as to applicable law relevant to the ascertainment of parties and persons otherwise bound by an arbitration agreement. As the UK embarks on a review of the Arbitration Act 1996, consideration could turn to the lacunae and practical methodological inconsistencies on display in recent English arbitral case law. Three interrelated questions are worthy of discussion: the law applicable to arbitration agreements; the validity of arbitration agreements; and the status of third parties in the context of arbitration agreements. These questions have implications for stays of domestic proceedings, anti-suit injunctions in restraint of foreign proceedings, court assistance for arbitral tribunals, and the recognition and enforcement of arbitral awards. Questions of who is a party to (or is otherwise bound by) an arbitration agreement are usually seen as matters concerning the validity of an arbitration agreement. In most cases, this inevitably becomes a question of the law applicable to an arbitration agreement. Often it is the case that out of the two most obvious candidates for law

governing an arbitration agreement, one will provide for the operation of the arbitration agreement between two particular parties to a dispute, and the other will not. Attempts to clarify the question of the law governing arbitration agreements took place in *Enka and Kabab-Ji*. Following the recent Court of Appeal decision in *Lifestyle Equities*, this area of law is far from clear. It would seem that non-parties can be forced by English courts to endure the time and expense of foreign arbitration processes only to be left with an unenforceable award.'

These cases have led to a divergence in the application of the seat rule and have introduced a level of uncertainty in the determination of the *lex arbitri*, which could potentially affect the confidence of parties in international arbitration as a reliable and consistent dispute resolution mechanism. The case of *Lifestyle Equities* demonstrated the importance of the seat when considering stays under Section 9 of the Arbitration Act 1996. The English Court of Appeal in this case upheld a stay of proceedings, even though *Lifestyle Equities* was not a party to the arbitration agreement, because they were bound by it as a non-party.

This decision turned on an expansive reading of Section 9 of the Arbitration Act 1996, emphasising the significance of the seat. However, as mentioned in our article and submission letter, this approach seems to diverge from the reasoning in *Kabab-Ji*, which focused on determining whether a third party became a party to the arbitration agreement. The distinction between parties and bound non-parties, as well as the difference between interpretation and scope of arbitration agreements, has created confusion and fragmentation in English law. I would also like to draw your attention to footnote 38 in the Second Consultation Paper, which refers to *Lifestyle Equities* as being consistent with *Kabab-Ji*, stating rather surprisingly:

“*Kabab-Ji SAL v Kout Food Group* [2021] UKSC 48, [2022] 1 All ER (Comm) 773. The approach in *Kabab-Ji* was further followed in *Lifestyle Equities CV v Hornby Street (MCR) Ltd* [2022] EWCA Civ 51, [2022] 2 All ER (Comm) 990”.

In my view, as discussed in our article, the approach taken in these cases diverges in important ways, particularly concerning the distinction between parties and bound non-parties and the difference between interpretation and scope of arbitration agreements.

‘The distinction between parties, and bound non-parties, as well as that between interpretation and scope of arbitration agreements did not feature in the Supreme Court decision in *Kabab-Ji*. Such distinctions seem to fly in the face of the Supreme Court in *Kabab-Ji* where it noted it would be illogical if a different approach were taken to questions of validity and parties to arbitration agreements at the agreement and award recognition phases of the broader arbitration process’

As asked in the 2022 article, if instead of being a question of privity in light of the enforcement of foreign award provisions under s103(2)(b) of the Arbitration Act 1996, if instead, Section 9 of the Arbitration Act 1996 had been the lynchpin in *Kabab-Ji*, could then have:

‘KFG have been considered a non-party bound to arbitrate in Paris [...] even if any eventual award was unable to be enforced on them in England by virtue of the wording of Section 103(2)(b) and Article V(1) (a) of the New York Convention? Or does the new constitution of the issue as one concerning the scope of an arbitration clause mean that the discussion is freed from the clutches of Article V(1) (a) and instead deals with the application of Article V(1)(c) of the New York Convention? The interaction of scope (or often termed arbitrability) in Article V(1)(c) with capacity and validity under Article V(1)(a) is not made clear’.

As is argued and reframing the question of who is party to an arbitration agreement (or otherwise obliged to arbitrate) in English law as one concerning the scope of an arbitration agreement as opposed to one relating to the question of capacity in validity has broader consequences for the interpretation of Art V of the New York Convention. As for the Majority approach in *Lifestyle Equities*:

‘It seems conceptually and practically difficult to separate the question of interpretation of an arbitration agreement from its scope, particularly where that inquiry is focused on the language of the arbitration agreement. [The] notion that a non-party to an arbitration agreement may still be bound by it unless it is inoperative is curious. It is difficult to justify why principles relating to who is party to an arbitration agreement (whether for agreement application or award recognition) should be distinguished from a question of when non-parties are otherwise bound by such agreements. Further, if such a distinction were to be accepted, it is difficult to see why the scope of an arbitration clause, formed between parties A and B, should decide whether non-party C is bound to arbitrate. *Lifestyle Equities* suggests a category of bound non-parties to arbitration, who lack the powers and defences normally afforded to a party to arbitral tribunal proceedings [despite there lacking] a strong textual or contextual basis to read Section 9 as expansive and isolated from the rest of the regime embodied in the Arbitration Act 1996. [I]t is important to recognize that such terminology of bound non-signatories and bound non-parties creates legal and functional uncertainties in terms of the arbitration of disputes by such named non-parties. It is misleading, not just in terms of the need for, and operation of, a valid and effective arbitration agreement, but in terms of the implications for those seeking stays, anti-suit injunctions and the recognition and enforcement of resulting awards (or those seeking to prevent such recognition and enforcement)’.

Trying to reconcile *Enka*, *Kabab-Ji* and *Lifestyle Equities*, the Arbitration Act 1996 offers an incoherent classification of:

‘parties, non-parties bound by Section 9, non-parties who can escape enforcement under Section 103(2)(b) of the Arbitration Act 1996 as well as non-parties ‘restricted from resisting arbitration under Section 9 unless they can establish their involvement was beyond the scope of the arbitration agreement’.

Table 1. ‘Entitlements of Entities in Relation to Arbitral Proceedings Depending on Their Classification’ in that article illustrates the current dilemma and reveals gaps and uncertainties’ with a position less than clear and a strong argument that ‘dispute resolution by arbitration has become fragmented internally in England’.

‘*Kabab-Ji* spoke of a lack of international uniformity generally on these questions, but it is becoming increasingly clear that perhaps a more pertinent problem is the lack of uniformity within England itself. There is still no clear answer to the question of whether ‘the Court of Appeal in *Lifestyle Equities*, the Supreme Court in *Dallah* draw a meaningful distinction between third parties as parties to arbitration agreements, and third parties as bound-non parties to arbitration agreements? The Supreme Court in *Kabab-Ji*, focusing on Section 103(2)(b) of the Arbitration Act 1996 argued any difference in application between the applicable tests at common law and under Section 103(2)(b) of the Arbitration Act 1996, ‘would be illogical if the law governing the validity of the arbitration agreement were to differ depending on whether the question is raised before or after an award has been made’.

This proposition seems correct, and the inconsistency between that statement and the majority approach in Lifestyle Equities where, in any substantive sense, differing approaches to the question of validity at pre-award and post-award stages was on display does not support the position that the 'approach in Kabab-Ji was further followed in Lifestyle Equities CV v Hornby Street'.

#### CONSISTENCY AND GLOBAL UNIFORMITY UNSEATED

I would also like to emphasise the importance of the lex arbitri in the conduct of arbitration and the potential issues that may arise from the parties' neglect or misunderstanding in selecting the lex arbitri. In the article, 'The Unconscious Choice: Reflections on Determining the Lex arbitri' Kanaga Dharmananda SC provides an in-depth analysis of the challenges faced in determining the lex arbitri, especially in cases where the parties' choice is unclear or absent. The article highlights the importance of predictability and consistency in the selection of the lex arbitri and discusses the challenges posed by various factors, including the lack of explicit reference to the procedural law in many model arbitration clauses and the difficulties in determining the seat of arbitration in international cases. The article advocates for a more focused approach to the lex arbitri in arbitration agreements and emphasises the importance of informed choice and the potential pitfalls of imputing the selection of procedural laws based on vague or incidental language in an agreement. Dharmananda's analysis is particularly relevant considering the current consultation on the reform of the Arbitration Act 1996 (UK) and could provide valuable insights to the UK Law Commission in addressing the issues related to the determination of the lex arbitri.

#### CONCLUSION

I encourage the UK Law Commission to consider the insights and challenges as put forward in my recently co-authored article in Arbitration International and consider the meritorious arguments put forward by many scholars, advocates, and arbitrators over time. It is crucial for the international arbitration community to address this issue and work towards restoring the uniformity and predictability that the seat-based approach once offered. By revising the Arbitration Act 1996 to include a new rule that makes the law of the seat the default law governing the arbitration agreement, the UK Law Commission can reaffirm the importance of the seat rule and contribute to global uniformity in international arbitration. Such an amendment would not only strengthen the confidence of parties in arbitration but also enhance the overall efficiency and effectiveness of the international arbitration system.

Considering these developments, adopting (or returning to) a rule that makes the law of the seat the default law governing arbitration agreements would help mitigate the uncertainties and inconsistencies arising from the different approaches taken in cases like Enka and Lifestyle Equities. This rule would provide a clear and uniform framework for determining the law applicable to arbitration agreements, promoting legal certainty and predictability for parties involved in international arbitration. This approach would promote legal certainty and consistency.

I hope that this submission and the attached (pre-publication) article will provide useful insights for the UK Law Commission in its ongoing efforts to reform the Arbitration Act 1996. I am grateful for the opportunity to contribute to this important consultation process and would be happy to provide any further information or assistance as required.

#### Section 67

##### Consultation Question 2

Other

Please give your reasons::

N/A

##### Consultation Question 3

Yes

Please give your reasons::

N/A

#### Discrimination

##### Consultation Question 4

Other

Please give your reasons::

N/A

##### Consultation Question 5

No

Please give your reasons::

N/A

Consultation Question 6

Please give your answer::

N/A



4 April 2023

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

By online submission to <https://consult.justice.gov.uk/law-commission/second-arbitration>

**THE FOLLOWING SUBMISSION IS IN RESPONSE TO CONSULTATION QUESTION 1 OF  
THE REVIEW OF THE ARBITRATION ACT 1996 SECOND CONSULTATION PAPER.**

Dear Commission,

## INTRODUCTION

I am an Associate Lecture at the Curtin Law School, with an established research interest in transnational dispute resolution clauses. My PhD dissertation completed at the University of Cambridge explored, *inter alia*, the role of international arbitration-based dispute resolution clauses within the supply chain and the potential for those mechanisms to play a role in protecting international human rights.

## EXECUTIVE SUMMARY

Firstly, the reopening of the UK Law Commission reform process<sup>1</sup> concerning the Arbitration Act 1996 is a most welcome development. I believe this is a wise decision, and I was hoping to make submissions about this in the first consultation paper. I appreciate the information provided about the current position of arbitration and its significant role in both domestic and international settings. The Arbitration Act 1996 provides a significant framework for international arbitration seated in England and Wales and Northern Ireland and plays a significant role in the provision of stays for domestic proceedings,<sup>2</sup> recognition and enforcement of foreign arbitral awards,<sup>3</sup> and as well as the granting of anti-suit injunctions<sup>4</sup> in protection of arbitral or curial processes in England and Wales. I am pleased to see that the Law Commission is consulting again, taking the opportunity

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<sup>1</sup> UK Law Commission, 'Law Commission to Review the Arbitration Act 1996' <<https://www.lawcom.gov.uk/law-commission-to-review-the-arbitration-act-1996/>> accessed 5 June 2022.

<sup>2</sup> Arbitration Act 1996 s 9. See s 2(2) that s 9 applies 'even if the seat of the arbitration is outside England and Wales or Northern Ireland or no seat has been designated or determined'.

<sup>3</sup> *ibid* ss 100–104.

<sup>4</sup> Senior Courts Act 1981 s 37.



to revisit two issues covered in the first consultation and address the topic of the proper law of the arbitration agreement. I believe this is a topic that requires discussion and potentially reform, following the Supreme Court decision in *Enka v Chubb*.<sup>5</sup>

I hope that as many interested parties as possible will respond to the consultation, and the responses of consultees to this second consultation paper will inform the final report and recommendations. Thank you again for your efforts in ensuring that the Act remains fit for purpose and that the UK continues to be a leading destination for commercial arbitrations. I appreciate the complexities involved in identifying the proper law of an arbitration agreement, particularly because it is usually a clause in a main contract and may have different governing laws from the matrix contract. Moreover, the law of the matrix contract and arbitration agreement may or may not align with the law of the seat, which is where the arbitration is legally deemed to occur. I am grateful for the Law Commission's efforts in ensuring that the proposals are provisional and subject to formal consultation exercises. I hope that many interested parties respond to the consultation, and their responses will inform the final report and recommendations. Thank you for the opportunity to share my views on this important topic.

**THE FOLLOWING SUBMISSION IS IN RESPONSE TO CONSULTATION QUESTION 1 OF THE REVIEW OF THE ARBITRATION ACT 1996 SECOND CONSULTATION PAPER. THAT QUESTION READS AS FOLLOWS:**

**Consultation Question 1:** We provisionally propose that a new rule be included in the Arbitration Act 1996 to the effect that the law of the arbitration agreement is the law of the seat, unless the parties expressly agree otherwise in the arbitration agreement itself. Do you agree?

In response to this question, I submit that the primary concern for policymakers is to review the Arbitration Act 1996 (UK) holistically, and not just section by section, as it is the inconsistencies between various provisions and provisions such as Section 37 of the Senior Courts Act 1981 (UK) that are problematic. To retain its status as an attractive, world-leading destination for arbitration, it is important that a consistent approach is taken by English courts to the overall substantive issues, and to not take varying approaches based on which section of the Arbitration Act 1996 (UK) or the Senior Courts Act 1981 (UK) is at issue. This would provide no certainty for businesses and their legal representatives. Interpretive approaches to parts of the Arbitration Act 1996 such as the ss 100-104 provisions and those in sections 67 and 9, in addition to inconsistencies with the application of Section 37 of the Senior Courts Act 1981 (UK), do not make England an attractive place for arbitration. Or, put another way, they weaken its standing as a world-class location for international arbitration. This review has significant consequences beyond the UK, including for the New York Convention<sup>6</sup> and UNCITRAL Model Law.<sup>7</sup> It is an incredible opportunity to set an example for best practice and contribute to global uniformity, rather than further fragmentation.

**WITH THAT IN MIND I MAKE THE FOLLOWING RECOMMENDATION:**

**Recommendation 1:** That a rule be included in the Arbitration Act 1996 to the effect that the law of the arbitration agreement is the law of the seat, unless the parties expressly agree otherwise in the arbitration agreement itself.

<sup>5</sup> *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb (Rev1)* [2020] UKSC 38 (09 October 2020).

<sup>6</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards (The 'New York Convention'), 330 UNTS 3 (opened for signature 10 June 1958, entered into force 7 June 1959).

<sup>7</sup> UNCITRAL Model Law on International Commercial Arbitration 1985 (with the amendments adopted in 2006) (the 'UNCITRAL Model Law').



## INTERNATIONAL UNIFORMITY

The default rule of the seat of arbitration being the default rule for determining the *lex arbitri* has historically been one of the few aspects of international arbitration where there was a considerable level of uniformity and consensus. This uniformity provided predictability and legal certainty for parties engaging in international arbitration, as they could reasonably expect the law of the seat to govern the arbitration agreement in the absence of an express or implied choice to the contrary. I strongly support the proposal to include a new rule in the Arbitration Act 1996 that would make the law of the seat the law governing the arbitration agreement, in the absence of an express or implied choice by the parties. I agree that unless the parties expressly agree otherwise in the arbitration agreement itself, is a sound approach. The law of England and Wales is generally considered to be generous in terms of arbitrability, scope, and confidentiality. Therefore, if an arbitration agreement is governed by a foreign law that is less generous in these aspects, the parties may lose the ability to arbitrate and the siting of that dispute resolution process in England and Wales.

Attached is a preprint of the article, 'Party Crashers: Issues in Identifying Parties and Others Bound by Arbitration Agreements' (Party Crashers) co-authored with Kanaga Dharmananda SC published last year in the 38th edition of *Arbitration International* for your consideration. That article was aimed at bringing to light these issues in relation to the ongoing consultation on the reform of the Arbitration Act 1996. As the article argued, recent developments in arbitral case law, such as *Enka*,<sup>8</sup> *Kabab-Ji*,<sup>9</sup> and *Lifestyle Equities*,<sup>10</sup> have undermined this uniformity and raised concerns about the consistency and predictability of the seat-based approach. As the abstract reads:

*'The determination of the law governing arbitration agreements has been the subject of recent close attention. The relationship of third parties to arbitration agreements is sensitive to an increasingly unwieldy array of factors, including the subject matter of a dispute, the nature of the purported basis for the transfer of an arbitration agreement, and the wording of the original instrument containing the arbitration clause. A rising question is whether third parties are to be considered parties or non-parties otherwise bound by arbitration agreements. In addition, there is an issue of timing: when are the arbitration agreements or relevant awards to be impugned, and does the third-party issue pertain to the validity or just the scope of an arbitration agreement. This article seeks to address these issues'*<sup>11</sup>

A few select extracts also include:

*'It seems fundamental to be able to recognize a counterparty to a transaction and, by extension, a party to any arbitration agreement covering disputes that may arise from the transaction. It is a vital aspect of the capacity to discern relevant parties to know which law to apply to the question. It will be important to appreciate how that law treats non-signatories and when such non-signatories could be held to be parties or otherwise bound*

<sup>8</sup> *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb (Rev1)* [2020] UKSC 38 (09 October 2020).

<sup>9</sup> *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2021] UKSC 48 (26 October 2021).

<sup>10</sup> *Lifestyle Equities CV v Hornby Street (MCR) Ltd* [2022] EWCA Civ 51 (26 January 2022).

<sup>11</sup> S Allison and K Dharmananda, 'Party Crashers: Issues in Identifying Parties and Others Bound by Arbitration Agreements' (2022) 38(3) *Arbitration International* 151.



by the arbitration agreement. **Against these desirable objectives, there is the need to grapple with the position in the UK as to applicable law relevant to the ascertainment of parties and persons otherwise bound by an arbitration agreement.** As the UK embarks on a review of the Arbitration Act 1996, consideration could turn to the lacunae and practical methodological inconsistencies on display in recent English arbitral case law. Three interrelated questions are worthy of discussion: the law applicable to arbitration agreements; the validity of arbitration agreements; and the status of third parties in the context of arbitration agreements. These questions have implications for stays of domestic proceedings, anti-suit injunctions in restraint of foreign proceedings, court assistance for arbitral tribunals, and the recognition and enforcement of arbitral awards. Questions of who is a party to (or is otherwise bound by) an arbitration agreement are usually seen as matters concerning the validity of an arbitration agreement. In most cases, this inevitably becomes a question of the law applicable to an arbitration agreement. Often it is the case that out of the two most obvious candidates for law governing an arbitration agreement, one will provide for the operation of the arbitration agreement between two particular parties to a dispute, and the other will not. Attempts to clarify the question of the law governing arbitration agreements took place in *Enka* and *Kabab-Ji*. Following the recent Court of Appeal decision in *Lifestyle Equities*, **this area of law is far from clear.** It would seem that non-parties can be forced by English courts to endure the time and expense of foreign arbitration processes only to be left with an unenforceable award.<sup>12</sup>

These cases have led to a divergence in the application of the seat rule and have introduced a level of uncertainty in the determination of the *lex arbitri*, which could potentially affect the confidence of parties in international arbitration as a reliable and consistent dispute resolution mechanism. The case of *Lifestyle Equities*<sup>13</sup> demonstrated the importance of the seat when considering stays under Section 9 of the Arbitration Act 1996. The English Court of Appeal in this case upheld a stay of proceedings, even though *Lifestyle Equities*<sup>14</sup> was not a party to the arbitration agreement, because they were bound by it as a non-party. This decision turned on an expansive reading of Section 9 of the Arbitration Act 1996, emphasising the significance of the seat. However, as mentioned in our article and submission letter, this approach seems to diverge from the reasoning in *Kabab-Ji*,<sup>15</sup> which focused on determining whether a third party became a party to the arbitration agreement. The distinction between parties and bound non-parties, as well as the difference between interpretation and scope of arbitration agreements, has created confusion and fragmentation in English law. I would also like to draw your attention to footnote 38 in the Second Consultation Paper,<sup>16</sup> which refers to *Lifestyle Equities*<sup>17</sup> as being consistent with *Kabab-Ji*,<sup>18</sup> stating rather surprisingly:

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<sup>12</sup> Allison and Dharmananda (n 11).

<sup>13</sup> *Lifestyle Equities CV v Hornby Street (MCR) Ltd* [2022] EWCA Civ 51 (26 January 2022).

<sup>14</sup> *Lifestyle Equities CV v Hornby Street (MCR) Ltd* [2022] EWCA Civ 51 (26 January 2022).

<sup>15</sup> *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2021] UKSC 48 (26 October 2021).

<sup>16</sup> 'Review of the Arbitration Act 1996' (Law Commission) <<https://www.lawcom.gov.uk/project/review-of-the-arbitration-act-1996/>> accessed 3 April 2023.

<sup>17</sup> *Lifestyle Equities CV v Hornby Street (MCR) Ltd* [2022] EWCA Civ 51 (26 January 2022).

<sup>18</sup> *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2021] UKSC 48 (26 October 2021).





“Kabab-Ji SAL v Kout Food Group [2021] UKSC 48, [2022] 1 All ER (Comm) 773. The approach in Kabab-Ji was further followed in Lifestyle Equities CV v Hornby Street (MCR) Ltd [2022] EWCA Civ 51, [2022] 2 All ER (Comm) 990”.<sup>19</sup>

In my view, as discussed in our article, the approach taken in these cases diverges in important ways, particularly concerning the distinction between parties and bound non-parties and the difference between interpretation and scope of arbitration agreements.

*‘The distinction between parties, and bound non-parties, as well as that between interpretation and scope of arbitration agreements did not feature in the Supreme Court decision in Kabab-Ji. Such distinctions seem to fly in the face of the Supreme Court in Kabab-Ji where it noted it would be illogical if a different approach were taken to questions of validity and parties to arbitration agreements at the agreement and award recognition phases of the broader arbitration process’<sup>20</sup>*

As asked in the 2022 article, if instead of being a question of privity in light of the enforcement of foreign award provisions under s103(2)(b) of the Arbitration Act 1996, if instead, Section 9 of the Arbitration Act 1996 had been the lynchpin in *Kabab-Ji*,<sup>21</sup> could then have:

*‘KFG have been considered a non-party bound to arbitrate in Paris [...] even if any eventual award was unable to be enforced on them in England by virtue of the wording of Section 103(2)(b) and Article V(1) (a) of the New York Convention? Or does the new constitution of the issue as one concerning the scope of an arbitration clause mean that the discussion is freed from the clutches of Article V(1) (a) and instead deals with the application of Article V(1)(c) of the New York Convention? The interaction of scope (or often termed arbitrability) in Article V(1)(c) with capacity and validity under Article V(1)(a) is not made clear’.<sup>22</sup>*

As is argued and reframing the question of who is party to an arbitration agreement (or otherwise obliged to arbitrate) in English law as one concerning the scope of an arbitration agreement as opposed to one relating to the question of capacity in validity has broader consequences for the interpretation of Art V of the New York Convention. As for the Majority approach in *Lifestyle Equities*:

*‘It seems conceptually and practically difficult to separate the question of interpretation of an arbitration agreement from its scope, particularly where that inquiry is focused on the language of the arbitration agreement. [The] notion that a non-party to an arbitration agreement may still be bound by it unless it is inoperative is curious. It is difficult to justify why principles relating to who is party to an arbitration agreement (whether for agreement application or award recognition) should be distinguished from a question of when non-parties are otherwise bound by such agreements. Further, if such a distinction were to be accepted, it is difficult to see why the scope of an arbitration clause, formed between parties A and B, should decide whether non-party C is bound to arbitrate. Lifestyle Equities suggests a category of bound non-parties to arbitration, who lack the powers and defences normally afforded to a party to arbitral tribunal proceedings [despite there lacking] a strong*

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<sup>19</sup> ‘Review of the Arbitration Act 1996’ (n 15) n 38: “Kabab-Ji SAL v Kout Food Group [2021] UKSC 48, [2022] 1 All ER (Comm) 773. The approach in Kabab-Ji was further followed in Lifestyle Equities CV v Hornby Street (MCR) Ltd [2022] EWCA Civ 51, [2022] 2 All ER (Comm) 990”.

<sup>20</sup> Allison and Dharmananda (n 11).

<sup>21</sup> *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2021] UKSC 48 (26 October 2021).

<sup>22</sup> Allison and Dharmananda (n 11).



*textual or contextual basis to read Section 9 as expansive and isolated from the rest of the regime embodied in the Arbitration Act 1996. [I]t is important to recognize that such terminology of bound non-signatories and bound non-parties creates legal and functional uncertainties in terms of the arbitration of disputes by such named non-parties. It is misleading, not just in terms of the need for, and operation of, a valid and effective arbitration agreement, but in terms of the implications for those seeking stays, anti-suit injunctions and the recognition and enforcement of resulting awards (or those seeking to prevent such recognition and enforcement)'.<sup>23</sup>*

Trying to reconcile *Enka*,<sup>24</sup> *Kabab-Ji*<sup>25</sup> and *Lifestyle Equities*<sup>26</sup> the Arbitration Act 1996 offers an incoherent classification of:

*'parties, non-parties bound by Section 9, non-parties who can escape enforcement under Section 103(2)(b) of the' Arbitration Act 1996 as well as non-parties 'restricted from resisting arbitration under Section 9 unless they can establish their involvement was beyond the scope of the arbitration agreement'.<sup>27</sup>*

Table 1. 'Entitlements of Entities in Relation to Arbitral Proceedings Depending on Their Classification' in that article<sup>28</sup> illustrates the current dilemma:

Action	Persons Entitled		
	Parties to the Arbitration Agreement	Non-Parties Otherwise Bound by the Arbitration Agreement	Non-Parties Not Bound by the Arbitration Agreement
Ability to Pursue English Court Proceedings Despite Arbitration Agreement	✗	✗	✓
Ability to Seek a Stay of English Proceedings in Favour of Arbitration in England	✓	✓	✗
Ability to Seek a Stay of English Proceedings in Favour of Arbitration in a Foreign Jurisdiction	✓	?	✗
Availability of Anti-Suit Injunction to Restrain Foreign Proceedings in Breach of an Arbitration Agreement	✓	?	✗
Ability of Award Creditor to Enforce Arbitral Award Rendered in a Foreign Arbitration in England	✓	?	✗

<sup>23</sup> Allison and Dharmananda (n 11).

<sup>24</sup> *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb (Rev1)* [2020] UKSC 38 (09 October 2020).

<sup>25</sup> *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2021] UKSC 48 (26 October 2021).

<sup>26</sup> 'Review of the Arbitration Act 1996' (n 15) fn 38.

<sup>27</sup> Allison and Dharmananda (n 11).

<sup>28</sup> Allison and Dharmananda (n 11).



Ability of Award Debtor to Resist Enforcement of Foreign Arbitral Award in England	x	?	✓
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As concluded, that 'table reveals gaps and uncertainties' with a position less than clear and a strong argument that 'dispute resolution by arbitration has become fragmented internally in England'.<sup>29</sup>

*'Kabab-Ji spoke of a lack of international uniformity generally on these questions, but it is becoming increasingly clear that perhaps a more pertinent problem is the lack of uniformity within England itself'. There is still no clear answer to the question of whether 'the Court of Appeal in Lifestyle Equities, the Supreme Court in Dallah draw a meaningful distinction between third parties as parties to arbitration agreements, and third parties as bound-non parties to arbitration agreements?' The Supreme Court in Kabab-Ji, focusing on Section 103(2)(b) of the Arbitration Act 1996 argued any difference in application between the applicable tests at common law and under Section 103(2)(b) of the Arbitration Act 1996, 'would be illogical if the law governing the validity of the arbitration agreement were to differ depending on whether the question is raised before or after an award has been made'.<sup>30</sup>*

This proposition seems correct, and the inconsistency between that statement and the majority approach in *Lifestyle Equities* where, in any substantive sense, differing approaches to the question of validity at pre-award and post-award stages was on display does not support the position that the 'approach in *Kabab-Ji* was further followed in *Lifestyle Equities CV v Hornby Street*'.<sup>31</sup>

## CONSISTENCY AND GLOBAL UNIFORMITY UNSEATED

I would also like to emphasise the importance of the *lex arbitri* in the conduct of arbitration and the potential issues that may arise from the parties' neglect or misunderstanding in selecting the *lex arbitri*. In the article, 'The Unconscious Choice: Reflections on Determining the *Lex arbitri*' Kanaga Dharmananda SC provides an in-depth analysis of the challenges faced in determining the *lex arbitri*, especially in cases where the parties' choice is unclear or absent.<sup>32</sup> The article highlights the importance of predictability and consistency in the selection of the *lex arbitri* and discusses the challenges posed by various factors, including the lack of explicit reference to the procedural law in many model arbitration clauses and the difficulties in determining the seat of arbitration in international cases. The article advocates for a more focused approach to the *lex arbitri* in arbitration agreements and emphasises the importance of informed choice and the potential pitfalls of imputing the selection of procedural laws based on vague or incidental language in an agreement. Dharmananda's analysis is particularly relevant considering the current consultation on the reform of the Arbitration Act 1996 (UK) and could provide valuable insights to the UK Law Commission in addressing the issues related to the determination of the *lex arbitri*.

## CONCLUSION

<sup>29</sup> Allison and Dharmananda (n 11).

<sup>30</sup> Kanaga Dharmananda, 'The Unconscious Choice *Reflections on Determining the Lex Arbitri*' (2002) 19 *Journal of International Arbitration* 151, [35]: 'If there is to be consistency and coherence in the law, the same law should be applied – and therefore the principles for identifying the applicable law should be the same – in either case'.

<sup>31</sup> 'Review of the Arbitration Act 1996' (n 15) fn 38.

<sup>32</sup> Dharmananda (n 29).



I encourage the UK Law Commission to consider the insights and challenges as put forward in my recently co-authored article in *Arbitration International* and consider the meritorious arguments put forward by many scholars, advocates, and arbitrators over time. It is crucial for the international arbitration community to address this issue and work towards restoring the uniformity and predictability that the seat-based approach once offered. By revising the Arbitration Act 1996 to include a new rule that makes the law of the seat the default law governing the arbitration agreement, the UK Law Commission can reaffirm the importance of the seat rule and contribute to global uniformity in international arbitration. Such an amendment would not only strengthen the confidence of parties in arbitration but also enhance the overall efficiency and effectiveness of the international arbitration system.

Considering these developments, adopting (or returning to) a rule that makes the law of the seat the default law governing arbitration agreements would help mitigate the uncertainties and inconsistencies arising from the different approaches taken in cases like *Enka*<sup>33</sup> and *Lifestyle Equities*.<sup>34</sup> This rule would provide a clear and uniform framework for determining the law applicable to arbitration agreements, promoting legal certainty and predictability for parties involved in international arbitration. This approach would promote legal certainty and consistency.

I hope that this submission and the attached (pre-publication) article will provide useful insights for the UK Law Commission in its ongoing efforts to reform the Arbitration Act 1996. I am grateful for the opportunity to contribute to this important consultation process and would be happy to provide any further information or assistance as required.



**DR SIMON ALLISON**

*Ph.D. (Law) (Cantab), B.Ec. (W.Aust.), LL.B. (Hons), M.Phil. (Law)*  
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<sup>33</sup> *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb (Rev1)* [2020] UKSC 38 (09 October 2020).

<sup>34</sup> *Lifestyle Equities CV v Hornby Street (MCR) Ltd* [2022] EWCA Civ 51 (26 January 2022).

Submitted to Law Commission second consultation on the Arbitration Act 1996  
Submitted on 2023-05-14 10:44:12

## About you

What is your name?

Name:  
Clare Ambrose

What is the name of your organisation?

Enter the name of your organisation:  
Twenty Essex

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]  
[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.

Tell us why you regard the information as confidential:

## Proper law

Consultation Question 1

Yes

Please give your reasons::

Agree but the purpose of this rule is to respect party autonomy but also provide a default rule. The proviso to the default rule is more restricted than necessary since it requires any alternative agreement to be made "expressly" and "in" "the arbitration agreement". This precludes parties from making agreements that would ordinarily be given effect. For example, parties may agree a different governing law in a separate agreement or clause, or by way of an exchange of correspondence. A better wording would follow other provisions in the act which simply provide "unless otherwise agreed". The existing Arbitration Act definition of "agree" in section 5 would be sufficient to identify what agreements count.

## Section 67

Consultation Question 2

No

Please give your reasons::

The proposal at (3) that "the court will allow a challenge where the decision of the tribunal on its jurisdiction was wrong" seems sensible and unobjectionable. However, the other proposed adjustments at (1) and (2) are much less clear and risk uncertainty with limited benefit. Rules of court cannot override a party's right to a fair hearing and will not generally affect substantive rights (e.g. a party's right to a court hearing to adjudicate its civil rights). The proposals at (1) and (2) look like a somewhat mixed attempt to adjust the rules of evidence on a jurisdictional challenge and are likely to be impractical to apply (or unnecessary as regards new grounds of objection).

(1) The proposed rule at (1) that the court will not entertain new grounds of objection is already adequately covered by the rules on waiver in section 73. The proposed rule that evidence will not be entertained if it could have been submitted before the tribunal are likely to create significant uncertainty as to



what it means for evidence to be “entertained” or “submitted”.

(2) The proposed provision at (2) that “evidence will not be reheard” somewhat begs the question as to what is being reheard, and what it means for evidence to be reheard. The real intention is that where witness evidence has been given before the Tribunal, then that witness’s evidence may not be re-given in court, save exceptionally in the interests of justice.

A more simple and workable measure would be to give statutory force to a rule that the court may limit evidence to be admitted in a challenge under section 67 in the interests of justice and taking account of the evidence and arguments that have been admitted before the Tribunal. The court already has powers to restrict evidence that would otherwise be admissible under CPR Part 32. However, express wording relating to section 67 (including the proposal that the court will allow the challenge where the tribunal’s decision was wrong) would provide a firm statutory reversal of the dicta in *Azov Shipping v Baltic* suggesting an entitlement to a “re-hearing”. This simple form of wording would avoid the difficulties of principle in the original Law Commission proposal to restrict the court’s decision under section 67 to one of “review” or “appeal”. It would also avoid the uncertainty created by the wording now proposed. This simpler form of wording would make clear that the court may restrict evidence that would otherwise be admissible on grounds that it would be unfair to allow wider evidence or a re-run. This would guard against the abuses which the amendment is intended to target but maintain the principles underlying a jurisdictional challenge.

### Consultation Question 3

No

Please give your reasons::

Same answer as above, although the alternative approach proposed above would allow rules of court to be made that would provide more detail as to the court’s approach.

### Discrimination

#### Consultation Question 4

Yes

Please give your reasons::

#### Consultation Question 5

Yes

Please give your reasons::

Another way of introducing a principle prohibiting discrimination would be to make clear that discrimination on grounds of protected characteristics does not form part of the fair resolution of disputes. Introducing this as a general principle would be a way of making it apply to every aspect of an arbitration.

#### Consultation Question 6

Please give your answer::

The Act does not need to give particulars of remedies available where discrimination occurs within the context of arbitration since existing Equality Act remedies and Arbitration Act remedies cover most situations. The situations where there is a potential lack of recourse are likely to be rare, and difficult to legislate effectively for (plus arbitrators may have immunity from civil suit as long as their conduct is within the discharge of their functions and not in bad faith). Having a sanction of removal/ setting aside (together with ordinary worker remedies) will be a sufficient sanction in most cases.

a) As mentioned in the consultation where there is discrimination within arbitration that impeaches the process or the award (e.g. the tribunal and parties unjustifiably refuse to make any adjustment as requested or required for a witness regarding a protected characteristic) then that would be unlawful and the parties would have various Arbitration Act remedies, mainly the remedy of removal of the tribunal, or setting aside the award, under ss24 and 68. Remedies by way of such court application will allow publicity of the allegations of discrimination (if not the underlying details of the arbitration) which is a sanction in itself.

b) If the parties are not seeking to impeach the award or process then the most likely remedy (in the above example the witness is the most likely claimant) would be in the County Court against the person employing or contracting with the witness. The availability of a public hearing (and the fact that the seat of the arbitration is in London so service should be feasible) provides some potential sanction, even if unlikely.

c) It would be exceptional for a non-party participant to seek a personal remedy against the arbitrator (not least as there would generally be immunity) but this remedy could apply if the arbitrator acted in bad faith.

d) Where a service provider or employer or contractor discriminates then there are existing remedies under the Equality Act, most typically in the County Court or an employment tribunal.

e) There are also strong existing remedies available under professional regulations (for example a solicitor that allocates only male associates to a case for a Middle East client or a professionally qualified arbitrator who bullies counsel).

Having a principle that discrimination is prohibited within arbitration would make those remedies more effective since it would send a firm message that arbitration is not exempt, and that confidentiality will not trump an allegation of discrimination. In my experience of situations where there has been discriminatory conduct (including harassment), confidentiality is a strong disincentive for making any complaint in the context of arbitration. A legislative statement prohibiting discrimination would make it easier to challenge discrimination and reduce complacency regarding discrimination (including unconscious bias) in this context.

Most arbitral associations are probably already covered by the Equality Act (see Part 7 on associations) and discrimination relating to membership of these associations (and selection within their panels) could already give rise to a civil law remedy (usually starting in the County Court). A provision making

clear that discrimination is not permitted within the context of arbitration is unlikely to result in an alarming uptick of cases against these institutions (such cases are unprecedented to my knowledge). It will, however, make clear to these arbitral associations that they are not exempt from discrimination legislation and express legal prohibitions will not only give rise to remedies for individuals but may encourage measures to reduce unjustified discrimination, in the same way that other sectors responded to the Equality Act.

Submitted to Law Commission second consultation on the Arbitration Act 1996  
Submitted on 2023-05-19 11:07:03

## About you

What is your name?

Name:  
Georgia Antonopoulou

What is the name of your organisation?

Enter the name of your organisation:  
Birmingham Law School, University of Birmingham

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.

Tell us why you regard the information as confidential:

## Proper law

Consultation Question 1

Not Answered

Please give your reasons::

## Section 67

Consultation Question 2

Not Answered

Please give your reasons::

Consultation Question 3

Not Answered

Please give your reasons::

## Discrimination

Consultation Question 4

Yes

Please give your reasons::

Such a provision upholds neutrality and is in line with institutional arbitration rules.

#### Consultation Question 5

No

Please give your reasons::

Generally prohibiting discrimination in the context of arbitration would create room for challenges, and thereby delay proceedings, increase costs and undermine the finality of arbitration proceedings.

In case Consultation Question 5 refers to the discriminatory conduct of arbitrators (not parties) an explicit prohibition of discrimination would overly regulate arbitrators' conduct and would therefore run counter to the relevant provisions on arbitrators' immunity.

#### Consultation Question 6

Please give your answer::

## Response ID ANON-44ZW-8XF4-3

Submitted to Law Commission second consultation on the Arbitration Act 1996  
Submitted on 2023-05-20 08:58:33

### About you

What is your name?

Name:  
Peter Ashford

What is the name of your organisation?

Enter the name of your organisation:

I am the director of Peter Ashford Ltd (through which I take arbitration appointments) and a consultant to Fox Williams LLP (through which I undertake 'client' or counsel work).

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]  
[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.

Tell us why you regard the information as confidential:

N/A

### Proper law

Consultation Question 1

Yes

Please give your reasons::

The law of the seat is both logical and coherent. My pre-Enka article (available at [https://peterashford.com/Portals/0/PDF/The%20Proper%20Law%20of%20the%20Arbitration%20Agreement\\_1.pdf?ver=vu7Y6z7B1tfG8ixCabgpeg%3d%3d](https://peterashford.com/Portals/0/PDF/The%20Proper%20Law%20of%20the%20Arbitration%20Agreement_1.pdf?ver=vu7Y6z7B1tfG8ixCabgpeg%3d%3d)) I respectfully suggest makes good that point.

Enka leaves the law in an unsatisfactory state for the reasons you give. It is also unsatisfactory in its reasoning for the reasons I give in another article (available at <https://www.foxwilliams.com/wp-content/uploads/2020/10/The-Proper-law-of-the-Arbitration-Agreement-%E2%80%93-the-Final-Word-from-the-Supreme-Court.pdf>).

### Section 67

Consultation Question 2

Yes

Please give your reasons::

A complete rehearing is expensive, time consuming and contrary to the aim of arbitration as set out in s1(a) of the Act. The aim is a 'fair' resolution - not perfection - and without unnecessary delay or expense. That should include not only the arbitration itself but also any allied court process.

### Consultation Question 3

Yes

Please give your reasons::

That seems sensible.

### Discrimination

### Consultation Question 4

Yes

Please give your reasons::

In the words of *Yiacoub v Queen* [2014] UKPC 22, [12] "That and similar formulations use the word 'biased', which in other contexts has far more pejorative connotations, to mean an absence of demonstrated independence or impartiality. Lord Hope had made this clear in the contemporary case of *Millar v Dickson* [2002] 1 WLR 1615 at paragraph 63: "...the appearance of independence and impartiality is just as important as the question whether these qualities exist in fact. Justice must not only be done, it must be seen to be done. The function of the Convention right is not only to secure that the tribunal is free from any actual personal bias or prejudice. It requires this matter to be viewed objectively. The aim is to exclude any legitimate doubt as to the tribunal's independence and impartiality."

Nationality can give rise to legitimate doubts (especially in e.g. a case against a state) and hence deeming the justification of what might otherwise be a discriminatory act is appropriate.

### Consultation Question 5

Other

Please give your reasons::

Yes in the direct discrimination but may arbitration agreements might have a requirement that the arbitrator have 20 years experience of be a KC or similar. Such requirements are, I suggest legitimate matters that the parties might wish to have. But they might indirectly discriminate as the senior end of the legal profession is predominantly white males.

It would be unfortunate if there were challenges on this basis.

### Consultation Question 6

Please give your answer::

Difficult. Pre-award (i.e. at the appointment stage) where little cost has been incurred removal of the arbitrator is appropriate. But post-award if the appointed arbitrator has made a fair award following a fair process it would seem overkill to set aside an award.

Submitted to Law Commission second consultation on the Arbitration Act 1996  
Submitted on 2023-04-27 16:26:54

## About you

What is your name?

Name:  
David Barnett

What is the name of your organisation?

Enter the name of your organisation:  
David Barnett

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.

Tell us why you regard the information as confidential:

## Proper law

Consultation Question 1

Yes

Please give your reasons::

## Section 67

Consultation Question 2

Yes

Please give your reasons::

Consultation Question 3

Yes

Please give your reasons::

## Discrimination

Consultation Question 4

No

Please give your reasons::

No do not agree. Parties should be free to choose the arbitrator whom they believe has the most experience of the type of disputer that is to be determined. In complex technical matters there may only be a small pool of arbitrators with the requisite skills and knowledge. Indeed, what is the nationality of the party?

Many companies operate through tax havens, so is the nationality, the tax haven , on the face of it yes, or the controlling mind behind the tax haven?

Consultation Question 5

No

Please give your reasons::

Just think this too hard to prove

Consultation Question 6

Please give your answer::

If it can be proved then the Act already has sufficient tools to deal with such an issue.



## Response to Review of the Arbitration Act 1996 – Second Consultation

### Consultation Question 1.

**5.1 We provisionally propose that a new rule be included in the Arbitration Act 1996 to the effect that the law of the arbitration agreement is the law of the seat, unless the parties expressly agree otherwise in the arbitration agreement itself. Do you agree?**

Yes. We support this proposal for the reasons set out in the second consultation. In our previous response we proposed this amendment 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*).

Without this amendment, parties may be surprised to find they have chosen England & Wales as the safe seat of a foreign law governed contract, and then find themselves facing arguments about the arbitrability of their dispute or the severability of the arbitration agreement under the foreign law, which undermines the predictability of the arbitration regime they thought they were choosing.

### Consultation Question 2.

**5.2 We provisionally propose the following approach to a challenge under section 67 of the Arbitration Act 1996.**

**Where an objection has been made to the tribunal that it lacks jurisdiction, and the tribunal has ruled on its jurisdiction, then in any subsequent challenge under section 67 by a party who has participated in the arbitral proceedings:**

- (1) the court will not entertain any new grounds of objection, or any new evidence, unless even with reasonable diligence the grounds could not have been advanced or the evidence submitted before the tribunal;**
- (2) evidence will not be reheard, save exceptionally in the interests of justice;**
- (3) the court will allow the challenge where the decision of the tribunal on its jurisdiction was wrong.**

**Do you agree?**

We would agree with the above proposal subject to the following caveats:

Abu Dhabi • Amsterdam • Beijing • Bratislava • Brussels • Budapest • Casablanca • Copenhagen • Dubai • Dublin • Dusseldorf • Frankfurt • The Hague • Hamburg • Helsinki • Hong Kong • London • Luxembourg • Lyon • Madrid • Milan • Munich • Paris • Prague • Rome • San Francisco • Shanghai • Shenzhen • Singapore • Stockholm • Sydney • Warsaw

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The wording of the rule should be amended to make it clear that in order to bring a challenge under s.67 the party should not simply have participated in the arbitral proceedings but also the proceedings before the tribunal objecting to its jurisdiction. We consider that this would give due deference to the tribunal's award and prevent the application under s.67 becoming a full rehearing with new arguments and new evidence save in the circumstances listed in paragraphs (1), (2) and (3) of the revised section.

### **Consultation Question 3.**

**5.3 We provisionally propose that the Arbitration Act 1996 be amended to confer the power to make rules of court to implement the proposals in CQ2 above. Do you agree?**

Yes. We agree that this proposal should be implemented via rules of the court.

### **Consultation Question 4.**

**5.4 We provisionally propose that it should be deemed justified to require an arbitrator to have a nationality different from that of the arbitral parties. Do you agree?**

Yes, we agree that it should always be deemed justified to require an arbitrator to have a nationality different from that of the arbitral parties. This proposal will assist the appearance of impartiality, but we are also of the view that parties should have the freedom to agree otherwise.

### **Consultation Question 5.**

**5.5 Do you think that discrimination should be generally prohibited in the context of arbitration?**

### **Consultation Question 6.**

**5.6 What do you think the remedies should be where discrimination occurs in the context of arbitration?**

Our answer to question 5 must necessarily be caveated by our concerns in relation to question 6.

We think it is important that discrimination should be unacceptable in all contexts, including arbitration, however we have some concerns regarding the remedies which should be available where it occurs in the arbitration context. We are apprehensive that a specific remedy could be weaponised by a disgruntled party to delay enforcement and bring unmeritorious challenges to an award or its enforcement whether in this jurisdiction or in others. We are also not sure what the position might be if there was a general prohibition but both parties were complicit in the discrimination? Does this mean the award would be unenforceable?

It is our view that the remedies already available under the Arbitration Act 1996 should be sufficient to address any discrimination which may occur which produces a material impact on the process and/or the outcome, including those set out at paragraph 4.65 of the Consultation

paper; removal of the arbitrator under section 24 of the Arbitration Act 1996, and challenge to an award for serious irregularity under section 68. As a result, our answer to question 5 is 'no'.



**Bird & Bird LLP**  
**22 May 2023**

## Response ID ANON-44ZW-8XFR-1

Submitted to Law Commission second consultation on the Arbitration Act 1996  
Submitted on 2023-05-22 14:54:31

### About you

What is your name?

Name:  
Ronald A. Brand

What is the name of your organisation?

Enter the name of your organisation:  
  
Center for International Legal Education  
University of Pittsburgh School of Law

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?

██████  
██████████████████

What is your telephone number?

██████████████████  
██████████████████

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Tell us why you regard the information as confidential:

### Proper law

#### Consultation Question 1

No

Please give your reasons::

Response to the Consultation on the  
Law Commission Review of the Arbitration Act 1996  
Second Consultation Paper

#### Consultation Question 1

The matters raised in the Second Consultation Paper and the proposed amendment to the Arbitration Act 1996 affect international arbitration broadly and thus are of interest beyond England and Wales. This Response is submitted with deep respect for the work of the Law Commission and as an acknowledgement of the global impact the proposed amendment would have.

1. The Second Consultation Paper ("Paper") uses "Proper law of the arbitration agreement" as the title for its second chapter, in which it provisionally proposes a new rule for the Arbitration Act 1996.

2. Para 2.6 states the provisional proposal as follows:

We provisionally propose that a new rule be included in the Arbitration Act 1996 to the effect that the law of the arbitration agreement is the law of the seat, unless the parties expressly agree otherwise in the arbitration agreement itself.

3. Neither the provisional proposal nor the Chapter 2 discussion defines what is meant by "the law of the arbitration agreement." This creates a problem both in understanding the discussion and discerning the scope and effect of the proposed change to the Arbitration Act 1996.

4. There are places in which the Paper seems to differentiate issues, suggesting that some should not be subject to the new rule, but without any clarity in this respect.

5. Paras 2.30 and 2.31, in discussing the *Kabab-Ji* and *The Newcastle Express* cases, acknowledge the difference between the law applicable to the determination of the validity of an arbitration agreement (*Kabab-Ji*) and the law applicable to determining the existence of an arbitration agreement (*The Newcastle Express*). But nowhere else is this important distinction mentioned, and paras 2.74-2.78 (“Provisional proposal”) do not indicate in any way whether the provisional proposal on the “law applicable to the arbitration agreement” will be the law applicable to existence, validity, or both. Moreover, the discussion and provisional proposal fail to indicate whether the provisional proposal applies to other important issues that arise in challenges to arbitration agreements.

6. The Paper fails to consider the full practical implications of its provisional proposal, largely because it fails to consider just why and how issues of applicable law are raised in litigation (a fact that indicates the importance of courts to the matter - despite the Paper’s discussion of, and focus on, the doctrine of separability). This results in a failure fully to consider those who will most need to use any statutory rule that will result.

7. The Paper discusses the rule as a litigation and arbitration matter (although it does not clearly distinguish just when the issue should properly be before a court and when it should properly be before an arbitral tribunal). Thus, it considers the rule only from a dispute resolution perspective.

8. The proposed rule will affect more than decisions made in dispute resolution. For every arbitration (and for every case filed in a court) involving challenges to an arbitration agreement (or a choice of court agreement), there are many more contracts drafted with choice of forum agreements (both arbitration agreements and choice of court agreements). Thus, there will be many more transaction planning lawyers (and businesspersons) than there will be dispute resolution lawyers who will need to be aware of and respond to any new statutory rule. The Paper appears not to consider the impact of any new rule on guiding contract drafting - which arguably will be the most important effect of the rule. Good contract drafting can and should prevent the question of the law applicable to the arbitration agreement from arising in the first place by providing explicit choice of the law applicable to the arbitration agreement for all purposes.

9. In order to examine just how the rule will affect both contract drafters and dispute resolution lawyers (and courts and arbitral tribunals), it is necessary to consider just when the question being addressed arises.

10. In dispute resolution, the question of the law applicable to an arbitration agreement arises when one party challenges a putative arbitration agreement. That challenge can fall into one or more of five categories:

a) a challenge to the existence of the agreement (usually lack of effective consent);

b) a challenge to the formal validity of the agreement;

c) a challenge to the substantive validity of the agreement;

d) a challenge to the scope of the agreement; and

e) a challenge to the exclusivity of the agreement (more often a question with choice of court agreements than with arbitration agreements).

11. Each of these five issues necessarily requires a governing law; and it is important to note that some are matters of substantive contract law while others are matters of arbitration law. This is perhaps most clearly demonstrated by the New York Convention Article II formal validity requirements, which often are restated in some manner in the arbitration law of many jurisdictions (e.g., the UNCITRAL Model Law on International Commercial Arbitration, Article 7). Formal validity clearly is a matter of arbitration law, and it is difficult to find any arbitral tribunal, court, or commentator that would challenge that position. Formal validity is thus a contract law issue that is routinely dealt with in the law of arbitration.

12. Three of the other four bases for challenging an arbitration agreement are matters of substantive contract law. Rules for determining whether a contract has been formed (i.e., whether the parties have effectively consented to the agreement) are not found in arbitration law statutes; they are found in substantive contract law. Moreover, this is a question that generally precedes the other four questions - unless and until there exists an “agreement” to arbitrate, there can be no arbitration. This is a question that generally will avoid the doctrine of separability (which most often arises in questions of validity, not in questions of consent or contract formation - although Arbitration Act 1996, Section 7 applies to doctrine to questions of existence as well as validity) and produce similar results for challenges to both the matrix contract and the arbitration agreement. Rules for determining scope and exclusivity of an arbitration agreement (or a choice of court agreement) are also generally found in substantive contract law. These are questions of the intent of the parties, and it is substantive contract law that provides the rules for determining the intent of the parties (see, e.g., Articles 8 and 9 of the United Nations Convention on Contracts for the International Sale of Goods).

13. Legal rules on substantive validity of an arbitration agreement are more difficult to categorize. They may be found in substantive contract law. They may also be found in more specialized statutes dealing with issues like franchises, distributorships, or consumer protection. The Arbitration Act 1996, in Sections 89-91, does contain specific rules for “Consumer arbitration agreements,” and thus provides some coverage of substantive invalidity (to a limited extent).

14. Some questions can possibly be considered to be either issues of consent (existence of the contract) or substantive validity. These may include questions of capacity and authority to enter contracts. Regardless of which category they are determined to occupy, however, they normally are governed by substantive law applicable to contractual relations, and not by the law of arbitration.

15. The threshold question for the Law Commission's provisional proposal is: if the source of the law on which a challenge to an arbitration agreement may be based is not arbitration law, then does it make sense to include an autonomous rule of applicable law for determining that source in an arbitration statute? But answering this question does not conclude the exercise. If one assumes that a rule on the law applicable to an arbitration agreement should be found in an arbitration law statute, it must be further determined (i) what that rule should be, and (ii) whether it should apply to all four of the bases for challenge to an arbitration agreement other than formal validity.

16. A good argument can be made that rules of applicable law on contract law issues should be found in the substantive contract law of a jurisdiction, and not in procedural rules for arbitration. This argument is strengthened when one considers that it is logical to have similar applicable law rules for both arbitration agreements and choice of court agreements – particularly on questions of contract formation. Both are choice of forum agreements, and contract drafters – particularly in international contracts – must consider both what forum is most appropriate (courts or arbitration) and what law governs that choice.

17. When party autonomy is respected, including in choice of law, then the rules on party autonomy should be the same whether the parties choose arbitration or litigation. The question is one of contract drafting, not one of the procedure applied in litigation or arbitration. Thus, putting the rule of applicable law in the law determining the procedure to only one type of dispute resolution unnecessarily disconnects and complicates the contract drafting process.

18. It is uniformly recognized that the choice of the seat of arbitration in an arbitration agreement is not merely a choice of location at which the arbitral proceedings will necessarily take place. The choice of the seat of arbitration is a choice of law. It determines the procedural law applicable to the arbitration process. That law may govern both the procedure within the arbitration process and the judicial functions which are available in order to assist with and otherwise govern the arbitration. One of the benefits of arbitration is the ability to separate choice of seat (arbitration procedure) from choice of substantive law, and most major international arbitral institutions (and parties to arbitration) are comfortable with those choices not leading to the law of the same jurisdiction.

19. The choice of the seat of arbitration is not a choice of substantive contract law; that is a matter for the substantive choice of law provision in the matrix contract. Arbitration law – the law chosen in designating the “seat” of arbitration – normally does not include rules of substantive contract law, including rules of contract formation. It may seem rather odd, then, to assume that the choice of procedural arbitration law should somehow control what substantive contract formation law should govern whether parties have agreed to arbitration, and whether that choice is substantively valid. Moreover, until the substantive contract law can be applied to determine that an agreement to arbitrate exists, there is no arbitration procedure to be governed by the choice of seat (or by the law implicated by that choice). Simply stated, consent is the fundamental requirement for arbitration; without consent, there can be no arbitration. Rules of applicable law, regardless of their source cannot change that basic understanding – to do so would infringe access to justice by taking away basic choice from parties.

20. It is submitted that the Law Commission should carefully consider what it means by “the law of the arbitration agreement” before proposing any change to the Arbitration Act 1996 that might affect issues beyond arbitration procedure (i.e., those issues generally governed by the Act). This consideration should include the scope of possible issues that might be raised in a challenge to an arbitration agreement and whether those issues have any real relationship to arbitration procedure (the normal focus of the Act) or are better left to substantive contract law and the related rules of private international law.

Ronald A. Brand  
Chancellor Mark A. Nordenberg University Professor  
Academic Director, Center for International Legal Education  
University of Pittsburgh School of Law

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

## Section 67

### Consultation Question 2

Not Answered

Please give your reasons::

### Consultation Question 3

Not Answered

Please give your reasons::

## Discrimination

### Consultation Question 4

Not Answered

Please give your reasons::

Consultation Question 5

Not Answered

Please give your reasons::

Consultation Question 6

Please give your answer::

**Formal Response to the Law Commission’s**

**Second 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 Second 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. As with our response to the Law Commission’s First Consultation Paper (“our First Response”), which this Second Response should be read with, it does not engage with each and every question raised by the Consultation Paper. It focuses instead on the three related issues of jurisdiction and applicable law which were addressed in our First Response, and which are addressed in the Second Consultation Paper as follows:
  - (a) Challenges to the jurisdiction under Section 67 of the Arbitration Act (“the Act”): Chapter 3 of the Second Consultation Paper and Consultation Questions 2 and 3;
  
  - (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: Chapter 3 of the Second Consultation Paper, proposal formulated in our First Response declined in paragraphs 3.66 to 3.85 the Second Consultation Paper;



- (c) Applicable law of the arbitration agreement: Chapter 2 of the Second Consultation Paper and Consultation Question 1.

3. Each of these issues is considered in turn below. In summary:

- (a) We respectfully disagree with the Law Commission’s revised proposal in relation to s. 67. We agree with the Law Commission’s amended conclusion that section 67 itself need not be revised, but do not agree that rules of court should be introduced to frame how challenges under section 67 should be heard by the courts. The proposed constraints are unwarranted as a matter of principle, and the courts already possess (and are using) the case management powers to ensure a fair and efficient hearing of s. 67 applications in a manner tailored to each case. The proposed rules of court would replace that necessary flexibility with a straightjacket and are in fact more likely to create delay and extra costs than to avert the same. Our answers to Consultation Questions 2 and 3 are accordingly No and No.
- (b) As we explained in Part C of our First Response, it is our respectful view,<sup>1</sup> that the issues of potential waste of time and costs identified by the Law Commission would best be addressed by rationalising the avenues of challenge to jurisdiction under the Act in the following way: (i) amending sections 9(1) and 9(4) to align the position in England and Wales with the position of all leading Model Law jurisdictions (including Singapore, Hong Kong and Canada) and avoid a full determination of issues of jurisdiction when a party seeks a stay of Court proceedings in favour of arbitration; (ii) abrogating section 32; (iii) abrogating section 72(1). The Law Commission considers these issues at paragraphs 3.66 to 3.85 of the Second Consultation Paper and does not adopt those proposals. In our respectful submission, this would be a huge opportunity missed to make England and Wales a more competitive seat for international arbitration, and to send a powerful signal to international users (especially when coupled with the important proposed reform on applicable law now made by the Law Commission) that our jurisdiction’s disposition is firmly *in favorem arbitrii*.

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<sup>1</sup> As noted in our First Response, this part of our Response does not include Lord Mance.

- (c) We are grateful to the Law Commission for having listened to the representations made formally in our First Response (and informally before that in other fora), and by numerous other consultees, regarding the law applicable to the arbitration agreement. For the reasons set out in our First Response, our answer to Consultation Question 1 is Yes.

**(B) Consultation Questions 2 and 3: Challenging Jurisdiction under Section 67**

- 4. In relation to s.67, the Law Commission’s revised proposal, as set out in Chapter 3 of the Second Consultation Paper is that there should be no reform of s.67 itself, but that certain “rules of court” should be amended to make it clear that, in cases where the party seeking to challenge an award under s.67 has already participated in the underlying arbitration, and objected to the jurisdiction of the tribunal, then:
  - (a) The court should allow the challenge if the decision of the tribunal was wrong.
  - (b) The court should not entertain any new grounds of objection, or any new evidence, unless with reasonable diligence the grounds could not have been advanced, or the evidence submitted, before the tribunal.
  - (c) Evidence should not be reheard, save exceptionally in the interests of justice.
- 5. In contrast, in cases where the party bringing the s.67 challenge has not participated in the arbitration, no equivalent reform is proposed. Similarly, no equivalent reform is proposed in cases where a party seeks to resist the enforcement of a foreign award under s.103 on jurisdictional grounds. In such cases, the Law Commission appears to consider that the court should adopt a different procedure, or at least, that it should not be subject to any additional restrictions in deciding how best to conduct the case.
- 6. We welcome the Law Commission’s recognition that it is unnecessary to propose any statutory reform of s.67 itself. We agree with this, for the reasons we set out at §§7-27 of our First Response.

7. We also welcome the Law Commission’s decision not to pursue its original proposal, that a challenge under s.67 should proceed as an appeal, rather than a re-hearing.
8. The Law Commission’s revised proposal, which would involve a more limited reform of certain “rules of court”, is along similar lines to the alternative proposal which we suggested at §24 of our First Response, namely that, instead of amending s.67 itself, CPR r. 62.10 or Practice Direction 62 could be amended 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”.*

9. However, as we also explained, our view was that even that limited reform was unnecessary. That remains our view. We are not persuaded that the revised reform proposals in the Second Consultation Paper are necessary. Indeed, our view is that such reform (which would introduce rigid constraints on the courts’ management powers absent from the wording we had proposed and which is quoted immediately above) would be undesirable, and that it would have a number of adverse and unintended consequences. In particular, the proposals would introduce unnecessary rigidity in an area where the courts need – and have already been exercising – flexibility to best manage each case on its own facts using their existing case management powers.
10. We have eight main concerns about the Law Commission’s revised proposals, which we identify below.
11. **First**, one of the main drivers of the Law Commission’s reform proposals appears to be a concern that factual or expert evidence should not be re-heard. We do not agree that the Law Commission should be concerned about this. As a matter of principle, if factual or expert evidence is relevant to the question of whether the tribunal had jurisdiction (for example, where there is a dispute as to whether there was a valid arbitration agreement or not), then there is, in our view, nothing wrong or objectionable about such evidence being reheard. If the Tribunal erred in its understanding or evaluation of the evidence,

then the court should be in a position to consider the evidence afresh, in order to decide whether the Tribunal had jurisdiction.

12. **Second**, the Law Commission's attempts to distinguish *Dallah* and *Azov Shipping* are, with respect, unpersuasive. It should be acknowledged that the Law Commission's reform proposals (even in their revised form) would represent departure from (or at least a curtailment of) the approach that was endorsed in both of these (seminal) decisions:

(a) The Law Commission says that *Dallah* can be distinguished because it was a decision under s.103 (not s.67). That is, with respect, a technical distinction with no substantive merit, and which fails to engage either with the substance of the Supreme Court's reasoning, or the subsequent impact of the decision on the development of the law. Although, technically speaking, *Dallah* was a decision under s.103, the Supreme Court nevertheless addressed the standard of review under s.67. Thus:<sup>2</sup>

(i) Lord Mance said at [26] that: "*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*".

(ii) Lord Collins said at [96] that: "*The consistent practice of the courts in England has been that they will examine or re-examine for themselves the jurisdiction of arbitrators. This can arise in a variety of contexts, including a challenge to the tribunal's jurisdiction under section 67 of the 1996 Act*". Lord Collins also went on to say that the decision of Rix J in *Azov Shipping*

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<sup>2</sup> In the Court of Appeal in *Dallah*, Moore-Bick LJ had likewise noted at [21] that "*the courts have consistently held that proceedings challenging the jurisdiction of an arbitral tribunal under section 67 of the Arbitration Act 1996 involve a full rehearing of the issues and not merely a review of the arbitrators' own decision*".

(which was concerned with the appropriate standard of review under s.67, not s.103) was “*plainly right*” (as to which, see further below).

- (b) The fact that the above observations were made in the context of a s.103 application (and so, strictly speaking, *obiter* regarding the position on s. 67 applications) does not detract from their importance in the present context, the point at issue here being precisely whether there is a valid basis for distinguishing between the regimes under s.103 and s.67. What is more, subsequent decisions (both in England and in other jurisdictions<sup>3</sup>) have, unsurprisingly, taken *Dallah* as determining the standard of review to be applied under both s.103 and s.67. This was recognised (most recently) by the Court of Appeal in *Newcastle Express*, where Males LJ said at [14] that:

“... a section 67 challenge involves a rehearing (and not merely a review) of the issue of jurisdiction, so that the court must decide that issue for itself. It is not confined to a review of the arbitrators' reasoning, but effectively starts again. That approach was confirmed by the Supreme Court in *Dallah* ...”

- (c) The Law Commission has itself acknowledged that this is the case at §3.123 of the Second Consultation Paper, where it is (rightly) accepted that “*there is a weight of first instance decisions which cite Dallah to hold that section 67 involves a full rehearing*”.<sup>4</sup> As noted above, this in fact extends to the Court of Appeal.
- (d) In any event, as we explain at §16 below, there is no justification, as a matter of principle, for adopting a different approach as between the standard of review or procedure to be adopted for challenges to jurisdiction under s.67 and s.103.
- (e) There are no grounds at all for distinguishing *Azov Shipping*, given that that was a decision under s.67 (not s.103). Indeed, in that case, Rix LJ made precisely the

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<sup>3</sup> See our First Response at §11.

<sup>4</sup> Citing *Kyrgyz Republic v Stand Energy Corp* [2017] EWHC 2539 (Comm), [2018] 1 Lloyd's Rep 66; *GPF GP Sarl v Republic of Poland* [2018] EWHC 409 (Comm), [2018] 1 Lloyd's Rep 410; *LLC Agronefteprodukt v Ameropa AG* [2021] EWHC 3474 (Comm), [2022] 1 Lloyd's Rep 388 at [30]; and *Gol Linhas Aereas SA v Matlinpatterson Global Opportunities Partners (Cayman) II LP* [2022] UKPC 21, [2022] 2 Lloyd's Rep 169 at [42].

point identified at §11 above, that “*where ... there are substantial issues of fact as to whether a party has made the relevant agreement in the first place, then it seems to me that, even if there has already been a full hearing before the arbitrators, the court, upon challenge under s.67, should not be placed in a worse position than the arbitrator for the purposes of that challenge*”.

13. **Third**, in other cases (for example, where there is a pure issue of law as to the interpretation of the arbitration agreement), the Court can already use its case management powers to limit or prevent a rehearing of witness evidence if such evidence would be unnecessary or irrelevant (as will often be the case): see e.g. *X v Y* [2015] EWHC 395 (Comm) at [66], where Teare J held that it did not follow from the Supreme Court’s decision in *Dallah* that “... a party is entitled to a full judicial determination of an issue if determination of that issue is not necessary to enable the court to determine the outcome of the jurisdictional challenge”.<sup>5</sup> The importance of the court’s existing case management powers was also recognised by the Court of Appeal in *Newcastle Express*, where Males LJ said at [16] that “[e]ven under the present law ... the court is not without case management powers in such a case to control the evidence adduced on any section 67 challenge”. In our view, the Law Commission’s suggestion that the court’s existing case management powers are insufficient is therefore misplaced. In practice, it is simply not the case that “if a challenge under section is a full rehearing, then the parties [will] be free to introduce whatever evidence they wish”. As the Law Commission itself recognises at §3.44 of the Second Consultation Paper, “the background trend since *Azov* suggests a reduced willingness by the courts to allow oral evidence in a challenge under section 67”. The evidence that will be permitted by the court will depend on the nature of the jurisdictional challenge that is being pursued.
14. **Fourth**, there is no need for any reform to prevent a party who has participated in the arbitration from raising new arguments or grounds of objection which it did not advance before the tribunal. That concern is already addressed by s.73(1)(a). Indeed, the Law Commission appears to recognise that this is the case at §3.104 of the Second Consultation Paper: “Under section 73, a failure to object promptly that the tribunal

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<sup>5</sup> Incidentally, Teare J also accepted in the same paragraph that the decision in *Dallah* established that “when a party issues a jurisdictional challenge pursuant to section 67 of the Arbitration Act 1996 that party is “entitled to a full judicial determination on evidence of an issue of jurisdiction before the English court””.

*lacks jurisdiction means a loss of the right to object later ... This should preclude an applicant under section 67 from raising before the court new grounds of objection which it could have raised before the tribunal*". There is no basis for introducing a separate bar specific to s. 67 challenges (and in subsidiary rules of court, albeit introduced through a proposed gateway in primary legislation, i.e. the Act itself<sup>6</sup>), especially given the Law Commission's recognition that a body of case law has already developed under section 73.<sup>7</sup>

15. **Fifth**, in our view, the Law Commission has failed to take sufficient account of the position in other jurisdictions (which it dismisses in two short paragraphs at §§3.116-3.117 of the Second Consultation Paper). We addressed this issue at §11 of our First Response (by reference to the position in Canada, Australia, Singapore, Hong Kong and France). By contrast, the only example which the Law Commission has given of a jurisdiction which has taken a different approach is Switzerland (see at §3.117 of the Second Consultation Paper). Even then, the Law Commission notes that the Swiss approach has been the subject of criticism, and that it was criticised by some of the other consultees. We agree that the position adopted elsewhere "*cannot be decisive*" of the approach that should be taken in this jurisdiction. However, we would respectfully suggest that, where a proposed reform would (clearly) be out-of-step with the approach adopted in the majority of other major arbitral seats, particularly cogent reasons are required in order to justify such a radical departure. We do not consider that such reasons have been identified to date, and the Law Commission itself acknowledges that this is not the case, noting (at §3.125) that:

*[It has] heard how reform could negatively impact the market, alternatively how no reform could negatively impact the market. Factually, it has not been possible for us to verify which prediction is more likely.*

16. The Law Commission nonetheless concludes (in the same paragraph) that "*[a]s a matter of principle, we think that our proposals are merited*". In addition to the comments we

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<sup>6</sup> See §3.126 of the Second Consultation Paper.

<sup>7</sup> See §3.114 of the Second Consultation Paper.

have made above as to the proposed reform not in fact being justified as a matter of principle, we respectfully submit that this is not a sound basis for altering this important area of the law. As noted in our First Response,<sup>8</sup> 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, and the law should not be changed to depart from the consensus reached in competing seats without a clear evidential basis.

17. **Sixth**, the Law Commission has made it clear that it does not intend to propose any equivalent reform to the standard of review under s.103. This means that the court will have to apply a different set of procedural rules (and in all likelihood a different standard of review) depending on whether it is dealing with (i) a challenge to jurisdiction under s.67; or (ii) the enforcement of a foreign award under s.103. In our view, there is no justification, as matter of principle, for such a difference of approach.
18. **Seventh and importantly**, the proposed reform is likely to have adverse and unintended consequences. In particular, if the proposed reform is implemented, then respondents could well be advised to keep their powder dry and to either (i) wait until after the tribunal has delivered its merits award to challenge jurisdiction under s.67; or (ii) to do so at the enforcement stage under s.103. If they do so, this is likely to result in additional delay and costs being incurred because the tribunal will have to go through the entire arbitration process before the respondent pursues its jurisdiction objections. In other words, the proposed reforms could well end up compounding the very problems which the Law Commission states that it is seeking to address through its reforms (i.e. delay and expense).
19. **Eighth**, we do not think it is necessary to amend the Arbitration Act to confer a power to make rules of court in relation (only) to the procedure to be adopted for jurisdiction challenges under s.67 (which is, as we understand it, what the Law Commission is currently proposing: see §3.129 of the Second Consultation Paper and Consultation Question 3). It is not clear to us from what is said in the Second Consultation Paper who the Law Commission is suggesting should make the proposed rules, or, indeed, which

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<sup>8</sup> At §4.



“rules of court” are being referred to. If what is being envisaged is an amendment to CPR r. 62.10 or Practice Direction 62, then this should be a matter for the Civil Procedure Rules Committee. There is no need for any statutory amendment to the Arbitration Act in order to confer the relevant rule-making power.

### **(C) Rationalisation of the avenues of challenge to jurisdiction under the Act**

20. As we explained in Part C of our First Response, it is our respectful view,<sup>9</sup> that the issues of potential waste of time and costs identified by the Law Commission would best be addressed by rationalising the avenues of challenge to jurisdiction under the Act in the following way:
- (a) Amending sections 9(1) and 9(4) to align the position in England and Wales with the position of all leading Model Law jurisdictions (including Singapore, Hong Kong and Canada) and avoid a full determination of issues of jurisdiction when a party seeks a stay of Court proceedings in favour of arbitration.
  - (b) Abrogating section 32.
  - (c) Abrogating section 72(1).
21. The Law Commission considers these issues at paragraphs 3.66 to 3.85 of the Second Consultation Paper and does not adopt those proposals. In our respectful submission, this would be a huge opportunity missed to make England and Wales a more competitive seat for international arbitration, and to send a powerful signal to international users (especially when coupled with the important proposed reform on applicable law now made by the Law Commission and addressed in Part (D) below) that our jurisdiction’s disposition is firmly *in favorem arbitrii*.
22. Starting with section 9, the Law Commission recognises in terms that “*the position under section 9 is admittedly complex*”.<sup>10</sup> It would justify that complexity on the basis that “*it represents an interaction between the wording of section 9 itself, and use of the court’s*

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<sup>9</sup> As noted in our First Response, this part of our Response does not include Lord Mance.

<sup>10</sup> See §3.79 of the Second Consultation Paper.

*inherent jurisdiction. It is an example of an attempt to find a compromise between, on the one hand, the court considering the question of jurisdiction for itself, and up front, and on the other hand, ceding the first decision to the tribunal*".<sup>11</sup> It notes that "[c]urrently ... when a party seeks a stay, the weight of case law indicates that they must prove, on the balance of probabilities, that there is an applicable arbitration agreement" and expresses the view that "it is open to the case law to move in [the] direction" of avoiding a full determination of the issue of jurisdiction on stay applications.<sup>12</sup> We respectfully disagree that these are valid reasons for avoiding taking legislative action, for the following reasons:

- (a) It is hardly consonant with England's status as a leading jurisdiction favouring arbitration to have a default rule pursuant to which a party opposing arbitration need only start Court proceedings to be assured that such objections to arbitral jurisdiction as it cares to make will be decided by the Court and not to by the arbitral tribunal. Such a default rule is directly inimical to the principle of competence competence, which is enshrined in s. 30 of the Act as rightly noted by the Law Commission. Under English law, as it currently stands, the rule is not that the arbitral tribunal will usually have priority, it is the converse. This is reflective of an attitude of mistrust towards arbitration which does not have its place in today's arbitration world, and which England should firmly abandon.
  
- (b) This is all the more striking given the Law Commission's open recognition, in the context of its own proposal with respect to s. 67 that "*a measure of deference to the tribunal can be justified. After all, arbitrators must be impartial. They must adopt procedures to resolve the dispute fairly. If not, an arbitrator can be removed by the court. And a serious irregularity which causes substantial injustice permits an award to be challenged. If instead, an impartial arbitrator, after a fair process, makes factual findings, that might well be a reason for deference. All the more so, perhaps, if the arbitrator is chosen by the parties or has conspicuous expertise.*"<sup>13</sup> The English Courts currently shows no such deference when considering stay applications, and there is – once again – no basis for that anti-arbitration bias in a

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<sup>11</sup> *Id.*

<sup>12</sup> See §3.76 of the Second Consultation Paper.

<sup>13</sup> See §3.61 of the Second Consultation Paper.

modern international arbitration law. It is reflective of times past, and the present reform exercise should be used to consign it to history.

- (c) This is evident from the very careful, detailed comparative law analysis by the Singapore Court of Appeal in *Tomolugen Holdings*<sup>14</sup> which notes that England is out of step with all other leading jurisdictions on this point. We noted this in our First Response and attached this important case thereto. It is disappointing to note that it is not referred to in the Second Consultation Paper, suggesting that it may not have received the attention it deserves. We would respectfully invite the Commission to consider this authority from one of the current leading State courts on international arbitration afresh. It makes the case for reform cogently; but the Singaporean jurisdiction may not mind if England does not listen and thereby maintains the competitive advantage Singapore (and other leading jurisdictions) currently enjoy in that respect.
- (d) Nor is it an answer to say, with respect, that “*it is open to the case law to move in that direction*”. *Al Naimi* has now stood for 23 years, and as explained in our First Response – the language of sections 9(1) and 9(4) is such that there will be no change without legislative reform.
- (e) Nor is it an answer to say, with respect, that the Court retains case management flexibility to allow the issue to go first to the arbitral tribunal and that the current position constitutes “*a compromise between, on the one hand, the court considering the question of jurisdiction for itself, and up front, and on the other hand, ceding the first decision to the tribunal*”. As rightly noted by the Law Commission in its summary analysis of the principle of competence competence,<sup>15</sup> the need to find the right balance between those two possibilities is inherent in the nature of competence competence – the search being for a solution which will be the most efficient in terms of time and costs. The current position under English law is that there is no clarity as to who goes first (court or tribunal), but that this issue falls to be argued out in every single case by reference to case management considerations. The Law Commission refers to the (largely aligned) solutions

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<sup>14</sup> [2015] SGCA 57 at para. 25-70.

<sup>15</sup> See §3.54 to 3.65 of the Second Consultation Paper.

proposed by Prof. Gaillard and Prof. Park,<sup>16</sup> but does not consider the extent to which they should be adopted in England and Wales.

- (f) The proposal contained in our First Response is aligned with the pragmatic solutions advocated by both of those very experienced arbitration practitioners. It would provide for a clear rule of priority in favour of arbitral tribunals while leaving clear and simple mechanisms for the court to go first when faced with a manifestly inapplicable or void arbitration clause.
23. As for section 32, the section is not being used in practice. It sends the wrong signal (in again suggesting a mistrust of arbitral tribunals determining their own jurisdiction) and should be abrogated.
24. Section 72(1) should similarly be abrogated, for the same reason of perception; and because it does in fact hand a trump card to parties who would avoid determination of issues of jurisdiction by the arbitral tribunal to seize the court of the same. The Law Commission states in response that “*a party cannot be forced to participate in an arbitration whose jurisdiction they refute, as has been acknowledged by the DAC, and by the Supreme Court in Dallah. So repealing section 72(1) would deny such a party any chance of challenging the arbitral proceedings prior to an award*”.<sup>17</sup> This is, with respect, misconceived:
- (a) Repealing section 72(1) would not have that effect. We have not proposed repealing section 72(2) which expressly preserves the right of a non-participating party to challenge an arbitral award under sections 67 and 68 of the Act.
- (b) What section 72(1) does is entirely different: it gives the right to the recalcitrant party to force a situation where the court will go first (or at the very least in parallel to the arbitral tribunal) on issues of jurisdiction. As with section 9(4), this is directly inimical to the principle of competence competence, undermines the very rationale which the Law Commission states it wishes to promote in the current reform (viz. allow a degree of deference to arbitral tribunals), and there is no place for such a

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<sup>16</sup> See §3.60 and 3.62 of the Second Consultation Paper.

<sup>17</sup> See §3.83 of the Second Consultation Paper.

rule in a modern international arbitration jurisdiction. We note, again, that England and Wales are alone in having such a rule.

25. The Law Commission’s overall conclusion on sections 9, 32 and 72 is that “*sections 9, 32 and 72 individually and cumulatively strike a balance which is defensible, and which does not call for legislative reform*”. We respectfully disagree, both as to substance (for the reasons set out above) and as to the approach adopted. The question ought not to be whether the current legislative scheme is “defensible” but whether it is promoting England and Wales as a jurisdiction of choice in international arbitration. For the reasons set out above, it is not. It is overly complex. It provides no certainty, with multiple options available to the parties to fight it out on the preliminary question of who decides issues of jurisdiction – court or tribunal. Its default bias is against the determination of issues of jurisdiction by arbitral tribunals, with the result that not much more than lip service is ultimately paid to the principle of competence competence enshrined in section 30. It is a hangover from another age, when courts would view arbitral tribunals with mistrust. It should be amended and a clear signal sent to international users that the proclivity in England and Wales – as in all other leading arbitral jurisdictions – is pro-arbitration, with clear and simple rules put in place to regulate the interaction between the courts and arbitral tribunals on issues of jurisdiction.
26. The Law Commission takes the view that arbitral tribunals should be accorded a degree of deference. We respectfully agree. As Lord Wilberforce noted during the parliamentary debates on the Arbitration Bill 27 years ago, arbitral tribunals are not and ought not to be treated as poor relations of the courts.<sup>18</sup> That deference should be recognised by doing away with the mistrust for tribunals apparent from the manner in which the courts have interpreted section 9 of the Act and from sections 32 and (more importantly) 72(1) of the Act. The simplified regime we propose, allied to the already existing flexible regime for a *de novo* review of jurisdiction by the courts, will align England and Wales with competing arbitral seats such as Singapore, and send a powerful message to the market that England and Wales are on a par with those jurisdictions and able to act to correct their legal framework where required.

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<sup>18</sup> See Lord Wilberforce, Hansard, col 778, 18 January 1996, cited by Lord Steyn in *Lesotho Highlands* [2005] UKHL 43 at [18].

### **(D) Consultation Question 1: Law Applicable to the Arbitration Agreement**

27. We are grateful to the Law Commission for having listened to the representations made formally in our First Response (and informally before that in other fora), and by numerous other consultees, regarding the law applicable to the arbitration agreement. For the reasons set out in our First Response, our answer to Consultation Question 1 is Yes. We further respectfully agree with the entirety of §2.77 of the Consultation Paper which we reproduce here for ease of reference:

*This proposed new rule, applying the law of the seat, has the virtues of simplicity and certainty. The law governing the matrix agreement would be irrelevant. Any doubt over which law governs the matrix agreement would not infect the question of which law governs the arbitration agreement. The new rule would apply whether the arbitration was seated in England and Wales, or elsewhere. It would apply whether the seat was chosen by the parties, or otherwise designated. Where the arbitration is seated in England and Wales, the new rule would avoid the problems which arise from *Enka v Chubb* unless the parties explicitly agreed otherwise, in which case the parties must be taken as facing the consequences with eyes wide open. The ability to agree otherwise preserves party autonomy.*

28. In particular, we are of the view (as already expressed in our First Response<sup>19</sup>) that the application of the rule to all arbitrations (and not simply to arbitrations seated in England and Wales) is important. It will have the benefit of clarity and avoid further arguments as to the law applicable to the arbitration agreement in enforcement proceedings. It will put paid to any argument that the proposed rule in favour of the law of the seat is a parochial one in favour of English law. It will resolve problems such as those which arose in *Kabab-ji v Kout Food*<sup>20</sup>, 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.

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<sup>19</sup> At para. 66.

<sup>20</sup> [2021] UKSC 48.

29. We think it is significant and reassuring that the Supreme Court Justices who delivered the leading judgment in *Enka* have expressed support for possible reform in this area.<sup>21</sup>
30. We only add some responses to the possible arguments against the proposed reform summarised in §2.63 to 2.73 of the Second Consultation Paper. We note that those include the views of one consultee, and note in that respect that there were in fact numerous debates on this proposed reform in the lead up to the deadline for response to the First Consultation Paper, including at the Brick Court Conference referred to in our First Response. It is accordingly significant that, of all the submissions received by the Commission on this point, only one sought to argue against the proposed reform. Taking the points made in opposition in turn:
- (a) The first argument noted is that “*parties may have an expectation that the law they have chosen to govern their contract governs all the terms of their contract, including the arbitration clause*”. That is not our (cumulative) experience. Parties who choose a neutral and safe arbitral seat expect to receive the protection of the law of that arbitral seat for their arbitration, including on all the key issues addressed in the Second Consultation Paper (separability, arbitrability, scope and confidentiality).
- (b) The second argument noted is that “*if the law of the matrix contract and the law of the arbitration clause do not align, that can create problems. For example, it might lead to someone being held to be a party to the arbitration clause, under its governing law, and yet not a party to the matrix contract, under its different governing law*”. We do not see how that poses any difficulties, conceptually or in practice. The whole point of separability, for instance, is that a tribunal may determine – with jurisdiction – that the parties did not conclude a valid agreement. Similarly, there is no conceptual or practical difficulty with a tribunal concluding, with jurisdiction, that a party to the arbitration agreement is not a party to the matrix contract. Conversely, where a party is found not to be a party to the arbitration agreement, that will be the end of the analysis. There will be no jurisdiction to determine the subsequent question of whether that party could be a party to the

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<sup>21</sup> See §2.73 of the Second Consultation Paper.

matrix contract. We do not think this is a serious argument against the proposed reform.

- (c) The third argument noted is that “*to the extent that the matrix contract is governed by foreign law, evidence of that foreign law will be before the tribunal or court anyway. The fact that the arbitration clause might need evidence of that same foreign law will therefore add little extra cost or delay*”. This appears to be based on a misunderstanding. The issues of law which will arise in relation to the arbitration agreement will be issues of arbitration law (e.g. regarding separability, arbitrability, scope, confidentiality). There will rarely be overlap with issues arising in relation to the matrix contract. We again do not think this is a serious argument against the proposed reform.
- (d) The fourth argument noted is that “*the supposed complexities around section 4(5) are surmountable. To the extent that any inquiry at all will need to be made, as to whether any given section of the Act is disapplied by the choice of foreign law, guidance has already been provided by the Supreme Court in Enka v Chubb*”. We respectfully disagree for the reasons set out in para. 56-59 of our First Response. The comments made by the Supreme court in *Enka* on that point were *obiter*, suffer (with respect) from internal tensions and potential misconceptions which would have to be argued out in the courts, and only address a handful of the numerous problematic statutory provisions. What is more, the procedure v substance complexities created by *Enka*’s interpretation of section 4(5) are only one part of the larger picture addressed in our First Response and now addressed by the Law Commission in the Second Consultation Paper.
- (e) As for the further argument noted by the Law Commission on public policy limitations, we respectfully agree with the answer provided by the Law Commission in §§2.70 to 2.72 of the Second Consultation Paper. We would add that, in our experience, parties choose a seat in a safe jurisdiction – such as England and Wales – precisely because of the potential for the misuse of foreign public policy as a tool to invalidate the parties’ agreement to arbitrate. We give an example of this in para. 53(a) and footnotes 36 and 37 of our First Response. In other words (i) English law does indeed have limitations to the parties’ freedom to arbitrate; and (ii) those limitations are more likely to operate fairly and neutrally in



any given case than the limitations imposed by another State which may itself have an interest (direct or indirect) in the dispute. And as noted by the Law Commission that State's limitations will remain in place when it comes to enforcement of any award in its jurisdiction.

London, 26 May 2023

**Annex 1**

**Further members of Brick Court Chambers referred in paragraph 1**

Sir Gerald Barling

Craig Morrison KC

Sir Paul Walker

Georgina Petrova

Simon Thorley KC

Jonathan Scott

Richard Lord KC

Charlotte Thomas

Fionn Pilbrow KC

Sarah Bousfield

Klaus Reichert SC

Submitted to Law Commission second consultation on the Arbitration Act 1996  
Submitted on 2023-04-18 11:59:22

## About you

What is your name?

Name:  
Professor Adrian Briggs

What is the name of your organisation?

Enter the name of your organisation:  
University of Oxford

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?

██████  
██

What is your 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.

Tell us why you regard the information as confidential:

## Proper law

Consultation Question 1

No

Please give your reasons::

1. I have just come across the Second Consultation Paper on the review of the Arbitration Act, and I write in response to the general invitation to comment. I hope this comment will be helpful even though it is hostile to the first proposal contained therein. I make no comment on an other proposal in the Paper.

2. If I have understood it correctly, the proposal is that parties to a commercial contract that includes an arbitration agreement may expect, intend, or choose the law to govern that arbitration agreement, but their expectation, intention or choice will be ineffective or disregarded unless it is expressed, and is written within in the clause or sub-clause which states the contract's reference to arbitration. In the absence of such express and precisely-positioned statement of the law they intend to govern the arbitration agreement, the arbitration agreement will be governed by the law of the seat, wherever that is, even if – so far as I can see – the parties to the contract have not specified the seat of the arbitration and clearly intended something different.

The proposal is misguided as a matter of common law principle

3. I am surprised that such a rule, or any part of it, might be proposed as a rule of English arbitration law. It strikes me as profoundly, fundamentally wrong. It appears to mean that the demonstrable intention or expectation of the parties will be ignored unless it is phrased in a particular form and placed in a particular part of the contract. I can think of no rule of the English conflict of laws which is, or which has ever been, formulated in so restrictive a way. It is far more restrictive than the rule which was until recently found in the Brussels I Regulation for choices of court; if there has ever been anything so restrictive in limiting the scope of the parties' intention as to applicable law I cannot, for the life of me, think where it may be found.

4. I can see no conceivable justification for such a sweeping contradiction of party intention, especially when this is done in the context of commercial

relations. I can see no reason to suppose that this can be justified by reference to what the contracting parties knew or should be taken to have known when they made their contract. That the parties may not have appreciated the full consequences of their intention may be a fact, but the proposition that if they had realised this they might have made a different agreement has been, for centuries, irrelevant to the proper interpretation of what they did agree and bind themselves to.

5. I can see no reason why the generosity of the Rome I Regulation in giving effect to party autonomy should not be mirrored in the rules of English private international law where these, rather than the Rome I Regulation, identify the law governing a contractual agreement. It was the pride of English law that it gave effect to party autonomy in all those cases in which this could be discerned; the idea that we now, left to our own devices, treat this critical element of commercial law with far less respect than was done in the Rome I Regulation is, surely, intolerable, shaming even.

6. If this proposal is pursued to enactment, the effect will be that only those contract-drafters with up-to-the-minute expertise in English arbitration law will be able to construct a contract which fully gives effect to their wishes. It must be obvious, especially when one thinks of the numbers of contracts drafted by those who are not fully-updated English arbitration lawyers, that commercial parties will frequently have their expectations, intentions, or even expressed choices as to governing law defeated by this unprecedented and (for many, surely) inexplicable legal rule. I have never seen the like of it; I cannot think of a single thing to be said in its favour (and I say that after having read and re-read the relevant section of the Second Consultation Paper).

7. The history of English law is that statutory rules which require the particular formality of writing for the contract or term to be legally effective generate endless litigation, escape devices, rectifications, equitable contradictions-which-pretend-they-are-not-contradictions, and so forth, to avoid the harsh consequences of the statutory rule. This case will be even worse, for the proposal appears to be that the term on which the parties were ad idem be written in a particular place in the contract. The arguments that this proposed rule is a rule of undue harshness, which may be shown to defeat the parties' common intention, will begin the moment it is enacted. It is a deeply depressing thought.

8. My suspicion is that, to the extent that they focus on it, parties who draft or cause to be drafted a contract which will also contain a dispute resolution provision for arbitration, or (as does happen) for arbitration or judicial resolution, it not always being clear how these fit together, would expect that their disputes will be resolved by the mechanism identified, or if there should be any problem, by looking to the law that governs the contract as a whole (which will be the law that governs the vast majority of the obligations undertaken) and proceeding from there. It strikes me as implausible that they will have had in their minds the possibility that the contract is governed by two different laws. And not only that. If the contract does contain one of these 'mixed measures' dispute resolution clauses, the idea that the scope, &c, of the jurisdiction clause should be governed by the law that governs the contract (see Dicey, Morris & Collins, para 12-069), while the arbitration provision is governed by a different law, is very hard to explain or defend.

The issues affected, including arbitrability

9. The Consultation Paper appears to take it for granted that the law that governs the arbitration agreement determines whether the agreement is arbitrable. It proceeds on the basis that if the law governing the main contract, from which the dispute arises, renders the dispute not arbitrable, this is objectionable in principle, and fundamentally objectionable if the law of the seat (including its conflicts rules ? I cannot see where this choice is faced up to) would take a different view.

10. The approach to arbitrability is undoubtedly difficult. Those who drafted the UNCITRAL Model Law steered clear of it. On 6 January 2023, the Singapore Court of Appeal wrestled with the problems which arise when the law governing the substantive contract denies that a particular kind of dispute imposes on the parties to it a duty to go to arbitration: see *Anupam Mittal v Westbridge Ventures* [2023] SGCA 1, an analysis whose reasoning would, surely, have contributed something of value to the reasoning in the Consultation Paper. Some might even say that if arbitrability is the basis for the exclusion of the jurisdiction of the court seised with court proceedings, it is proper for that court to apply its own law (including its conflicts rules) that issue. It is, as I said, and as the Singapore Court of Appeal seems to confirm, an issue on which several laws have evident relevance. To my mind, the correct answer appears to be that the law of the contract from and out of which the dispute arises must determine the extent of the parties' freedom to agree to take those disputes to a court or tribunal as the case may be; and the law that governs the court or tribunal, as the case may be, must determine whether that body has power under the law that creates its authority to determine the matter.

11. That appears to me to be the right approach to arbitrability. But there are other questions which will be answered by the law that governs the arbitration agreement (albeit that the answers given may determine whether there is a dispute which the parties agreed to take to arbitration). The Consultation Paper gives the impression that the most important thing is to ensure that, whenever there is a dispute which may be brought before a London tribunal, every preliminary question should be governed by English (domestic) law, which will point to the conclusion that there is no sustainable objection to the arbitration. Surely we can do better than that.

The unexpressed seat

12. It gets worse. In those cases in which the parties have not expressed their intentions in the only clause in which they are allowed to do so with effect, the law governing the arbitration will be the law of the seat. In those contracts – and they do not appear to be few – in which the parties do not specify the seat, which is almost always for sensible reasons, there will be no mechanism by which to identify the law that governs the arbitration agreement. I cannot begin to understand why this would improve the law in general, or the Arbitration Act in particular. It does no such thing: it creates an impossibility or a nonsense, the solution to the problems of which is nowhere to be seen.

13. The law laid down by the Supreme Court in *Chubb v Enka*, and then in *Kabab-Ji*, is capable of clear expression in statutory form, albeit that it would be improved by elimination of the 'may be displaced' provisions which you set out at para 2.14. I cannot really see where the Consultation Paper finds substantive fault with it: the fact that it emerged from the Supreme Court in slightly untidy form is hardly a reason to fling the baby out with the bathwater. For what little it is worth, I would have preferred the law to be as stated by the minority in *Chubb v Enka*, but the balance of opinion is clearly in favour of the majority, whose instinct for what accords with the legitimate expectations of commercial parties, and with common law principle, is unlikely to be bettered by anyone else, and certainly not by me.

14. I therefore express my opposition to the proposal to alter the law in the way proposed by the First Question in the Second Consultation Paper, and

hope that there is no need to repeat or amplify my reasons for doing so. If any material alteration to the 1996 Act is to be made, it should take the form of a strict codification, varied only by being tidied up, of the relevant law established by the Supreme Court, and left at that. What is currently proposed is, I am afraid to say, wholly unacceptable.

## Section 67

### Consultation Question 2

Other

Please give your reasons::

No comment to make.

### Consultation Question 3

Other

Please give your reasons::

No comment to make.

## Discrimination

### Consultation Question 4

Yes

Please give your reasons::

No justification for interference on such trivial grounds.

### Consultation Question 5

No

Please give your reasons::

In a private matter the parties should be able to choose whom they want as arbitrators. It is nobody's business but theirs.

### Consultation Question 6

Please give your answer::

None.

## Response ID ANON-44ZW-8XFT-3

Submitted to Law Commission second consultation on the Arbitration Act 1996  
Submitted on 2023-05-16 16:14:27

### About you

What is your name?

Name:

[REDACTED]

What is the name of your organisation?

Enter the name of your organisation:

British Coffee 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::

[REDACTED]

What is your email address?

[REDACTED]  
[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.

Tell us why you regard the information as confidential:

### Proper law

Consultation Question 1

Yes

Please give your reasons::

We believe this would give a greater level of clarity and certainty for the parties. From a coffee specific point of view it would fit well with our existing Arbitration rules and the European Contract for Coffee which incorporates an Arbitration clause.

### Section 67

Consultation Question 2

Yes

Please give your reasons::

Given the need for a tribunal to determine whether it has jurisdiction before proceeding the proposed approach seems completely appropriate and fair on all parties.

Consultation Question 3

Yes

Please give your reasons::

No further comment

## Discrimination

### Consultation Question 4

No

Please give your reasons::

BCA, in common with a number of other commodity associations who operate arbitration chambers, rely on a relatively small pool of arbitrators who have both the necessary commercial background and the arbitral training. These arbitrators are drawn, largely from individuals working for businesses within both the UK and EU27. Given the international nature of the coffee market however, the nationality of the arbitrators themselves could be wider and is not a consideration when they are being considered for addition to the pool of arbitrators.

Given that nationality does not address where individual arbitrators are based and work and, the relatively small pool of specialist arbitrators (having a knowledge of the coffee industry), this proposal would raise significant concerns as to the appointment of arbitrators who are able to demonstrate the necessary level of independence from the parties.

The unintended consequence would therefore be to force the repeated appointment of some arbitrators over others.

We believe this position would be widely shared, for similar reasons, across the commodity sectors and therefore BCA would therefore not support this proposal whilst being supportive of the need to prohibit discrimination in arbitration more generally.

### Consultation Question 5

Yes

Please give your reasons::

As stated above we are supportive of the need to prohibit discrimination generally in arbitration and would see the proposal under CQ4 as being at odds with this general view.

### Consultation Question 6

Please give your answer::

We feel there will be other respondents better placed to consider appropriate remedies.

## **Law Commission's Review of the Arbitration Act 1996**

### **Second Consultation Paper**

#### **Response on behalf of the British Insurance Law Association**

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 Second Consultation Paper on the Arbitration Act 1996. The response has been circulated to the BILA Committee, but the answers given should not be taken as representing the views of the BILA membership as a whole. BILA is an independent non-profit making organisation. Its membership is drawn from insurers, insurance brokers and other intermediaries, academic lawyers, solicitors and barristers. We wish to acknowledge the considerable contribution made by Dr Miriam Goldby, Professor at Queen Mary College London and Alison Green, Vice President of BILA, to this response and the previous response to the Law Commission's Review of the Arbitration Act.

#### **CP Question 1**

We provisionally propose that a new rule be included in the Arbitration Act 1996 to the effect that the law of the arbitration agreement is the law of the seat, unless the parties expressly agree otherwise in the arbitration agreement itself. Do you agree?

Paragraph 2.78

#### ***Answer***

*We appreciate the difficulties highlighted in the Consultation Paper so far as the decision of the Supreme Court in Enka v Chubb is concerned.*

*We were divided in our views on this particular question.*

#### ***The Law Commission's proposal***

*There was support for the Law Commission's proposal that the arbitration agreement is the law of the seat unless the parties expressly agree otherwise in the arbitration agreement itself. That approach gives primacy to the parties' express choice of the proper law and gives a clear default position to the law of the seat. It also serves to reduce time and costs spent on arguing and litigating about what is the proper law of the contract.*

*There was also support for an alternative approach as set out below:*

#### ***The alternative approach***

*In many commercial contracts (especially routine contracts), the arbitration agreement is nothing more than a standard form clause embedded in the matrix contract, and is not specifically negotiated. In such situations, we question whether there are sufficient grounds for arguing that the validity of one (often boilerplate) clause in a contract is to be decided on the basis of a different law from that governing the validity of the rest of the contract.*

*In these circumstances, we consider that there are considerable difficulties with treating the arbitration agreement as a separate agreement, unless e.g., despite questions as to the validity of the matrix contract, the parties submit to arbitration anyway, without challenging*



*the tribunal's jurisdiction, in which case, even if the matrix contract is invalid, they can be said to confirm the validity of the (separable) arbitration agreement after the dispute arose. In which case, the validity of the rest of the contract is immaterial.*

*In our view the preferred analysis would be as follows:*

- 1. Separable does not mean the same as separate. Where the arbitration agreement is just a clause in an underlying contract (e.g., insurance policy or charterparty), the parties are not likely to have intended it to have a different applicable law unless explicitly stated. Indeed, factors vitiating the underlying agreement (e.g., duress, misrepresentation) would equally vitiate the arbitration agreement and should not be analysed under a different law when applied to the arbitration agreement. It should be remembered that arbitration clauses are often boilerplate clauses and not negotiated.*
- 2. Where the arbitration agreement was entered into ad hoc, after the dispute arose, the law with the closest connection to it is likely to be that of the seat, so in this scenario the law applicable to the arbitration agreement should be that of the seat.*

*In short, we are in agreement with the approach in Enka v Chubb as it is more nuanced and captures the large variety of different circumstances in which arbitration agreements are entered into. Having a blanket rule that applies to all arbitration agreements would not allow sufficient leeway for taking decisions in accordance with the parties' legitimate expectations. We suggest that this kind of flexibility should on occasion take precedence over greater clarity.*

## **CP Question 2**

We provisionally propose the following approach to a challenge under section 67 of the Arbitration Act 1996.

Where an objection has been made to the tribunal that it lacks jurisdiction, and the tribunal has ruled on its jurisdiction, then in any subsequent challenge under section 67 by a party who has participated in the arbitral proceedings:

- (1) the court will not entertain any new grounds of objection, or any new evidence, unless even with reasonable diligence the grounds could not have been advanced or the evidence submitted before the tribunal;
- (2) evidence will not be reheard, save exceptionally in the interests of justice;
- (3) the court will allow the challenge where the decision of the tribunal on its jurisdiction was wrong.

Do you agree?

Paragraph 3.128

*Answer*

*We appreciate that there are strongly held views on whether a challenge under s.67 should take the form of a rehearing or not. We agree with the Law Commission's approach as a reasonable "third way". As stated in our response to the Law Commission's First Consultation on s.67, we were concerned that treating a challenge under s.67 as an appeal rather than a rehearing would mean that the court would consider itself bound by the tribunal's findings of fact. We favour a position where the court will consider only new*

*grounds of objection and new evidence in circumstances where with reasonable diligence the grounds could not have been advanced or the evidence could not have been submitted before the tribunal. We would favour previous oral evidence not being reheard if that is in the interests of justice but would delete the word “exceptionally” as previous evidence may need to be reheard in the light of new evidence that a court is prepared to consider. The focus of the court should be on whether the decision of the tribunal on its jurisdiction was wrong.*

### **CP Question 3**

We provisionally propose that the Arbitration Act 1996 be amended to confer the power to make rules of court to implement the proposals in CQ2 above. Do you agree?

Paragraph 3.129

Answer

*Yes. Implementing this change by way of rules of court seems a sensible way forward.*

### **CP Question 4**

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

Paragraph 4.62

Answer

*We agree. It should be deemed justified and not discriminatory to require an arbitrator to have a nationality different from that of the arbitral parties. We appreciate that this accords with common practice internationally.*

### **CP Question 5**

Do you think that discrimination should be generally prohibited in the context of arbitration?

Paragraph 4.64

Answer

*We are against discrimination in the context of arbitration but we are still not entirely convinced that this should be dealt with expressly by the Arbitration Act. 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. We note that the Law Commission wishes to retain the proposal that a term be unenforceable which requires an arbitrator to be appointed by reference to a protected characteristic, unless that requirement can be justified as a proportionate means of achieving a legitimate end. We see some merit in this formulation but anticipate that this may lead to disputes about what may be regarded as a “proportionate means of achieving a legitimate end”.*

### **CP Question 6**

What do you think the remedies should be where discrimination occurs in the context of arbitration?  
Paragraph 4.68

#### **Answer**

*We consider that if an arbitrator were to act in a discriminatory manner, the present remedies available are sufficient, such as removal of the arbitrator under section 24 of the Arbitration Act 1996 or by way of challenge to an award for serious irregularity under section 68.*

*In terms of selection of arbitrators, we are opposed to there being discrimination, but consider that the formulation of remedies may be unworkable, except perhaps in a context where an arbitral institution is responsible for selecting and appointing arbitrators, in which case a remedy against the institution could be provided for arbitrators who have been discriminated against. However, we would be opposed to providing such remedies by extending the jurisdiction of employment tribunals as we do not consider that would be appropriate in the case of arbitrators: they are not employees and act in a quasi-judicial role.*

*A wider range of remedies (e.g., permitting the arbitral parties to challenge each other's appointments on the basis that they were discriminatory), might lead to a sudden unpredictable number of unmeritorious arguments about discrimination.*

**18 May 2023**

Submitted to Law Commission second consultation on the Arbitration Act 1996

Submitted on 2023-05-22 12:50:42

## 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

[REDACTED]  
[REDACTED]

What is your email address?

[REDACTED]  
[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.

Tell us why you regard the information as confidential:

## Proper law

### Consultation Question 1

Yes

Please give your reasons::

We agree with this proposal. Having a default rule in the Act will promote certainty, whilst allowing for parties to expressly agree otherwise. Certainty in this area is desirable. The principles set out by the Supreme Court in *Enka v Chubb* are not straightforward to apply – the Supreme Court were split on their application (though not on the principle that law of main contract should be given primacy). It should also avoid future *Kout Food* sagas – where English and French courts have reached different decisions on the law applicable to an arbitration agreement.

## Section 67

### Consultation Question 2

Yes

Please give your reasons::

We agree with this proposal. We think that the proposal maintains an appropriate balance between power of tribunal to rule on its own jurisdiction and powers of court. We think that the initial proposal (that section 67 challenges for lack of jurisdiction take the form of an appeal rather than a full rehearing) addressed concerns that a full rehearing means unnecessary delay and costs, and may allow a challenging party a second bite at the cherry after an unsuccessful challenge before the arbitral tribunal. However, the lack of a clear distinction between an “appeal” and a “rehearing” could give rise to confusion. We think that this new focus on particularising the limits of a challenge under section 67 will avoid confusion over semantics and promote certainty. We think that the limits set out in the new proposal strike the right balance between competence – competence and the court’s powers to step in where a tribunal has got it wrong.

### Consultation Question 3

No

Please give your reasons::

We disagree this this proposal. We think that to promote accessibility and certainty (particularly for international parties) the approach to section 67 challenges should be set out in the Act. Whilst UK based practitioners will be familiar with the rules of the court, many non-UK based practitioners are not and this could put them at a disadvantage. We are also concerned about the reference to this being a “softer” type of reform – that may change over time. We think the guiding objectives of reform should be clarity and certainty. If a change is to be made to the approach to section 67 challenges it should be made clear in the wording of the Act.

### Discrimination

#### Consultation Question 4

No

Please give your reasons::

We disagree with this proposal. Provided an arbitrator is impartial his/her nationality should not matter. We think that this proposal will result in increased number of objections to arbitrator appointments and will unduly restrict party choice of arbitrator.

#### Consultation Question 5

No

Please give your reasons::

We disagree with this proposal. We think that this places undue focus on discrimination. It is not clear what is meant by “discrimination in the conduct of the arbitral proceedings” or how an arbitrator may act in a way that is discriminatory. In any event, we feel that any significant issues that may arise in relation to arbitrator conduct could be dealt with under existing provisions in section 24 or section 68 of the Act. We do not think that additional provisions/amendment to the Act is necessary.

#### Consultation Question 6

Please give your answer::

See response to question 5.

A narrow, paved alleyway between brick buildings. In the center, a white building with a balcony and a red door is visible. The balcony has ornate black metal railings. A black street lamp stands in the middle of the alley. The ground is paved with light-colored stones.

# Response to the Law Commission Review of the Arbitration Act 1996 (Second Consultation)

Centre of Construction Law & Dispute Resolution

Published by the Centre of Construction Law & Dispute Resolution, King's College London

Published May 2023

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Available as a PDF on [kcl.ac.uk/construction-law](https://kcl.ac.uk/construction-law)

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## 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 PhD 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 responded to that consultation.<sup>1</sup>

The Law Commission published a second consultation paper in March 2023, with the aim of analysing three specific issues deeper: (i) the proper law of the arbitration agreement, (ii) challenging jurisdiction under section 67 and (iii) discrimination. The CCLDR responds to the second consultation in this paper. To this end, the Centre has again consulted its Taskforce of leading experts in arbitration and construction law who have been closely associated with the Centre and have contributed to the response to the first consultation paper.

## Proper law of the arbitration agreement

### Consultation Question 1.

We provisionally propose that a new rule be included in the Arbitration Act 1996 to the effect that the law of the arbitration agreement is the law of the seat, unless the parties expressly agree otherwise in the arbitration agreement itself. Do you agree?

We agree with the proposal and note that the CCLDR was among the respondents to the first consultation paper that advocated a revision of the law on this point. In our view, *Sulamérica v Enesa*<sup>2</sup> and, more significantly, the subsequent *Enka v Chubb*<sup>3</sup> resulted in an outcome that may reduce the attractiveness of England, Wales and Northern Ireland, and, particularly, London, as a seat for international arbitration. Parties rarely choose the law applicable to the

<sup>1</sup> Renato Nazzini and Aleksander Kalisz, ‘Response to the Law Commission Review of the Arbitration Act 1996’ (*Centre of Construction Law & Dispute Resolution*, 16 December 2022) <<https://www.kcl.ac.uk/construction-law/assets/ccldr-response-to-the-law-commission-review-of-the-arbitration-act-1996.pdf>> accessed 15 April 2023.

<sup>2</sup> *Sulamérica CIA Nacional de Seguros SA and others v Enesa Engenharia SA and others* [2012] EWCA Civ 638.

<sup>3</sup> *Enka Insaat Ve Sanayi A.S. v OOO Insurance Company Chubb* [2020] UKSC 38.

arbitration agreement.<sup>4</sup> The current law begs the question as to why parties who have expressly chosen the seat are presumed to have chosen, as the law applicable to the arbitration agreement, not the law of the seat, which, according to *Sulamérica* and *Enka*, has the closest connection with it, but the law of the underlying contract, which has a weaker relationship with the arbitration agreement.<sup>5</sup>

Decisions in *Sulamérica* and *Enka* provide a paradoxical view. On the one hand, they concur with many earlier decisions<sup>6</sup> that the law with which the arbitration agreement is most closely connected is the law of the seat and not the law of the underlying contract. On the other hand, they presume that, if the parties have chosen the law that governs the underlying contract, this is as an implied choice of law to the arbitration agreement. This is even more striking given the emphatic view expressed by the Court of Appeal and the Supreme Court as to the close connection between the law of the seat and the arbitration agreement. In *Sulamérica*, the Court held:

*No doubt the arbitration agreement has a close and real connection with the contract of which it forms part, but its nature and purpose are very different. In my view an agreement to resolve disputes by arbitration in London, and therefore in accordance with English arbitral law, does not have a close juridical connection with the system of law governing the policy of insurance, whose purpose is unrelated to that of dispute resolution; rather, it has its closest and most real connection with the law of the place where the arbitration is to be held and which will exercise the supporting and supervisory jurisdiction necessary to ensure that the procedure is effective.*

In a similar vein, the Supreme Court in *Enka* said that:

*In the absence of any choice of the law that is to govern the arbitration agreement, it is necessary to fall back on the default rule and identify the system of law with which the arbitration agreement is most closely connected. In accordance with our earlier analysis, this will generally be the law of the seat chosen by the parties (...)*

We argue that, not least for the reasons that the Court of Appeal and the Supreme Court set out above, English law should apply by default the law of the seat to the law of the arbitration agreement, in the absence of party agreement, rather than the law of the underlying contract.

We propose, therefore, that, in the absence of an express selection of law, the amended Arbitration Act 1996 should specify that the law of the seat should be applied to the arbitration agreement. There are many reasons why this change in the law would be beneficial to the attractiveness of England, Wales and Northern Ireland, and London in particular, as a place for arbitrating disputes. These include:

---

<sup>4</sup> Renato Nazzini, 'The problem of the law governing the arbitration clause between national rules and transnational solutions' in Renato Nazzini (ed), *Construction Arbitration and Alternative Dispute Resolution* (Routledge 2022); Renato Nazzini, 'The law governing the arbitration agreement: a transnational solution?' in Renato Nazzini (ed), *Transnational Construction Arbitration: Key Themes in International Construction Arbitration* (Routledge 2018).

<sup>5</sup> Renato Nazzini 'The Law Applicable to the Arbitration Agreement: Towards Transnational Principles' (2016) 65 ICLQ 681-703.

<sup>6</sup> *XL Insurance Ltd v Owens Corning* [2001] 1 All ER (Comm) 530; *C v D* [2008] 1 Lloyd's Rep. 239; *Abuja International Hotels Ltd v Meridien SAS* [2012] EWHC 87 (Comm).

1. **Choosing the law with the closest connection.** Consistently with the approach of the English courts, the law of the seat is the law of the closest connection with the arbitration agreement. Therefore, it is better to have that law applied to the arbitration agreement, rather than the law of the main contract – a law that has a weaker connection with the arbitration agreement.
2. **Harmonisation with the law of the courts in control of the process.** The seat determines the courts that have control over the arbitral process. Therefore, if the law of the arbitration agreement and the *lex arbitri* were the same, this would result in the more efficient outcome of the courts having supervisory jurisdiction over the arbitration applying their own law to the arbitration agreement, unless the parties have agreed otherwise. This is likely to result in more predictable and reliable decisions by a less expensive process. It is logical to presume that this is what commercial parties would intend. Of course, it is perfectly possible for English courts to apply a law different from English law when hearing applications concerning the validity and interpretation of the arbitration agreement. However, this is a less efficient and commercially sound outcome, and it is unlikely that commercial parties would have intended this.
3. **Preserving key features of arbitration.** As mentioned in the CCLDR’s previous response, applying the law of the seat to the arbitration agreement would deprive the parties of some key features of arbitration available under English law but not necessarily under other laws, such as confidentiality or separability. By choosing to arbitrate in London, the parties are likely to have intended the confidentiality and separability provisions of English law to apply to the proceedings. However, if the law of the main contract is not English law, the rules relating to confidentiality, which result from terms implied in the arbitration agreement, and separability, will not be those of English law, but, potentially, those of the law of the underlying contract. The parties may find themselves in an arbitral procedure very different from the one that they intended.
4. **Choosing a neutral law for the arbitration agreement.** Parties typically choose the seat of arbitration for the neutrality of the *lex arbitri*. Therefore, this neutral law should also apply to the arbitration agreement as the arbitration agreement is the contract that governs the dispute resolution process and confers jurisdiction on the tribunal. It is logical that a neutral law, and, therefore, the law of the seat, and not the law of the underlying contract, should apply to matters of process and jurisdiction, in the absence of an agreement to the contrary.<sup>7</sup>

We believe that there are at least two possible inspirations for the wording of the amended Arbitration Act 1996: the Scottish and Swedish approaches. The Arbitration (Scotland) Act 2010 provides the following in section 6:

***Law governing arbitration agreement***

*Where—*

*(a) the parties to an arbitration agreement agree that an arbitration under that agreement is to be seated in Scotland, but*

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<sup>7</sup> Renato Nazzini ‘The Law Applicable to the Arbitration Agreement: Towards Transnational Principles’ (2016) 65 ICLQ 681-703.

*(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.*

The above wording, if adapted *mutatis mutandis* to England, Wales and Northern Ireland, would have the added benefit of unifying the law on the arbitration agreement across the whole of UK, which may provide some more certainty to international parties. However, the section only applies to arbitrations seated in Scotland and not those seated abroad. We agree with the Law Commission that this would pose problems because each time the seat is not in England, Wales or Northern Ireland, *Enka* would still apply, resulting in divergent outcomes depending on where the seat is. Such divergent outcomes would not be justified as the reasons for a rule that provides that, unless the parties expressly agree otherwise, the law governing the arbitration agreement is the law of the seat apply whether the seat is in England, Wales or Northern Ireland or elsewhere.

We also agree with the Law Commission's contention that the wording of the Arbitration (Scotland) Act 2010 poses challenges as it only applies if the parties expressly agree on a seat in the arbitration agreement. For instance, the LCIA Arbitration Rules in Article 16 provide a default London seat for the parties unless they choose one in writing. Such a selection of a seat through the arbitration rules would not be treated as an express choice of seat in the arbitration agreement by the provision. Furthermore, section 3 of the Act provides that the juridical seat of the arbitration is the seat designated: "*(a) by the parties to the arbitration agreement, or (b) by any arbitral or other institution or person vested by the parties with powers in that regard, or (c) by the arbitral tribunal if so authorised by the parties, or determined, in the absence of any such designation, having regard to the parties' agreement and all the relevant circumstances*". Therefore, in all circumstances other than the designation by the parties, again *Enka* would still apply. This would produce inconsistent and illogical outcomes.

The Swedish Arbitration Act 1999 applies the law of the seat regardless of whether the arbitration is seated in Sweden or elsewhere unless the parties agree otherwise:

#### ***Section 48***

*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.*

*The first paragraph shall not apply to the issue of whether a party was authorised to enter into an arbitration agreement or was duly represented.*

In our view, the Swedish approach is preferable. Its application to arbitrations seated outside of England, Wales and Northern Ireland would leave no room to apply the common law principles in *Enka v Chubb*.<sup>8</sup> Since the reasons for selecting the seat are the same regardless of

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<sup>8</sup> Specific statutory conflict rules would, however, continue to apply. Importantly, section 103(2)(b) of the Act, which gives effect to Article V(1)(a) of the New York Convention, provides that recognition or enforcement of an award may be refused if the parties against whom it is invoked proves "*that the arbitration agreement was not*

whether the parties opt for England, Wales and Northern Ireland or any other jurisdiction, there is no reason for English law to treat these situations differently. In fact, it would be complex to do so.<sup>9</sup>

In contrast with the Swedish approach, however, we would qualify how parties can reach an agreement as to the seat. Although there should be no requirement for such an agreement to be made expressly in the arbitration agreement, it should be made in writing and with specific reference to the arbitration agreement. The reason for this caveat is that often, particularly in construction disputes, a contract is constituted by several documents. The main dispute resolution clause may be found, for example, in the general conditions of contract, whereas the law governing the arbitration agreement may be specified in the particular conditions. Would this count as an express choice “in” the dispute resolution clause, as the Law Commission proposes? In our view, insofar as the reference to the arbitration agreement is express and specific and, of course, in writing, the choice of law can be contained in a different clause or document.

## Challenging jurisdiction under section 67

### Consultation Question 2.

We provisionally propose the following approach to a challenge under section 67 of the Arbitration Act 1996.

Where an objection has been made to the tribunal that it lacks jurisdiction, and the tribunal has ruled on its jurisdiction, then in any subsequent challenge under section 67 by a party who has participated in the arbitral proceedings:

- (1) the court will not entertain any new grounds of objection, or any new evidence, unless even with reasonable diligence the grounds could not have been advanced or the evidence submitted before the tribunal;
- (2) evidence will not be reheard, save exceptionally in the interests of justice;
- (3) the court will allow the challenge where the decision of the tribunal on its jurisdiction was wrong.

Do you agree?

We agree to the Law Commission’s clarification as to the new proposed appeal under section 67. We note that the test as to whether the decision of the tribunal was wrong does not necessarily require the court to give deference to the decision of the tribunal and could be construed as a full-merits appeal.

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*valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made”.*

<sup>9</sup> Renato Nazzini ‘The Law Applicable to the Arbitration Agreement: Towards Transnational Principles’ (2016) 65 ICLQ 681-703.

### Consultation Question 3.

We provisionally propose that the Arbitration Act 1996 be amended to confer the power to make rules of court to implement the proposals in CQ2 above. Do you agree?

If the Law Commission takes the above proposals forward, we support codifying the above principles in the Act itself. This is the current approach. The grounds on which the parties may challenge an award and the remedies that a court may grant are set out in the Act. Part 62 of the CPR deals with procedural matters only.

The reason for this approach is important. The Act is intended to be a comprehensive and clear set of rules to be understood by commercial parties, within and outside the United Kingdom. Something so fundamental as appeals on jurisdictional grounds should be clearly and succinctly provided for in the Act not in secondary legislation, which may be less accessible and less readily comprehensible to an international audience.

### Discrimination

The CCLDR opposes all and any forms of discrimination in arbitration and elsewhere. For instance, our research and recommendations on the issue of diversity in UK construction adjudication<sup>10</sup> have led to the establishment of the Women in Adjudication network as well as the Equal Representation in Adjudication Pledge under the auspices of The Adjudication Society.<sup>11</sup> However, we believe that, when legislating in relation to dispute resolution procedures such as arbitration, a main feature of which is that the parties may choose, directly or indirectly, the arbitrators, care should be exercised in order to avoid unintended consequences.

### Consultation Question 4.

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

We agree. Most leading arbitration rules already provide that the nationality of the arbitrator should be different to that of the parties. For instance, the LCIA Arbitration Rules 2020 provide perhaps the strongest principle against arbitrators having the same nationality as the parties in Article 6.1:

*Upon request of the Registrar, the parties shall each inform the Registrar and all other parties of their nationality. 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.*

<sup>10</sup> Professor Renato Nazzini and Aleksander Kalisz, '2022 Construction Adjudication in the United Kingdom: Tracing trends and guiding reform' (Centre of Construction Law & Dispute Resolution 2022) <<https://www.kcl.ac.uk/construction-law/assets/2022-construction-adjudication-in-the-united-kingdom-tracing-trends-and-guiding-reform-feb23.pdf>> accessed 16 May 2023.

<sup>11</sup> See: <https://www.adjudication.org/diversity/diversity-in-adjudication-initiative>.

The 2018 DIS Arbitration Rules contain a similar provision in relation to sole arbitrator tribunals and three-member tribunals in Articles 11 and 12.3 respectively:

*If the arbitral tribunal is comprised of a sole arbitrator, the parties may jointly nominate the sole arbitrator. If the parties do not agree upon a sole arbitrator within a time limit fixed by the DIS, the Appointing Committee of the DIS (the “Appointing Committee”) shall select and appoint the sole arbitrator pursuant to Article 13.2. In such case, the sole arbitrator shall be of a nationality different from that of any party, unless all parties are of the same nationality or have agreed otherwise.*

(...)

*If the co-arbitrators do not nominate the President within the time limit provided in Article 12.2, the Appointing Committee shall select and appoint the President pursuant to Article 13.2. In such case, the President shall be of a nationality different from that of any party, unless all parties are of the same nationality or have agreed otherwise.*

ICC Arbitration Rules 2021 provide more flexibility on the issue in Article 13.5:

*Where the Court is to appoint the sole arbitrator or the president of the arbitral tribunal, such sole arbitrator or president of the arbitral tribunal shall be of a nationality other than those of the parties. However, in suitable circumstances and provided that none of the parties objects within the time limit fixed by the Secretariat, the sole arbitrator or the president of the arbitral tribunal may be chosen from a country of which any of the parties is a national.*

Similarly, the SCC Arbitration Rules 2023 state in Article 17(6):

*If the parties are of different nationalities, the sole arbitrator or the chairperson of the Arbitral Tribunal shall be of a different nationality than the parties, unless the parties have agreed otherwise, or the Board otherwise deems it appropriate.*

Article 6(7) of the UNCITRAL Arbitration Rules 2013 provides that appointing authority shall:

*[H]ave regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and shall take into account the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties.*

We note that some arbitration rules contain no wording at all on this point, including SIAC, VIAC, CIETAC and the Swiss arbitration rules.

If any provision against discrimination based on protected characteristics is introduced in the Act, we believe it is imperative to deem justified to require an arbitrator to have a nationality different from that of the parties, unless both parties have the same nationality.

#### **Consultation Question 5.**

Do you think that discrimination should be generally prohibited in the context of arbitration?



### **Consultation Question 6.**

What do you think the remedies should be where discrimination occurs in the context of arbitration?

We believe that any form of discrimination should be fought against with a view of eliminating it. We note, however, that our views on the questions asked by the Law Commission depend on what solution the Law Commission precisely envisages and, in particular, how it proposes to amend the Act.

It is important that, if legislation is passed to prohibit discrimination in the context of arbitration generally, such legislation should, as a minimum:

1. Be clear and clearly comprehensible to commercial parties, within and, importantly, outside the United Kingdom, as to what is and what is not permissible. Any cross-references to other pieces of legislation, such as the Equality Act 2010, would be unhelpful and substantially defeat the purpose of the Act, which is that of being a clear and comprehensible piece of legislation which provides certainty and predictability.
2. Ensure that it cannot be used to undermine arbitration agreements and challenge awards, whether in England, Wales and Northern Ireland and elsewhere, for example at the enforcement stage, based on all sorts of arguments that can be easily concocted as to purported discriminatory elements in the arbitration procedure or discriminatory conduct by any of the parties, arbitrators or institutions involved in the process.
3. Ensure that England, Wales and Northern Ireland, and, particularly, London, continue to be attractive arbitration seats. The answer to this is not, with respect to the Law Commission, that they may become unattractive only to parties who wish to discriminate. Even parties who are committed to non-discrimination may find the prospect of unpredictable new rules, protracted satellite litigation and unquantifiable risks as to the validity and enforceability of the award not worth taking, however laudable the objective pursued may be.
4. Ensure that parties are permitted to continue to choose the best arbitrators, counsel, and experts suited for their case on merits and without risking undermining the validity and enforceability of the award.

As regards remedies, as the Law Commission rightly points out, there are already remedies for discriminatory conduct or elements in the procedure or award. For example, if the tribunal behaves in a way that discriminates against a party or its counsel, sections 24 and 68 already provide effective remedies. Equally, an award that gives effect to discriminatory provisions in a contract could violate public policy under section 68 or under the New York Convention. Any discriminatory or offensive conduct is further subject to disciplinary procedures of associations such as the Bar Standards Board, the Solicitors Regulation Authority, arbitral institutions or professional organisations such as The Chartered Institute of Building or The Royal Institution of Chartered Surveyors relevant particularly to construction disputes. Individuals who behave in a discriminatory manner typically face disciplinary action in such organisations.

As to behaviour by a party or its counsel, the IBA Guidelines on Party Representation in International Arbitration 2013 provide the following remedies for misconduct:

26. *If the Arbitral Tribunal, after giving the Parties notice and a reasonable opportunity to be heard, finds that a Party Representative has committed Misconduct, the Arbitral Tribunal, as appropriate, may:*

*(a) admonish the Party Representative;*

*(b) draw appropriate inferences in assessing the evidence relied upon, or the legal arguments advanced by, the Party Representative;*

*(c) consider the Party Representative's Misconduct in apportioning the costs of the arbitration, indicating, if appropriate, how and in what amount the Party Representative's Misconduct leads the Tribunal to a different apportionment of costs;*

*(d) take any other appropriate measure in order to preserve the fairness and integrity of the proceedings.*

27. *In addressing issues of Misconduct, the Arbitral Tribunal should take into account:*

*(a) the need to preserve the integrity and fairness of the arbitral proceedings and the enforceability of the award;*

*(b) the potential impact of a ruling regarding Misconduct on the rights of the Parties;*

*(c) the nature and gravity of the Misconduct, including the extent to which the misconduct affects the conduct of the proceedings;*

*(d) the good faith of the Party Representative;*

*(e) relevant considerations of privilege and confidentiality; and*

*(f) the extent to which the Party represented by the Party Representative knew of, condoned, directed, or participated in, the Misconduct.*

Enclosures:

1. Renato Nazzini 'The Law Applicable to the Arbitration Agreement: Towards Transnational Principles' (2016) 65 ICLQ 681;
2. Renato Nazzini, 'The law governing the arbitration agreement: a transnational solution?' in Renato Nazzini (ed), *Transnational Construction Arbitration: Key Themes in International Construction Arbitration* (Routledge 2018);
3. Renato Nazzini, 'The problem of the law governing the arbitration clause between national rules and transnational solutions' in Renato Nazzini (ed), *Construction Arbitration and Alternative Dispute Resolution* (Routledge 2022).

\* \* \*

## Response ID ANON-44ZW-8X6M-C

Submitted to Law Commission second consultation on the Arbitration Act 1996  
Submitted on 2023-05-15 09:06:04

### 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?

[REDACTED]  
[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.

Tell us why you regard the information as confidential:

### Proper law

Consultation Question 1

Yes

Please give your reasons::

It is a matter of certainty, vide *Enka v Clubb* [2020] UKSC 38. It will avoid any unnecessary evaluation based on 3-stage test on the law of the arbitration agreement in *Sul America v Enesa* [2012] EWCA Civ 638. If so, *Kabab-Ji v Kout* [2021]UKSC48 would have been determined that French law to apply to the arbitration clause as the seat was in Paris. However, as for the enforcement, it could have been denied due to in violation of public policy in English law.

### Section 67

Consultation Question 2

Yes

Please give your reasons::

The Tribunal must be careful to consider the points of argument submitted by both parties in respect of its jurisdiction. If the Tribunal rules on its jurisdiction, it should be final unless a party challenges it in court. If so, the Court will then review the evidence as presented and gives its ruling. Any further new evidence/ground should not be considered. However, it will not absolutely prohibit any substantial ground in the interests of justice.

Consultation Question 3

Yes

Please give your reasons::

I totally agree that it is the rules of court in respect of determining the jurisdiction of the Tribunal and AA1996 be amended accordingly,

## Discrimination

### Consultation Question 4

No

Please give your reasons::

I do not know that it is necessary to have different nationality of an arbitrator to be appointed by a party. The issue is how to determine the nationality of an arbitrator, by means of passport, or by race, or by his/her own declaration/disclosure. How do you view the permanent residence (which is not the same of his/her nationality)? It is not uncommon for an arbitrator to have dual or even more nationality and stay in different place from his/her own state/country. I understand that different nationality of an arbitrator from the party is to avoid any bias for the party. As an Arbitrator, he/she must act impartial and independent. Bias can be detected by his/her own performance or behaviour. It is not necessary related to his/her nationality.

### Consultation Question 5

Other

Please give your reasons::

I agree the above statement in respect of discrimination. The point is how to determine the discrimination. Bias may be deemed to be a factor of discrimination.

### Consultation Question 6

Please give your answer::

If discrimination occurs in the context of arbitration, the arbitration award could be applied to be set aside or stuck off.

## Final Response to second LC request for consultation on EAA 96 002

### Item 1. Proper Law of the Arbitration Agreement

We provisionally propose that a new rule be introduced into the Act to the effect that the law of the arbitration agreement is the law of the seat, unless the parties expressly agree otherwise in the arbitration agreement itself.

A default rule in favour of the law of the seat would see more arbitration agreements governed by the law of England and Wales, when those arbitrations are also seated here. This would ensure the applicability of the doctrine of separability, along with its practical utility, and would give effect to the more generous rules on arbitrability and scope which the courts have seen fit to develop. More than that, it would remove uncertainty over which law governs an arbitration agreement. We think that the ruling in *Enka v Chubb* is complex; a simple default rule removes much of the opportunity for argument and satellite litigation.

We ask consultees whether they agree with this proposal.

### Response:

Ciarb appreciates the Law Commission's responsiveness to our suggestion, which we understand was also suggested by numerous other respondents, that the consultation examine the law applicable to the arbitration agreement. In our original response we stated that the *Enka v Chubb* and *Kabab–ji v Kout Foods* cases had created additional confusion around this issue and that the risk of further litigation was high. We noted that:

*"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..."*

While some may argue that a new rule is not ideal for the reasons the LC notes well, we agree that a new rule in the Arbitration Act 1996 of the nature proposed by the LC is the best practical remedy available to this increasingly problematic question. Such a rule would also be an assistance to arbitrators and parties since time and expense will not be taken up determining this issue within arbitrations. Arbitrators will also be able to apply the law of the seat in a consistent fashion with any analysis of the arbitration agreement itself, which will in turn further strengthen clarity and practice in this area.

## **Item 2. Challenging jurisdiction under Section 67**

Our updated provisional proposal is as follows: (1) the court should not entertain any new grounds of objection, or any new evidence, unless even with reasonable diligence the grounds could not have been advanced or the evidence submitted before the tribunal; (2) evidence should not be reheard, save exceptionally in the interests of justice; and (3) the court should allow the challenge only where the decision of the tribunal on its jurisdiction was wrong. We propose that this process should be encapsulated in rules of court, rather than in legislation.

We ask consultees whether they agree with the particulars of our revised proposal.

### **Response:**

Ciarb believes that the proposal put forward by the LC is consistent with the recommendations we put forth in our initial response. We particularly support the LC's position as stated that the updated in the updated proposal: "where a tribunal rules on its own jurisdiction before a court does, there is reason for some deference to be shown to that ruling and to the process which led to it."

However, we are uncertain as to the robustness of removing the proposed reforms to rules of court rather than attempting a modification of the Act. We understand the concerns around modification and the impossibility of foreseeing all possible repercussions. The last thing anyone would want is to fix one problem while inadvertently creating numerous others and ultimately damaging the effectiveness or popularity of the Act. Thus, we understand the desire of the LC to proceed cautiously and to test the effects of the proposed modifications via softer instruments. It is hoped that these soft instruments will indeed be created and adopted, and we note that this will require both motivation and action beyond the scope of a review of the Act itself.

## **Item 3. Discrimination**

(a) We now provisionally propose that it should be deemed justified to require an arbitrator to have a nationality different from that of the arbitral parties. We ask consultees whether they agree.

(b) We ask consultees whether they think that discrimination should be generally prohibited in the context of arbitration, and what they think the remedies should be where discrimination occurs.

**Response:**

(a) Ciarb notes that protected characteristics as defined in the Equality Act 2010 are age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation. Nationality is not included in this list. It has been suggested that nationality is used as a proxy for race in arbitration. We disagree. Nationality of an arbitrator in relation to a party to a dispute is relevant in ensuring the minimal chance for possible political pressure and reducing chances of a tactical challenge on the basis of a lack of impartiality. Thus, it is legitimate for parties to require that an arbitrator not share nationality with either party. However, since nationality is not a protected characteristic under the Equality Act 2010, we see the issue as moot and believe that including an express provision stating this in the Act would be a tautology.

(b) Ciarb notes that in their original response, we encouraged the LC to take the narrower option of stating 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.” We stand by this recommendation. We believe that this is compliant with the ruling in the Hashwani case and that, while recognising that discrimination is generally unacceptable, this acknowledges that arbitrators are service providers and not employees of the parties that appoint them. Further, parties may indeed have legitimate reasons for requesting certain protected characteristics if it can be shown the request was a proportionate means of achieving a legitimate aim.

We also would caution that a broad ban on discrimination in arbitration could ultimately achieve the opposite aim of the proposal and amount to a gesture, diluting the actual effectiveness and enforceability of the regulation, since no standard or scope would be provided. The LC noted that the consensus among respondents that the issue was of concern in a very narrow circumstance: appointment of a tribunal. Yet such broad language could open the door to attempts by parties to engage in tactical manoeuvres, such as trying to resist enforcement of an award based on an arbitrator’s purported discriminatory attitude towards a party with a protected characteristic. Such a door should not be opened.

Submitted to Law Commission second consultation on the Arbitration Act 1996  
Submitted on 2023-05-22 11:55:20

## About you

What is your name?

Name:

[REDACTED]

What is the name of your organisation?

Enter the name of your organisation:

CLLS Arbitration Committee

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?

[REDACTED]  
[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.

Tell us why you regard the information as confidential:

## Proper law

### Consultation Question 1

Yes

Please give your reasons::

Subject to what follows : our answer is "yes".

In setting out our response to this question, it is useful to repeat some of the guiding principles that framed our first response : (i) the Act should be a self-contained code with references to other sources being strictly limited; (ii)the Act should seek to be as clear as possible to users of the process, particularly those who are located outside England and Wales; and (iii)it should seek to make England an attractive forum for users of arbitration.

Applying those principles to this second consultation leads us to repeat our previous view that the law of the arbitration agreement should be stated to be the law of the seat, unless the parties agree otherwise. The Committee considers that without this amendment to the Act, it is likely that some arbitrations seated in England will become subject to considerable uncertainty in important areas such as the separability of the arbitration agreement and the arbitrability of the dispute.

The Committee has reflected on the wisdom of the using the word "expressly" as proposed.

It was felt that the word "expressly" risked opening up the provision to challenge unnecessarily.

In other words, the parties have either agreed to another law, or they have not. The Committee felt that the word "expressly" only served to confuse rather than clarify.

Further, since parties can agree the governing law of the arbitration agreement outside of the arbitration agreement, the Committee felt that the words "in the arbitration agreement itself" are too restrictive and that the rule should be silent as to where the agreement is made.



To take account of our above points, the Committee recommends modifying the proposed new rule to read: "the law of the arbitration agreement is the law of the seat, unless the parties agree that another law should apply."

## Section 67

### Consultation Question 2

Other

Please give your reasons::

In its response to the first consultation paper, the Committee agreed with the Commission's proposals regarding proposed reform of section 67 of the Act, while noting a strongly-felt minority view in favour of retaining the current approach of a de novo rehearing by the court of the tribunal decision on jurisdiction, with judges exercising case management powers to address inappropriate use of the challenge mechanism.

The Committee agrees broadly with the Commission's alternative proposal set out in the second consultation paper.

Overall, the Committee considers the proposed approach strikes an appropriate balance between retaining a high level of court oversight of arbitral jurisdiction, while addressing concerns regarding the time and costs impact in certain cases of second "bites of the cherry" in section 67 challenges.

Nevertheless, the Committee does not agree that evidence should be reheard only "exceptionally in the interests of justice". The Committee considers that this sets a too high and too uncertain hurdle for parties. We suggest that evidence may be reheard where it is "necessary in the interests of justice", i.e., that the requirement for exceptionality be removed.

### Consultation Question 3

No

Please give your reasons::

On balance, the Committee disagrees with the proposal in the sense that the majority of the Committee is in favour of the proposals in CQ2 being enshrined directly in the Arbitration Act itself. This would be most helpful for international users and is consistent with the principle that the Act should be a self-contained code with only limited reference to external sources.

However, a minority of the Committee take the view that it may be prudent to deal with the court's case management of section 67 cases in court rules, avoiding the potential need to make further amendments to the Act.

## Discrimination

### Consultation Question 4

Yes

Please give your reasons::

Yes, we do.

### Consultation Question 5

Other

Please give your reasons::

The Committee considers that the imperative of fostering diversity and countering discrimination in international arbitration is best supported through professional codes of conduct (such as the requirement under SRA Principle 6 upon all English solicitors to "encourage diversity, equality and inclusion"), as well as global initiatives such as the "Equal Representation in Arbitration Pledge" (which is supported by almost all the London law firms practising in this area), the "African Promise" and the "Racial Equality for Arbitration Lawyers" Initiative.

Our focus is on the perspective of international parties, who are key users of the Act. Our collective experience of acting for international parties from a broad cultural and geographic spectrum in international arbitration indicates that the proposals for countering discrimination reflected in the Law Commission's proposals may well end up doing more harm than good, in generating satellite disputes and ammunition for "guerrilla tactics" aimed at disrupting the arbitral process and overturning awards, whilst having little real influence on core issues such as appointment decisions. If adopted, these proposals may well diminish London's attractiveness as a seat of arbitration. The behavioural and cultural change that is still sorely needed will most effectively be fostered by initiatives within the arbitral community, the arbitral institutions and the relevant professional bodies, not through primary legislation. That is not to say the end goals are not of the utmost importance (they clearly are), merely that primary legislation is not the optimal path to achieving them.

A series of questions and uncertainty arise as to what test might be applied to determine whether there has been discrimination, who should determine whether there has been discrimination and what the consequences should be. Such uncertainties would serve to encourage the "guerrilla tactics" that we are concerned about.

Consultation Question 6

Please give your answer::

See response to question 5.

**Response to the Law Commission's Second Consultation Paper:  
Review of the Arbitration Act 1996**

**Consultation Question 1**

*"We provisionally propose that a new rule be included in the Arbitration Act 1996 to the effect that the law of the arbitration agreement is the law of the seat, unless the parties expressly agree otherwise in the arbitration agreement itself. Do you agree?"*

No. In our opinion, the status quo – as confirmed by the Supreme Court in *Enka v Chubb* – should remain unchanged.

***Perspective of non-arbitration specialists drafting contracts***

The view of our arbitration practitioners and transactional colleagues alike is that, in the absence of an express choice of governing law of the arbitration agreement, commercial parties typically expect that the law of the matrix contract will govern all aspects of their agreement.

That is the expectation when agreeing a clause such as "*this contract is governed by the law of X*". Commercial parties typically think that the law of X applies to all of the contract. They are typically unaware of arbitration doctrines such as the separability of the arbitration agreement.

Were they to apply their mind to the question, commercial parties might envisage the governing law of the arbitration agreement to determine principally (i) validity and whether choice of arbitration over litigation is effective, (ii) scope of disputes referable to arbitration, and (iii) the parties. Having decided that the law of X governs "*this contract*", they will very likely assume that it applies to these issues as well.

The provisional proposal will result in curious, and to commercial users inexplicable, outcomes. For example, assume that a provision in a contract is headed "Governing law and dispute resolution", and contains a clause at z.1 that states "*this contract is governed by the law of X*" followed at clause z.2 by an arbitration agreement. It would be reasonable to infer that the parties intended the express choice of law also applied to the arbitration agreement. But assume that the two clauses are separated into separate provisions, y.1 and z.1: in this scenario presumably it would be said there was no express choice of law for the arbitration agreement.

***The usual choice of law rules should apply***

In our opinion, arbitration agreements should not be treated differently to other types of agreements to which the common law rules for resolving choice of law issues apply. The three-stage inquiry should be applied in the same way, namely determining whether there has been

(i) an express choice of law, (ii) an implied choice of law, or (iii) in the absence of a choice, deciding the system of law "*most closely connected*" with the agreement.

For the reasons explained in *Enka*, with which we agree, from the perspective of commercial users, the system of law most closely connected with the arbitration agreement is usually the governing law of the matrix contract in which it is embedded.<sup>1</sup>

While we recognise that prescribing the law of the seat as the governing law of the arbitration agreement brings clarity, we do not consider that arbitration agreements are special and require their own legislative choice of law rule.

### ***Inconsistency with New York Convention***

We are further concerned that the proposal is at odds with the UK's obligations under the New York Convention.

The proposal is worded:

*'...law of the arbitration agreement is the law of the seat, unless the parties expressly agree otherwise in the arbitration agreement itself'* (emphasis added).

As noted above, one of the key issues governed by the applicable law is the validity of the arbitration agreement. The New York Convention provides at Article V(1)(a) that awards should not be recognised if:

*'...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'*.

Commentaries on Article V(1)(a) of the New York Convention observe that, for the purposes of the Article, parties' choice of law need not comply with any formal requirements<sup>2</sup> and may be explicit or implicit.<sup>3</sup>

Accordingly, the Law Commission's proposal of stipulating that in the absence of an express choice, validity shall be governed by the law of the seat, is inconsistent with the NYC which prescribes that in the absence of an express choice, courts should next look to any indication

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<sup>1</sup> See, 'Article II', by Wilske, S and Fox, TJ, in Wolff, R (ed.) *New York Convention: Article-by-Article Commentary*, 2<sup>nd</sup> edn (Munich: Beck, Hart, Nomos, 2019) pp. 169-174.

<sup>2</sup> Note 1, *ibid*, 'Article V(1)(a)', p. 287.

<sup>3</sup> *Ibid.*; United Nations Commission on International Trade Law (2016), *UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)*, New York, NY. United Nations, p. 142.

of the parties as to the governing law, before turning to the law of the seat (i.e., the law of the country where the award was made).

While the New York Convention relates to recognition of foreign awards, we would expect any reform to the Act to be consistent with the position that, for the purposes of the Convention, an "*indication*" of the governing law of an arbitration agreement can be made expressly or implicitly.

***Does the provision have extraterritorial effect?***

Part I of the Act applies where the seat of the arbitration is England and Wales. Accordingly, the Law Commission's proposal would only apply to such arbitrations. In that event, the general wording of the proposal is curious and potentially confusing. Instead, it could read "*the law of the arbitration agreement seated in England and Wales shall be the law of England and Wales, unless ...*".

**Consultation Question 2**

*"Where an objection has been made to the tribunal that it lacks jurisdiction, and the tribunal has ruled on its jurisdiction, then in any subsequent challenge under section 67 by a party who has participated in the arbitral proceedings:*

*(1) the court will not entertain any new grounds of objection, or any new evidence, unless even with reasonable diligence the grounds could not have been advanced or the evidence submitted before the tribunal;*

*(2) evidence will not be reheard, save exceptionally in the interests of justice;*

*(3) the court will allow the challenge where the decision of the tribunal on its jurisdiction was wrong.*

*Do you agree?"*

Yes. We agree with the Commission's view that it is not fair for a party who has participated in the arbitration and lost its jurisdictional challenge to pursue a de novo rehearing before the court. In particular, we consider it appropriate that evidence would not be reheard or new evidence allowed '*save exceptionally in the interests of justice*'.

As noted in our response to the First Consultation Paper, in our experience, the current approach of allowing a rehearing on jurisdiction causes London to appear less attractive as a seat, because of the potentially very substantial costs of court proceedings.

The Law Commission's proposal does not derogate from the Court having the last word on jurisdiction. It simply makes any challenge more efficient. The challenging party will not be prevented from setting out its arguments in support of its challenge in full for the court to decide, based on the existing evidential record, with protection afforded to the challenging party of admitting new evidence when justified in the interests of justice.

### **Consultation Question 3**

*"We provisionally propose that the Arbitration Act 1996 be amended to confer the power to make rules of court to implement the proposals in CQ2 above. Do you agree?"*

No. Our view is the Act should be amended to reflect explicitly the proposals in CQ2. While we note the Commission's comment that the language of the Act is potentially consistent with its proposals already, we are of the view that a "harder" type of reform is the most appropriate to meet the demands of commercial users of London arbitration.

### **Consultation Question 4**

*"We provisionally propose that it should be deemed justified to require an arbitrator to have a nationality different from that of the arbitral parties. Do you agree?"*

Yes. We do not see that public policy is offended by the parties wishing to have someone respectively neutral. We consider it appropriate to bring the Act in line with the UNCITRAL Model Law and several of the major institutional rules in this regard. We consider that commercial users of London arbitration would likely welcome this clarification.

### **Consultation Question 5**

*"Do you think that discrimination should be generally prohibited in the context of arbitration?"*

We do not consider it appropriate to amend the Act to counter discrimination in the context of arbitration. Our concern is that amending the Act to address discrimination may give rise ultimately to unwanted and unintended consequences – principally, a rise in unmerited and/or protracted challenges to arbitrators or awards. We consider that diversity and equality are best addressed in law through generally applicable equality legislation and in practice in the context of arbitration through institutional and other industry initiatives.

**Consultation Question 6**

*"What do you think the remedies should be where discrimination occurs in the context of arbitration?"*

As noted in our response to CQ5, we do not consider it appropriate to amend the Act to counter discrimination in the context of arbitration.

We note the Commission's observations that if an arbitrator acts in a way that is discriminatory, under the existing law they might be liable to removal under s.24 of the Act or their award may be liable to challenge under s.68. We consider that this already provides an appropriate safeguard.

**Clifford Chance LLP**

**May 2023**

**RESPONSE OF THE COMMERCIAL BAR ASSOCIATION TO  
THE LAW COMMISSION'S FURTHER CONSULTATION  
ON THE ARBITRATION ACT 1996**

**22 May 2023**

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This is the response of the Commercial Bar Association (“Combar”) to the Law Commission’s further 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. Combar responded to the initial consultation by the Law Commission on the Arbitration Act 1996 on 15 December 2022.

### **Consultation Question 1**

**1. We provisionally propose that a new rule be included in the Arbitration Act 1996 to the effect that the law of the arbitration agreement is the law of the seat, unless the parties expressly agree otherwise in the arbitration agreement itself. Do you agree?**

- 1.1. As the Law Commission will of course appreciate, Combar was a firm supporter and indeed proponent of the proposed reform which is now contained in Consultation Question 1.
- 1.2. Combar remains firmly in support of the proposed reform as framed and likewise supports the small but helpful departure from the wording in s6 of the Arbitration (Scotland) Act to refer to express agreement in the arbitration agreement -see Second Consultation Paper para 2.44.
- 1.3. It is only desirable to add a few short points by way of comment, in addition to the argument previously expressed to the Law Commission, all of which remains valid.
- 1.4. First, that the certainty and simplicity obtained by the adoption of this proposed reform is highly desirable. It is apparent that whatever else might be said of the law following *Enka v Chubb* it is neither simple nor certain (particularly as regards the impact of s4(5) or questions of arbitrability). The world of international commercial arbitration remains as competitive as ever and this proposed reform would add to the already significant advantages of commercial parties choosing this jurisdiction as the seat. The need for England and Wales to maintain and improve competitive advantage has been brought into sharper focus since Brexit.

- 1.5. Second, that the reaction to the proposed reform at conferences and in particular at London International Disputes Week 2023 which took place from 15 – 19 May 2023, has been extremely positive. [REDACTED]  
[REDACTED]  
[REDACTED]
- 1.6. Third, that we have noted what has been said at para 2.73 of the Second Consultation Paper about the support from Lord Leggatt and Lord Hamblen for possible reform. It should also be noted that the Combar paper in support of reform on this issue was prepared by David Joseph KC and David Bailey KC who acted on opposite sides of the issue in *Enka v Chubb* in the Supreme Court.
- 1.7. Fourth, none of the arguments against reform summarised at paragraphs 2.65 to 2.73 of the Second Consultation Paper appear to have real force.
- 1.8. The dominant expectation of parties who agree to arbitrate their disputes is that the process will be clear, certain, speedy and effective and not one mired in complex arguments as to differences between procedural law and substantive law governing the arbitration agreement. The real problem of non-alignment is that created when there is a difference between procedural law and the law governing the arbitration agreement, so that one or other party can invoke a foreign law to defeat the dominant expectation referred to above. If parties refer their disputes to arbitration in England and Wales, particularly as a neutral country, they would not expect to become mired in the finer points of the arbitration law of another country (cf: Second Consultation paras 2.65 – 2.66).
- 1.9. The fact that evidence of the laws of that other country might at some stage be before the courts or tribunal is cold comfort. The parties are taken to want a clear, simple and effective means of resolving their disputes under a unified arbitration law and procedure (cf: Second Consultation Paper para 2.67).
- 1.10. The argument that the problems created by s4(5) are surmountable is with respect not accurate and misses the point. S4(5) is not a provision replicated in other countries' arbitration laws and its radical effect should be relegated to a small minority of disputes, where for whatever reason the parties have expressed in their arbitration agreement another law to govern.

1.11. The argument that the generosity of the law in England and Wales with regard to arbitrability might give rise to abuse is unfounded. There is no evidential foundation for the argument and English law both with respect to illegality and public policy is generally robust and well respected. Nevertheless, even though an award might be issued in England and Wales enforcement might be refused in a foreign court by reference to the rules of arbitrability of the court of enforcement. This strikes the right balance. First and foremost, the Arbitration Act should permit with the greatest ease and simplicity parties to proceed to an award. Questions of enforcement would have to be addressed under the New York Convention.

1.12. Finally, we mention another proposal that has been floated in certain quarters, largely from practitioners with a civilian law background; namely that the law governing the arbitration agreement should not be anchored in the law of the seat unless the parties expressly agree otherwise, but rather that the validation principle should direct the choice of law. In other words, that the arbitration agreement would follow whichever system of law under which it was valid and not invalid. This idea is not one adopted in the Law Commission's proposal and it is suggested for very good reason.

1.12.1. First; it is not a choice of law rule at all. It would not assist the courts in ascertaining the governing law when there is more than one system of law under which the arbitration agreement was valid.

1.12.2. Second; the validation principle has been developed in a series of cases in the English Courts in order to overcome the confusion and difficulties raised by a foreign governing law of an English seated arbitration. The express choice of law rule is a much clearer and simpler tool to resolve such difficulty.

1.12.3. Third; the contours of the validation principle itself, notwithstanding a series of decisions from *Sulamerica* in the Court of Appeal to *Kabab-Ji* in the Supreme Court is uncertain. The whole idea of this reform is to make the law clearer and not replace one unclear and uncertain principle with another.

1.12.4. Fourth: whatever else, the validation principle is not a cost efficient solution as it will result in parties having to expend time and costs on ascertaining the laws under different systems through adducing foreign expert evidence.

2. **We provisionally propose the following approach to a challenge under section 67 of the Arbitration Act 1996.**

**Where an objection has been made to the tribunal that it lacks jurisdiction, and the tribunal has ruled on its jurisdiction, then in any subsequent challenge under section 67 by a party who has participated in the arbitral proceedings:**

**(1) the court will not entertain any new grounds of objection, or any new evidence, unless even with reasonable diligence the grounds could not have been advanced or the evidence submitted before the tribunal;**

**(2) evidence will not be reheard, save exceptionally in the interests of justice;**

**(3) the court will allow the challenge where the decision of the tribunal on its jurisdiction was wrong.**

**Do you agree?**

- 2.1. As we observed in our response to the previous consultation, the Law Commission's previous proposal to revise section 67 involved a direct challenge to the reasoning of the DAC. That challenge did 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 represented a rethink of one of the key elements of the structure of the Arbitration Act 1996.
- 2.2. Although there was a split, the majority of Combar members were not persuaded that the change proposed by the Law Commission in its first consultation was justified – and were concerned that an unprompted change of the kind proposed to the structure of the Act might have negative consequences for the arbitration market in London.
- 2.3. We further observed that, if and insofar as the perceived problem with section 67 related to or arose from the management of evidence, that was a matter over which the Courts could and do exercise control, as observed in *The Kalisti*, and noted at §§8.35-8.36 of the Law Commission's first consultation. We noted that there was a

case for saying that control could be exercised more frequently, but even if that were so, it did not justify changing the starting point for any challenge.

- 2.4. We note that in its revised proposals the Law Commission proposes that the starting point for determination of any challenge to a tribunal's decision on jurisdiction is whether the decision was wrong. For the reasons that we explain below, the test that the Court should apply on a section 67 challenge is whether the outcome of a Tribunal's determination on jurisdiction was wrong.
- 2.5. We are concerned with the suggestion in the second consultation that in applying the test of whether the "*decision of the tribunal on its jurisdiction was wrong*" the Court should give "*some measure of deference ... to the tribunal's award*".
- 2.6. We do not accept that there is any principled basis for the Court to afford "*deference*" to the tribunal's award as the Law Commission suggest.
- 2.7. First, the principle underlying the right to challenge an award on grounds of jurisdiction is that a tribunal which does not in fact have jurisdiction cannot confer jurisdiction on itself. That was the "*bootstraps*" reasoning in the DAC report (cited at §3.58 of the second consultation). It underlies the approach taken in Dallah.
- 2.8. Second, the Law Commission appears to accept that its suggestion of according "*deference*" to the tribunal's decision runs contrary to the decision of the Supreme Court in Dallah. We are not persuaded by (and do not accept) the Law Commission's attempt to distinguish or downplay that decision.<sup>1</sup>
  - 2.8.1. The Law Commission's suggestion at §3.30 that the Supreme Court suggested that "*the standard of review under section 103 might vary according to the circumstances*" is an overstatement. As the Law Commission go on to note the only circumstance that the Supreme Court envisaged was the special case where an issue estoppel arose (i.e. where essentially the same issue had been previously

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<sup>1</sup> We recognise that the Law Commission's criticism of Dallah is in part directed to its reference to section 67 requiring a "*full rehearing*". That was an expression used by Moore-Bick LJ in the Court of Appeal at [21]. Lord Mance JSC in the Supreme Court referred to a "*full judicial determination*" at [26]. Lord Collins said that the Court should not "*be in a worse position than the arbitrator*". In any event, the Law Commission also seeks to downplay Dallah on the separate question of whether a Tribunal's findings as to jurisdiction can be binding on the Court. That is the more important point on the question of "*deference*".

determined). The Supreme Court (rightly) did not suggest a broader variation in the “*standard of review ... according to the circumstances*”. In the case of an issue estoppel, a party is precluded from advancing a challenge at all. It is not that the standard of review to be applied upon such a challenge is lower.

2.8.2. The Law Commission suggest that Lord Saville’s observation in Dallah that “*findings of fact made by the arbitrators and their view of the law can in no sense bind the court*” was “*not part of the binding decision*”, because Dallah concerned section 103. That may be so, but (a) Lord Saville’s observations in this respect accorded both with the general state of the law and the DAC Report, and (b) the observations of the Supreme Court in this respect would rightly be afforded deference (emanating as they did from the most senior Court and one of the authors of the Arbitration Act 1996).

2.8.3. The Law Commission places emphasis at §3.33 on the Supreme Court’s indication that a tribunal could be the final arbiter of its own jurisdiction if the parties agreed to this (and see also § 3.63). That, however, is unexceptional. There is a difference in kind between a party who agrees to a tribunal being the final arbiter of its jurisdiction (who then seeks to challenge the decision) and one who does not agree to the tribunal deciding its own jurisdiction. One person has opted into arbitral finality, the other has not.

2.8.4. The Law Commission notes at §3.34 that the arbitral respondent in Dallah had not participated in the proceedings. We return to this point at paragraph 2.11 below.

2.8.5. The Law Commission criticises as contradictory Lord Mance and Lord Saville’s observations that the decision of the tribunal on its jurisdiction can be “*helpful*”. That is not a fair criticism. The Law Commission’s suggestion that “*something cannot be helpful if it has no value*” is itself a *non sequitur*, unless the Law Commission is applying a definition to the word “*helpful*” which is (a) unusual and (b) was plainly not being adopted by Lords Mance or Saville. Nor do we understand the reference in §3.35 to “*discretion*” in this context.

2.8.6. Finally, the Law Commission observes at §3.36 that it was recognised in Dallah that a party that objects to jurisdiction does not have to participate and could

simply resist enforcement before the courts where enforcement is sought. That does not provide a principled basis for affording “*deference*” to the tribunal’s findings. As the Law Commission accepts at §3.84, in practice parties often have no real choice as to whether to challenge jurisdiction before the Tribunal.

2.9. Third, the Law Commission suggests at §3.61 that “*deference*” is justified because of the due process requirements on tribunals. Those due process restrictions do not, however, resolve the logical incompatibility of a tribunal that does not have jurisdiction declaring that it has jurisdiction.

2.10. Fourth, the Law Commission suggests at §3.64 that affording “*deference*” to the tribunal’s decision involves giving “*competence-competence some substance*”. We think that betrays a misunderstanding of competence-competence. Competence-competence precludes the existential threat to any arbitration that would arise from a Tribunal being unable to determine its own jurisdiction at all. It does not justify “*deference*” being granted to that determination.

2.11. Fifth, it is not clear in any event what “*deference*” means in this context (see *e.g. per* Lords Hamblen and Leggatt in *Gol Linhas Aereas SA v MatlinPatterson Global Opportunities Partners (Cayman) II LP and ors* [2022] UKPC 21 at [42]). In the absence of any established legal standard for affording “*deference*” to the Tribunal’s award, we are concerned that the Law Commission’s proposals will result in uncertainty as to the standard that the Court is to apply on challenges as to jurisdiction. Uncertainty is highly undesirable, particularly to international users of commercial arbitration familiar with the established law.

2.12. Sixth, the Law Commission envisages that on section 67 applications there will now be a different standard of review in cases in which a respondent participates in the arbitration and in cases in which the respondent fails to participate. In the former case, the tribunal’s decision will be afforded “*deference*”. In the latter case, it will not. That seems unprincipled. If the basis for affording “*deference*” to the tribunal’s decision is (or is in part) that quality of decision-making on jurisdiction is assured by the due process requirements of the Arbitration Act 1996, then there would seem no logical reason why a Court should not also “*defer*” to some degree to the tribunal’s decision where one party fails to attend.



- 2.13. Seventh, we can foresee additional difficulties arising as to the availability and scope of issue estoppel as a basis for preventing unmeritorious challenges to enforcement – and are not persuaded that these are alleviated by the argument in the final sentence of §3.112. It is not, in our view, a sufficient answer to the creation of those difficulties, that this “*depends on that foreign law*”.
- 2.14. Eighth, we continue to believe that the creation of parallel regimes between section 67 and section 103 is undesirable, being inconsistent and difficult to justify.<sup>2</sup> Moreover, section 66(3) provides that permission to enforce an award made in England and Wales “*shall not be given where, or to the extent that, the person against whom it is sought to be enforced shows that the tribunal lacked substantive jurisdiction to make the award*”. That test is inconsistent with affording “*deference*” to the tribunal’s decision on jurisdiction by application of the test proposed by the Law Commission. The test under section 66(3) is not whether “*the decision of the tribunal on its jurisdiction was wrong*”. It is whether “*the tribunal lacked substantive jurisdiction*”. In our view, section 66(3) reflects the approach that should be taken by Courts to questions of jurisdiction. There is no good reason for having differing standards under section 66(3) and section 67, nor any good reason for having differing standards under section 66(3) and 103.
- 2.15. Finally, we note that at §3.88-3.91, the Law Commission suggests that the only two solutions to the (in Combar members’ experience, occasional) problem of delay and cost through duplication of argument is either (a) to allow the Court to rule first on jurisdiction in all cases or (b) to accord the tribunal some deference. We do not agree with that supposed dichotomy. The delay and cost arising from duplication can be addressed through case management limitations on the evidence available to the parties on a challenge to jurisdiction. Such limitations do not require the affording of “*deference*” to the tribunal’s decision on jurisdiction.
- 2.16. Taking these matters into account, we suggest that there is no proper basis for changing the test that is employed on a challenge to jurisdiction under section 67.
- 2.17. We turn, then, to the Law Commission’s proposals for limiting evidence and argument on a section 67 challenge. We note that at §3.125 the Law Commission

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<sup>2</sup> We note that the Law Commission is not proposing any revision to section 103(2): (see §3.130-3.138). Nor could it. Section 103(2) is a convention obligation.

envisages that its proposals for controlling evidence and argument “*be piloted and amended (whether tightened or relaxed) should that prove necessary*”.

2.18. Subject to two observations, we are content that (a) the Court should not entertain any new grounds of objection, or any new evidence, unless even with reasonable diligence the grounds could not have been advanced or the evidence submitted before the tribunal; and (b) evidence should not be reheard, save exceptionally in the interests of justice. That (at least insofar as evidence is concerned) accords with the approach to which we had referred in response to the first consultation: see paragraph 2.2 above.

2.19. The first observation is that arbitration in London is international. London arbitrations commonly involve overseas counsel and arbitrators of varying degrees of experience. It is the experience of some of our members that they are asked to explore the opportunities for domestic challenge to arbitration awards in cases which have not always run before the tribunal in the manner that they might have been had more experienced counsel been involved. There is a danger that being overly prescriptive about the arguments (as opposed to evidence) that could be deployed on a section 67 challenge could lead to unfairness in those cases.

2.20. The second observation is that preventing “*new grounds of objection*” to jurisdiction (i.e. as we understand it, alternative arguments (as opposed to evidence) against the tribunal’s jurisdiction) may lead to excessive scrutiny of the arguments that were adduced before the tribunal. There is some merit to the current (simpler) situation in which the arguments are considered on their merits, without the need to scour through the underlying memorials, transcripts and submissions to detect whether any particular point was run (and/or the manner in which it was run), subject always to the possibility that a party has waived its right to raise a particular ground of challenge or objection to the jurisdiction of the tribunal under section 73 (as discussed in, e.g., *National Iranian Oil Co v Crescent Petrol Co Intl Ltd* [2022] EWHC 2641 (Comm) at [36]).

### **Consultation Question 3**

**3. We provisionally propose that the Arbitration Act 1996 be amended to confer the power to make rules of court to implement the proposals in CQ2 above. Do you agree?**

- 3.1. As we have observed above, we do not accept that the decision in *Dallah* as to the effect of a tribunal's decision as to its jurisdiction is incorrect. In any event, we find it difficult to understand why there needs to be an express power in the Act to make rules implementing the Law Commission's proposed approach.
- 3.2. Hitherto, CPR Part 62, its accompanying Practice Direction and the Commercial Court Guide have been used to manage arbitration claims (including those under s.67 and s.69): see in particular PD62 ¶12.1 and O.8 of the Commercial Court Guide.
- 3.3. Providing a specific power in the Act to make rules of Court to govern s.67 applications, might tend to suggest that express statutory provision is required to make rules of Court governing challenges to arbitral awards. We do not think that is right - and we fear that adding such a provision in relation to s.67 might lead to (unjustified) questioning of the basis for the existing Court rules.

## Chapter 4: "Discrimination"

We note that Chapter 4 of the second consultation paper retains the Commission's proposal from its first paper that a term of an arbitration agreement should be unenforceable insofar as it requires an arbitrator to be appointed by reference to a protected characteristic, as defined in section 4 of the Equality Act 2010 ("EA 2010"), unless the requirement could be justified as a proportionate means of achieving a legitimate aim, with some modifications. We set out our views on the original proposal in our original response. Below we set out our views on the three new – and far wider – proposals in this area. Greater detail on our views, and more general observations, appear in Appendix A.

Combar has consulted with its members on each of the questions addressed further below. The views expressed below broadly reflect the responses that Combar received, and are the views of the authors; though it is right to note that there was one member who broadly supportive of the Law Commission's proposals.

### Consultation Question 4

4. **We provisionally propose that it should be deemed justified to require an arbitrator to have a nationality different from that of the arbitral parties. Do you agree?**
  - 4.1. The Law Commission received responses to its first consultation paper which emphasised the prevalence of parties agreeing that an arbitrator should have a particular nationality. Under the Law Commission's original proposal, such a provision would have been susceptible to challenge and would require justification.
  - 4.2. The provisional view of the Law Commission in the second consultation is that such provisions ensure the "*appearance of impartiality*" in international arbitration. The Law Commission therefore suggests that there should be a general exception to any prohibition on discrimination in the arbitration context, by which provisions requiring an arbitrator to have a nationality that is different from that of the arbitral parties should be deemed justified.

- 4.3. We agree that provisions requiring arbitrators to have a particular nationality are commonplace and that they will often be capable of justification, particularly in the context of international commercial arbitration.
- 4.4. However, it should be noted that nationality may be entirely irrelevant in other categories of arbitration (for example, family or sports arbitration). We are therefore concerned that a standing exception of the kind proposed cannot be justified in some fields – even though the suggestion, presumably, is that if enacted, the exception would apply to all arbitrations governed by the 1996 Act. We are also concerned that it is difficult to justify the exception as a matter of principle when the framework of the 2010 Act is considered (see further below). Nonetheless, if the Law Commission’s proposals are implemented, we consider that it is preferable to adopt the proposed exception (rather than not to do so).

#### **Consultation Question 5**

5. **Do you think that discrimination should be generally prohibited in the context of arbitration?**
- 5.1. As we made clear in our response to the Commission’s first consultation, Combar unconditionally condemns wrongful discrimination in all forms and all contexts. However, condemning wrongful discrimination does not automatically demand legislation. We are also all too aware that there are areas of arbitration in which women and minorities, in particular, are significantly under-represented; again, however, this is not necessarily best addressed through legislation.
- 5.2. Combar consulted and received a range of views from its members. However, the majority view is that the Law Commission’s proposal for a general prohibition on discrimination should not be adopted.
- 5.3. While we recognise the importance of the general aim of combatting discrimination, experience suggests that legislative proposals are most effective and most valuable where they are targeted at a clear and identified problem. The identification of the problem, in turn, permits the identification of a carefully crafted and specifically tailored solution.

5.4. The Law Commission has not identified the specific harm that it wishes to tackle. In consequence, its proposed legislative solution is unclear in a number of important respects. The lack of clarity in the current proposals is of considerable concern to Combar; the risk is that those proposals have the potential to cut across, and indeed do violence to, the carefully crafted legislative schemes in both the 1996 Act and the EA 2010. Those issues are considered in greater detail in Appendix A.

### **Consultation Question 6**

#### **6. What do you think the remedies should be where discrimination occurs in the context of arbitration?**

6.1. For the reasons set out above, and in Appendix A, we do not support the adoption of a general prohibition on discrimination in arbitration (notwithstanding our recognition of the important and laudable goal of seeking to eradicate discrimination in society more generally).

6.2. The 1996 Act already contains provisions that ensure the fairness of arbitral proceedings which, as the Law Commission acknowledges, are likely to be effective in respect of discrimination: see, in particular, the 1996 Act, ss.33 and 68. For the reasons identified in Appendix A below, it is moreover very unlikely that there will be an acceptable or suitable read across from the remedies that are available under the EA 2010 to the arbitration context.

6.3. Insofar as it is suggested that the Employment Tribunal should have jurisdiction in respect of any discrimination challenge arising in the arbitral context, Combar does not support that proposal. The Employment Tribunal unquestionably has expertise in discrimination law. But the Tribunal is not set up for challenges of the size and scale that may arise in the context of an international commercial arbitration. Nor are the issues that arise in cases of that kind familiar to the vast majority of Employment Tribunal judges. In contrast, many High Court judges have the requisite experience in *both* discrimination law and arbitration / commercial law. As with existing routes of challenge under the 1996 Act, therefore, the High Court is the appropriate forum for challenges arising from any general prohibition on discrimination (if one is adopted, which we oppose for the reasons identified above and below).



## APPENDIX A

### FURTHER OBSERVATIONS ON QUESTIONS 5 AND 6

#### The legislative scheme of the 1996 Act

1. The 1996 Act contains a “*coherent and modern framework*” and was specifically designed to codify many issues in arbitration that were “*previously dealt with piecemeal and incompletely in the case law*”.<sup>3</sup>
2. As the Commission is aware, the DAC recommended in 1989 that England should not adopt the UNCITRAL Model Law but should instead develop its own new legislation with the following features:<sup>4</sup>

*“(1) It should comprise a statement in statutory form of the more important principles of English law of arbitration, statutory and (to the extent practicable) common law.*

*(2) It should be **limited to those principles whose existence are uncontroversial.***

*(3) It should be set out in a logical order, and expressed in language which is **sufficiently clear and free from technicalities to be readily comprehensible to the layman.***

*(4) It should in general **apply to domestic and international arbitrations alike,** although there may have to be exceptions to take account of treaty obligations.*

*(5) It should not be limited to the subject-matter of the Model Law.*

*(6) It should embody such of our proposals for legislation as have by then been enacted...*

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<sup>3</sup> Russell on Arbitration, 24<sup>th</sup> Ed., para. 1-003.

<sup>4</sup> See further, paragraph 108 of the 1989 Report of the DAC under the chairmanship of Lord Justice Mustill (as he then was).



*(7) Consideration should be given to ensuring that any such new statute should, so far as possible, have the same structure and language as the Model Law, so as to enhance its accessibility to those who are familiar with the Model Law."*

3. As point (2) above identifies, the 1996 Act only sought to enshrine those principles whose existence are uncontroversial. In other areas it was intended to "*allow[s] judges to develop the common law in areas which the Act does not address*".<sup>5</sup>
4. As point (3) records, one of the main purposes of the 1996 Act was to make the law of arbitration more accessible. This has been repeatedly recognised by the Courts. See, for example, *Seabridge Shipping AB v AC Orsleff Eftf's A/S* [2000] 1 All ER (Comm) 415, per Thomas J at p.690: "*[o]ne of the major purposes of the Arbitration Act 1996 was to set out most of the important principles of the law of arbitration in England and Wales in a logical order and expressed in language sufficiently clear and free from technicalities to be readily comprehensible to the layman. It was to be 'user-friendly' language*". The 1996 Act is therefore "*not merely a consolidating Act*": it was "*intended to make the law of arbitration clear and more straightforward*" and to "*[set] out in readily understandable terms to parties to an arbitration what is required of them*": *Patel v Patel* [2000] QB 551, per Lord Woolf MR at p. 556A-C.
5. The 1996 Act applies to an arbitration where the seat of the arbitration is in England and Wales or Northern Ireland (1996 Act, s.2(1)). Where that is so, Part I of the 1996 Act applies irrespective of proper law, and even if the arbitration is conducted abroad. As point (4) above records, the 1996 Act was specifically drafted so as to ensure that it could "*apply to domestic and international arbitrations alike*".<sup>6</sup> The 1996 Act did not therefore draw distinctions based on the nature of the arbitration, or its subject matter. The principles were, instead, overarching ones that were thought to be relevant and applicable to arbitrations of all kinds.
6. The general principles on which Part I of the 1996 Act is founded are identified in section 1. In summary: (1) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense; (2) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in

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<sup>5</sup> *Halliburton v Chubb Bermuda Insurance Ltd* [2021] AC 1083, per Lord Hodge at [47].

<sup>6</sup> DAC Report on the UNCITRAL Model Law on International Commercial Arbitration 1989, at [34], as cited in Russell on Arbitration, at para. 1-004.

the public interest; and (3) in matters governed by Part I, the court is not permitted to intervene except on the very limited basis identified therein.

7. In that respect, the Courts have recognised that there is a public interest in protecting and preserving the scheme under the 1996 Act, including the principles of party autonomy and non-intervention on which it is premised. In *Terna Bahrain Holding Co Wll v Al Shamsi* [2012] EWHC 3283 (Comm), at [83], for example, the High Court noted that “*the Parliamentary purpose in the Act, which is **drastically to reduce the extent of the intervention of the Courts in interfering with Awards in order to achieve speedy finality, is an aspect of the public interest in the proper functioning of our arbitration system***”. In consequence, the 1996 Act permits intervention only in clearly defined circumstances where judicial support is necessary to preserve the integrity of the arbitration.
8. The three principles set out in section 1 of the 1996 Act reflected the desire to make England a more attractive jurisdiction for commercial arbitration which, at the time, was perceived as insular and outdated, with more Court intervention than was considered desirable by those seeking an alternative to Court proceedings.

### The legislative scheme of the EA 2010

9. The EA 2010 was given Royal Assent on 8 April 2010. As the Explanatory Notes to the EA 2010 record (§10), the legislation had two main purposes: “*to harmonise discrimination law, and to strengthen the law to support progress on equality*”.
10. The EA 2010 did not prohibit discrimination in all contexts but in specific priority areas, where discrimination was seen to be particularly invidious. By way of example, the key concepts identified in Part 2 of the EA 2010 were applied, *inter alia*, to: (1) the provision of services or the exercise of a public function (Part 3); (2) the disposal or management of premises (Part 4); (3) work or employment (Part 5); (4) education bodies, when allocating places (Part 6); (5) private clubs and political organisations, in respect of their members, associates or guests (Part 7).

11. The EA 2010 is of limited territorial application. In relation to Part 5 (Work), for example, Employment Tribunals are required to determine whether the law applies, depending “*on the connection between the employment relationship and Great Britain*”.<sup>7</sup> While the EA 2010 is silent as regards its territorial application to the ‘non-work’ parts of the legislation, the Courts have not generally applied its provisions extraterritorially (save insofar as the EA 2010 makes express provision for this).
12. Chapter 2 of the EA 2010 addresses ‘prohibited conduct’. In that respect, the EA 2010 does not only prohibit direct discrimination – i.e. discrimination “*because of*” one of the protected characteristics identified in s.4 EA 2010 (see EA 2010, s.13) – but also a range of other conduct, including indirect discrimination (which arises where a policy, practice or criterion places persons with a protected characteristic at a particular disadvantage: s.19), harassment (i.e. unwanted conduct that has the purpose or effect of creating a hostile, degrading, humiliating or offensive environment for the complainant or of violating the complainant’s dignity: s.26), and victimisation (where a person treats another less favourably because he or she has in good faith done a ‘protected act’ under the EA 2010: s.27). Specific obligations also arise in respect of specific characteristics where, for example, the EA 2010 recognises a specific form of discrimination (discrimination arising from disability: s.15) and specific duties (e.g., the duty of reasonable accommodation) for disabled people.
13. The EA 2010 has therefore been carefully crafted. While it seeks to recognise certain general types of prohibited conduct, that conduct is prohibited only in certain recognised spheres of life (e.g., the employment context, the provision of services) and the EA 2010 makes more specific provision for certain contexts and certain specific protected characteristics.
14. The different types of prohibited conduct are also designed to work together. An important purpose of the prohibition on indirect discrimination, for example, is to act as ‘anti-avoidance’ mechanism to ensure that employers and other actors are not able to frame their policies and practices in a way that would avoid the prohibition on direct discrimination. Direct discrimination and indirect discrimination are not, however, treated in the same way under the legislation. In particular, save for a very narrow exception for ‘genuine occupational requirements’, the former is not capable of

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<sup>7</sup> Explanatory Notes, §15.

justification, whereas the latter will not be unlawful where it is proportionate to a legitimate aim.

#### **Issues raised by Chapter 4 of the Second Consultation**

15. We have set out, above, a brief summary of the legislative scheme that underpins both the 1996 Act and the EA 2010. We have done so because, in our view, it is essential to understand the scope, purpose and design of each piece of legislation to assess the proposals made in Chapter 4 of the second consultation.
16. Combar's answers to each of the specific consultation questions raised in Chapter 4 is set out above. However, beyond the specific consultation questions, the second consultation has raised thirteen points, in explanation of its proposals. Some of those points merit further comment. We have therefore set out comments on the wider points raised in Chapter 4 of the second consultation below, in the hope that it assists the Law Commission in taking these issues forward.

##### *(1) Discriminatory appointments*

17. The most important development in the second consultation paper is that the Law Commission now proposes that it may be appropriate "*to prohibit discrimination generally in an arbitration context*" (at §4.21). The second consultation paper states that this is appropriate because discriminatory arbitrator appointments are a more significant problem than discriminatory terms in arbitration agreements. One consultee, for example, is cited as stating that "*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*" (at §4.20).

18. Against that backdrop, while the Law Commission has recognised that arbitrators can already be removed under the 1996 Act where they act in a manner which is not fair and impartial (s.68), consultees are asked to comment on whether there should be a prohibition on discrimination in arbitration more generally and, if so, what the remedies would be. In particular, it is suggested that “[f]or other remedies, we might take our cue from the Equality Act 2010”, which provides that where discrimination occurs in a work context, remedies include a declaration of the complainant’s rights, compensation and a recommendation of how the respondent should act.
19. Careful consideration will need to be given to how a prohibition on “*discrimination generally in an arbitration context*” would be drafted. In this regard, the proposal in the second consultation remains at something of a formative stage and, in consequence, regrettably, the second consultation paper does not set out any drafting for the proposed legislation (as the first consultation paper did in relation to party appointments). Even at this early stage, however, Combar has a number of observations on the Law Commission’s proposal.
20. First, it is not clear what these new proposals add to the existing law as found in the 1996 Act and EA 2010. As noted by the Law Commission, discriminatory behaviour by an arbitrator is likely to amount to serious procedural irregularity (1996 Act, s.68) or circumstances giving rise to justifiable doubts as to the arbitrator’s impartiality (1996 Act, s.33). Equally, discrimination in the “*representation of parties*”, as described in the passage cited by the Law Commission at §4.20, will be governed by the provisions of the EA 2010 concerned with instructing barristers. It is not apparent what discrimination as to “*procedural measures*” or “*participation within the tribunal*” means, such that it is difficult to respond to the proposals in this regard. In our view, however, it is very important to identify what the perceived harm is in order to assess whether a new legislative solution is necessary and to ensure that any new legislation is effective and appropriately targeted.
21. Secondly, if the Law Commission’s proposal amounts to a broad expansion of s.68 of the 1996 Act, this needs to be made clear.

- 21.1. The proposals set out in the first consultation paper expressly did not provide new grounds to challenge an arbitral award, instead applying at an earlier stage in the arbitration process.
  - 21.2. If it is now proposed that discriminatory acts within an arbitration should permit a party to challenge an arbitral award, this should be made express.
  - 21.3. A proposal of that kind would not sit comfortably with the general principles identified in section 1 of the 1996 Act (in particular, party autonomy and the limited grounds of intervention of the Courts). It would also be at odds with the principal of finality of awards, which the Courts have repeatedly emphasised.
  - 21.4. The proposal should not therefore have the effect of granting to domestic courts a general supervisory jurisdiction over arbitral proceedings. That has never been the policy of the 1996 Act and would ignore the fact that section 68 acts as a long stop available in clear and extreme cases. It is not, and should not be, a general means by which parties can find collateral means to attack awards or seek to ensure that arbitration proceedings are conducted only in the same manner as court proceedings would be.
22. Thirdly, and perhaps most importantly, it is not clear who would be able to seek a remedy in an “arbitration discrimination claim”. For example, where an arbitrator is not appointed as a result of discrimination by one or both of the arbitrating parties, that arbitrator will not know that this has occurred (unless this is disclosed to the arbitrator, presumably in breach of confidence). In the other cases envisaged by the Law Commission, for instance where a discriminatory procedural measure is adopted in an arbitration, it is again difficult to see who might seek a remedy in that respect. Procedural challenges of that kind could presumably happen at any stage of proceedings (and not just at the time of appointment, as the original proposal by the Law Commission anticipated) and therefore have the potential to cause real and serious delay, thereby jeopardising the attractiveness of English arbitration.
23. Finally, it is not clear that the procedure for bringing Arbitration Act discrimination claims should follow the example of the procedure applied by Employment Tribunals in cases of workplace discrimination. High Court proceedings and those in the Employment Tribunal differ in many significant respects, not least the fact that confidentiality is the cornerstone

of arbitration but has very little place in a process of open justice before the Courts. As a practical matter, the Law Commission should consider how an “arbitration discrimination claim” could be litigated in accordance with the overriding objective and in the context of a potentially ongoing arbitration. Simply adopting the approach found in the employment sphere will not lead to the correct approach in all the diverse forms of dispute to which the Arbitration Act applies.

(2) Indirect Discrimination

24. The Law Commission has acknowledged the responses it received to its first consultation which suggested that its proposals may not, as worded, be limited to direct discrimination (at §4.30). However, it remains of the view that such a limit is appropriate, stating that “prohibiting indirect discrimination could have the effect of outlawing major sectors of arbitral activity” (at §4.32).
25. Combar agrees with that latter statement. Again however, this does rather suggest that arbitral activity and anti-discrimination law cannot be aligned comfortably, despite the proposals now made in Chapter 4 of the second consultation paper.
26. As Combar emphasised in its response to the first consultation, the proposals are of uncertain ambit. This is made clear by its analysis of age discrimination at §4.50 to §4.51 of the second consultation paper. There, the Law Commission suggests that, under its proposals, “an arbitration clause requiring an arbitrator to have certain qualifications or experience is capable of being justified, and to this extent is therefore already catered for by our original proposal” (at §4.51). However, a clause requiring certain qualifications is not a clause which directly relates to a protected characteristic. It may constitute *indirect* discrimination but is not directly discriminatory. As such, Combar does not see why such a clause would require any justification under the Law Commission’s proposals, which do not purport to apply to indirectly discriminatory agreements.

27. The distinction drawn here is not a mere technicality. If parties are required to justify indirectly discriminatory terms, such as those requiring arbitrators to have particular experience, this is likely to result in the Courts having a significantly expanded role in the supervision of arbitrations and arbitration agreements, contrary to basic principles underpinning the 1996 Act. It is also likely to result in delay, and increase expense and complexity, by creating satellite litigation. We would therefore welcome greater clarity about precisely what is proposed by the Law Commission, and how the proposals fit and can be reconciled with the principles underpinning both the 1996 Act and the EA 2010.

(3) Party Autonomy

28. The fifth point raised in Chapter 4 responds to suggestions from consultees that party autonomy should not be restricted. Chapter 4 states that “*party autonomy cannot be a trump card*” because, whilst the 1996 Act “*recognises the importance of party autonomy*”, this is subject to “*such safeguards as are necessary in the public interest*” (at §4.36). Chapter 4 goes on to state that “*it is in the public interest to end unjustified discrimination*” (at §4.36).

29. Combar agrees that it is in the public interest that unjustified discrimination is brought to an end. However, this statement – on its face uncontroversial – raises two important issues.

30. First, when assessing what is in the ‘public interest’, the Law Commission must give proper consideration to the arbitration context and, in particular, the competing ‘public interests’ that must be borne in mind when deciding whether to legislate.

30.1. As the Supreme Court recognised in *Hashwani v Jivraj* [2011] 1 WLR 1872 (at §61), section 1(b) of the Arbitration Act enshrines “*[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*”. The focus in s.1(b) is on the breadth and importance of party autonomy, and the reference therein to safeguards necessary in the public interest does not provide a broad licence for courts to interfere with party autonomy. That is not the scheme of the 1996 Act.



- 30.2. Equally, as set out above, the courts have recognised that “*there is a public interest in the promotion and maintenance of London as a centre for international arbitrations*”, and that “[t]he Parliamentary purpose in the [1996] Act, which is drastically to reduce the extent of the intervention of the Courts in interfering with Awards in order to achieve speedy finality, is an aspect of the public interest in the proper functioning of our arbitration system”: *Terna Bahrain v Al Shamsi* [2012] EWHC 3283 (Comm) at §83.
- 30.3. It is overly simplistic, therefore, to say that “*it is in the public interest to end unjustified discrimination*”. As a broad statement of principle that is uncontroversial. But in assessing what that means in the arbitration context, the Law Commission must consider the fact that there are **competing considerations** that also go to the assessment of whether its proposals are in the public interest. In particular, there is a public interest (1) in the promotion of London as a centre for international arbitration – and concerns about delay, cost, and satellite litigation are therefore important and must be given proper weight – and (2) in maintaining an arbitration system that affords proper weight to party autonomy and ensures minimal intervention by the Courts.
- 30.4. As such, Combar considers that the Law Commission’s approach to party autonomy is too narrow. It cannot simply be said that party autonomy is subject to the public interest in ending unjustified discrimination. Such a suggestion ignores the public interest in maintaining an arbitration system which operates with minimal supervision by the courts. That is one of the key policies underpinning the 1996 Act.
31. Secondly, the Law Commission must consider the implications of its proposals for the existing legislative landscape for equality law.
- 31.1. The EA 2010 is the primary legislative means by which the public interest in ending unjustified discrimination is pursued. The Law Commission should therefore avoid proposals which are inconsistent with the scheme adopted by the Equality Act.

- 31.2. The proposals in Chapter 4 are not consistent with the overall scheme of the EA 2010 or the learning which has developed under it. By way of (non-exhaustive) example, the Equality Act does not generally permit direct discrimination to be justified, nor does it automatically deem certain forms of discrimination to be justified (as is here proposed by the Law Commission in relation to discrimination on the grounds of nationality).
- 31.3. Even more fundamentally, the core premise of the EA 2010 is that it is insufficient to prohibit only direct discrimination in the areas of life in which anti-discrimination law legitimately operates. As explained by Lady Hale in *JFS* at §56, rules against direct discrimination aim to achieve “*formal equality of treatment*”, whereas rules prohibiting indirect discrimination “*look beyond formal equality towards a more substantive equality of results*”.
- 31.4. In circumstances where the Law Commission recognises that laws prohibiting indirect discrimination cannot sensibly be applied in the arbitration context, it is difficult to see how the public interest in combatting discrimination, as revealed by the provisions of the EA 2010, supports a prohibition on direct discrimination in arbitral appointments or more broadly in arbitration. It is more coherent to recognise that, just as the EA 2010 does not apply to many types of contract and relationship, it cannot be brought into the field of arbitration in the manner the Law Commission has proposed.

(4) Consumer Choice

32. By the seventh point in Chapter 4, the Law Commission recognises that “*discrimination law generally does not apply to consumer choices*”, but notes that it considers that the decision to choose an arbitrator should nonetheless be subject to discrimination law because “*a discriminatory consumer does not – unlike an arbitral party – have their choice enforced by the court and backed by the coercive powers of the state*” (at §4.39 to §4.40). Chapter 4 also states that choosing an arbitrator is analogous to choosing a barrister, which is governed by the EA 2010 (at §4.40).

33. However, as explained by the Supreme Court in *Hashwani v Jivraj*, “the dominant purpose of appointing an arbitrator or arbitrators is the impartial resolution of the dispute in accordance with the terms of the agreement” (at §45). In this regard, there is no clear analogy with instructing a barrister. Appointing an arbitrator is a private consumer choice which the parties may agree to conduct on certain terms. That is not the sort of choice to which anti-discrimination law can readily be applied.

(5) Invalidating the whole arbitration clause

34. Chapter 4 notes (as point eight) that the common law rules on severance should apply in circumstances where a discriminatory agreement is unenforceable, such that only the offending words would be struck down. As the Law Commission has explained “[i]f that means being bound to arbitrate before a different arbitrator, so be it”. This is said to be justified because “in the end, the parties will still be getting a fair dispute resolution process before an impartial arbitrator” (at §4.44).

35. For the reasons identified in Combar’s response to the first consultation, we remain concerned that the proposed approach does not respect party autonomy as enshrined in the 1996 Act where (1) a clause so severed may be significantly different to the parties’ original agreement and (2) parties may well have preferred to litigate in the Courts in such circumstances. The policy of the 1996 Act is that the parties have their disputes adjudicated upon by a tribunal of their choice. It is for this reason that the grounds for challenging an award are so narrowly drawn.

(6) Faith-based arbitrations

36. The Law Commission’s ninth point responds to concerns raised by consultees concerning the enforceability of terms which seek to provide for faith-based arbitrations. The issues raised were addressed in Combar’s response to the first consultation.

37. However, the faith based example highlights an important issue under the 1996 Act, namely that it was drafted in terms that ensured that it would apply to a broad range of arbitrations of different natures and varying subject matters. The principles recognised in the 1996 Act (in particular, the principle of party autonomy) are essential to preserve that scheme and make it workable. The Law Commission is therefore encouraged to bear in mind the full range of arbitrations that fall within the scope of the 1996 Act when formulating its proposals. These range for international commercial arbitrations to small domestic family and sporting disputes.
38. The Law Commission's position is that, in any such contexts, directly discriminatory terms may be justified where this is a proportionate means of achieving a legitimate aim in the context of that arbitration. However, it does appear that in certain fields of arbitration (including faith-based arbitrations), parties are particularly likely to face challenges to their choice of arbitrator. Such challenges will delay the swift process of conducting arbitration and may expose parties to significant costs. The Law Commission should consider how particular fields of arbitration which may be most commonly (if not always) affected by its proposals can be protected in order to protect the diversity of specialised arbitration in England and Wales.

(7) The New York Convention

39. The twelfth point in Chapter 4 raises a new argument in relation to enforcement under the New York Convention. It is suggested that if parties are worried about hampering enforcement under the New York Convention, they should simply "*choose not to invoke [the Law Commission's] proposed reform*" (at §4.55).
40. The Law Commission gives as an example a case where X brings arbitral proceedings, X wishes to enforce an award overseas, and Y makes a discriminatory appointment. In such circumstances, X can simply choose not to challenge the appointment and ensure that the position under the New York Convention is secure.

41. With respect, however, this example is selective and ignores the central concern of consultees in relation to the New York Convention. A more realistic example is where X brings arbitral proceedings, X wishes to enforce an award overseas, and X makes a discriminatory appointment (in accordance with the parties' arbitral agreement). In such circumstances, Y will inevitably challenge the appointment both because the Law Commission's proposal permits Y to do so, and because such a challenge creates the possibility of preventing enforcement under the New York Convention.
42. Any final proposal which the Law Commission makes should recognise and guard against the potential for parties (such as Y in the above example) to use challenges on equality law grounds as a tactical means to delay proceedings or prevent enforceable awards being made.

(8) *Cross-referencing the Equality Act 2010*

43. The final point in the second consultation paper responds to the suggestion, raised by Combar and other consultees, that its proposed amendments to the Arbitration Act require parties to "*cross-reference another statute, namely the Equality Act 2010*" (at §4.57).
44. Here, the Law Commission accepts that it may be beneficial for the 1996 Act to "*contain something simple and bespoke*" on the topic of discrimination (at §4.59). However, it reasons that "*discrimination is wider than arbitration*" and is a topic "*addressed more generally in the Equality Act 2010*" (at §4.59). For this reason, the Law Commission considers it appropriate to amend the Arbitration Act in a way which requires parties to understand the provisions of the Equality Act.
45. However, it is unclear what is meant by the statement that "*discrimination is wider than arbitration*", or what consequences flow from it. Clearly, the provisions of the EA 2010 are relevant to English law's approach to discrimination in fields such as employment and the provision of services to the public. However, the scope of the 1996 Act is altogether different. Its provisions apply "*where the seat of the arbitration is in England and Wales or*

*Northern Ireland*” (see the 1996 Act, s.2(1)). It is not limited to arbitrations concerning English law-governed disputes. There is no reason to believe that parties adopting England and Wales as an arbitral seat will be familiar with the provisions of the Equality Act or otherwise subject to it in any of their dealings.

46. In addition, there is good reason to ensure that the 1996 Act can be understood as a self-contained instrument. As explained by the Court of Appeal in *C v D* [2008] Bus LR 843 at §17, “a choice of seat for the arbitration must be a choice of forum for remedies seeking to attack the award”, and “any challenges to any award” will be only those “permitted by [the 1996] Act”. In short, parties choose England as an arbitral seat because of the remedies incorporated within the 1996 Act. If the 1996 Act is to remain a coherent piece of legislation which attracts international custom, it should remain clear, simple and self-contained. As set out above, that was one of the fundamental aims of the 1996 Act, which is intended to be clear, user-friendly and readily comprehensible to the layman. The intentions behind the legislative scheme of the 1996 Act will therefore be significantly undermined if the parties are required to look at two pieces of legislation to understand their rights and obligations.

## Response ID ANON-44ZW-8X6J-9

Submitted to Law Commission second consultation on the Arbitration Act 1996  
Submitted on 2023-03-31 18:08:47

### About you

What is your name?

Name:  
JACQUES COVO

What is the name of your organisation?

Enter the name of your organisation:  
JACQUES COVO ex-FOSFA & GAFTA APPEALBOARD MEMBER

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.

Tell us why you regard the information as confidential:

### Proper law

Consultation Question 1

Yes

Please give your reasons::

It simplifies the proceedings.

### Section 67

Consultation Question 2

No

Please give your reasons::

In the event there is effectively no arbitral jurisdiction, this should be decided by the court without restricting the claimant from submitting the entire evidence it possesses, If it were otherwise he would feel the situation to be unfair.

Consultation Question 3

Other

Please give your reasons::

Did not find above CQ2

### Discrimination

#### Consultation Question 4

No

Please give your reasons::

It will ruin the commodity arbitrations for the U.K. citizens (or companies).

Also, in international commercial arbitration, a particularly important fact is the possibility for a party to select as arbitrator someone for whom he has confidence and very often this is a person of his nationality. Rarely not to say never the confidence is of the same level, in certain parts of the world, when the arbitrator is a foreigner

#### Consultation Question 5

Other

Please give your reasons::

1. I have difficulty to envisage that the matter may arise at the time of the appointment of an arbitrator as one is entitled to select the arbitrator of his choice.

2. As to appointments made by institutions or their treatment of a specific arbitrator because of religion, ethnicity, sex or age, I also have difficulty to envisage complaints against the institution.

#### Consultation Question 6

Please give your answer::

In respect to the attitude of arbitrators vis-a-vis a member of the Tribunal who

is badly treated by his or her colleagues because of religion, ethnicity, sex or age, the arbitrator at fault should be replaced and the proceedings should start anew.



Law Commission  
Review of the Arbitration Act 1996  
Second Consultation Paper

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Response to Question 1

Professor Andrew Dickinson

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1. For the reasons given below, I strongly disagree with the Law Commission's provisional proposal that a new rule be included in the Arbitration Act 1996 to the effect that the law applicable to an arbitration agreement is the law of the seat, unless the parties expressly agree otherwise in the arbitration agreement itself.
2. In my view, there is no good reason to alter the law laid down by the majority of the Supreme Court in *Enka*<sup>1</sup> and endorsed in its subsequent decision in *Kabab-Ji*.<sup>2</sup> The choice of law analysis in those decisions is both principled and (in its key components) clear, and the criticisms made of it in the Consultation Paper seem unfair. By contrast, the new rule proposed in the Consultation Paper involves a misguided pursuit of certainty at the expense of principle and is deeply flawed in its conception.

The Proposed Rule in Outline

3. The proposed rule would modify the common law position in two principal respects. First, by restricting the autonomy of the parties to choose the law applicable to their arbitration agreement, imposing a double-faceted requirement (a) that the parties' agreement on the law applicable be expressed (not implied), and (b) that the agreement be located "in the arbitration agreement". Secondly, by creating a fixed default rule, absent a choice meeting the above requirements, favouring the law of the seat.
4. In this response, I address first the role of party autonomy, before turning to consider the default rule.

Party Autonomy

5. The Consultation Paper's account of the decision in *Enka* ([2.14]ff) does not sufficiently acknowledge that the detailed reasoning of Lords Hamblen and Leggatt is founded on a wholly conventional analysis of the common law choice of law rules for contractual matters.<sup>3</sup> As a result, the way in which the current legal position is presented gives the misleading impression that the Supreme Court adopted a different set of rules for situations in which "there is a choice of law ... directed to the arbitration agreement itself" ([2.14], point (1)) and cases in which there is no such choice ([2.14], point (2)).
6. The true position, as their Lordships make clear in *Enka*, is there is a single common law rule with respect to party autonomy for arbitration and choice of court agreements (and all other contracts), that English law will apply the law chosen by the parties to govern their agreement,

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<sup>1</sup> *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38, [2020] 1 WLR 4117.

<sup>2</sup> *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2021] UKSC 48, [2021] Bus LR 1717.

<sup>3</sup> See *Enka*, [27]-[42].

unless that choice is contrary to public policy.<sup>4</sup> That rule is an expression of the principle of party autonomy.<sup>5</sup>

7. The question whether the parties have chosen the law of a particular country is to be answered by reference to the ordinary principles of English contract law, with which lawyers and judges have a close familiarity. In the case of a written instrument, those rules involve an objective assessment of the meaning of the express terms of that instrument, having regard to the other terms and the surrounding circumstances, as well as a willingness to imply additional terms as a matter of fact on the basis of obviousness or necessity for business efficacy.<sup>6</sup>
8. Following this, perfectly orthodox and principled, approach for arbitration agreements contained within a matrix contract may lead to a choice of law *for the arbitration agreement* being ascertained in a number of factually distinct ways, as follows:

<b>CHOICE EXPRESSED WITHIN THE ARBITRATION AGREEMENT</b>	<b>CHOICE EXPRESSED WITHIN THE INSTRUMENT OTHER THAN WITHIN THE ARBITRATION AGREEMENT</b>
<b>CHOICE IMPLIED WITH REFERENCE ONLY TO THE ARBITRATION AGREEMENT</b>	<b>CHOICE IMPLIED WITH REFERENCE TO TERMS WITHIN THE INSTRUMENT OTHER THAN THE ARBITRATION AGREEMENT</b>

9. The judgment in *Enka* correctly treats all four scenarios as facets of the unitary common law rule governing the parties' freedom to choose the applicable law. A specific choice of law within, and relating only to the arbitration agreement, used to be a relatively rare phenomenon but is becoming increasingly common.<sup>7</sup> The decision of the Court of Appeal in *Kabab-Ji* (subsequently affirmed by the Supreme Court) provides a clear example of a case in which a term (an express choice of law) in the instrument was held, on its proper interpretation, to extend to the entire instrument, including the arbitration agreement.<sup>8</sup> Absent an express choice of law provision, the particular terms of an arbitration clause may warrant the inference that the parties intended that the arbitrators and courts should apply English law not only to determine the merits but also to determine questions relating to the arbitration agreement.<sup>9</sup> The fourth possibility, a choice of law implied from other terms within the instrument (such as references to provisions of foreign law of the kind that were held insufficient in *Enka*<sup>10</sup>) and held to extend, of necessity, to the arbitration agreement must also be acknowledged, even if it is likely to be much rarer in practice.
10. This approach not only conforms to the principle of party autonomy, as applied in the common law's approach to the conflict of laws and in English contract law more generally, it also avoids arbitrary distinctions between lines of reasoning that often shade into one another. Why should an express choice of law provision within the body of an arbitration agreement and/or referring explicitly to the arbitration agreement be subjected to a different conflict of laws rule from a

<sup>4</sup> *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] AC 277; *Enka*, [27].

<sup>5</sup> See the discussion in the Annex to this submission.

<sup>6</sup> *Enka*, [31]-[35]. See generally *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173; *Barton v Morris* [2023] UKSC 23.

<sup>7</sup> See *Enka*, [43].

<sup>8</sup> *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2020] EWCA Civ 6, [2020] 1 Lloyd's Rep 269, affirmed [2021] UKSC 48, [2021] Bus LR 1717.

<sup>9</sup> *Enka*, [114], with reference to *Habas Sinai Ve Tibbi Gazlar Istihsal v VSC Steel Co Ltd* [2013] EWHC 4071 (Comm), [2014] 1 Lloyd's Rep 479, a decision of Hamblen J.

<sup>10</sup> *Enka*, [149]-[155].

choice of law provision located elsewhere within the written instrument (perhaps in the preceding or immediately following clause) and/or not referring explicitly to the arbitration agreement but extending on its proper interpretation to all terms within the written instrument? Why should a choice of law which can be established solely by interpreting the words to be found explicitly within the instrument be upheld, while one that relies upon an inference on the basis of obviousness/necessity be rejected?

11. The undesirability of drawing distinctions of these kinds is specifically, and in my view compellingly, addressed by Lords Hamblen and Leggatt in the following passages in *Enka*:

“It is rare for the law governing an arbitration clause to be specifically identified (either in the arbitration clause itself or elsewhere in the contract). It is common, however, in a contract which has connections with more than one country (or territory with its own legal system) to find a clause specifying the law which is to govern the contract. A typical clause of this kind states: ‘This Agreement shall be governed by and construed in accordance with the laws of [name of legal system]’. Where the contract also contains an arbitration clause, it is natural to interpret such a governing law clause, in the absence of good reason to the contrary, as applying to the arbitration clause for the simple reason that the arbitration clause is part of the contract which the parties have agreed is to be governed by the specified system of law.” (at [43])

“It does not follow from the separability principle that an arbitration agreement is generally to be regarded as ‘a different and separate agreement’ from the rest of the contract or that a choice of governing law for the contract should not generally be interpreted as applying to an arbitration clause.” (at [61])

“Many of the cases applying the common law rules distinguish between a choice of law which is ‘express’ or ‘implied’. ... The terminology is useful in reflecting the fact that an agreement on a choice of law to govern a contract, like any contractual term, may be explicitly articulated or may be a matter of necessary implication or inference from other terms of the contract and the surrounding circumstances. The distinction, however, is not a sharp one: language may be more or less explicit and the extent to which a contractual term is spelt out in so many words or requires a process of inference to identify it is a matter of degree. Determining whether the parties have agreed on a choice of law to govern their contract is in every case a question of interpretation. It is also important to keep in mind that whether a choice is described as express or implied is not a distinction on which any legal consequence turns. An implied choice is still a choice which is just as effective as a choice made expressly.” (at [35])

12. The Consultation Paper does not call this reasoning into question.<sup>11</sup> However, the rule proposed in the Consultation Paper would crystallise a distinction between, on the one hand, a choice expressed within the arbitration agreement (effective) and a choice demonstrated by any other route:

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<sup>11</sup> As I understand (although this line of argument is not explicitly advanced in the Consultation Paper), some consultees responding to the discussion of the choice of law question in the Law Commission’s first consultation paper (see at [11.8]-[11.12] in that paper) have argued that the approach to the question of party autonomy taken by the Supreme Court in *Enka* and *Kabab-Ji* might not faithfully give effect to the parties’ intentions, ascertained subjectively or objectively. I address such arguments, which I find unconvincing, in the Annex to this submission.

CHOICE EXPRESSED WITHIN THE ARBITRATION AGREEMENT	CHOICE EXPRESSED WITHIN THE INSTRUMENT OTHER THAN THE ARBITRATION AGREEMENT
CHOICE IMPLIED WITH REFERENCE ONLY TO THE ARBITRATION AGREEMENT	CHOICE IMPLIED WITH REFERENCE TO TERMS WITHIN THE INSTRUMENT OTHER THAN THE ARBITRATION AGREEMENT

13. In consequence, an express choice of law provision of the kind that was held effective for the arbitration agreement in *Kabab-Ji* would now no longer be given effect, even though there existed (in the form of the interpretation clause) a compelling reason for interpreting that clause as extending to each and every term within the written instrument, including the arbitration agreement.<sup>12</sup>
14. Moreover, if the proposal is to be literally understood, even an express choice of provision which referred explicitly and specifically to the arbitration agreement would not be given effect if it were not contained within the body of the arbitration agreement.
15. To avoid such undesirable conclusions, it would be necessary to broaden the wording of the proposed rule so as to refer (for example) to a choice of law made expressly with respect to the arbitration agreement. This, however, would still raise questions as to the degree of ‘explicitness’ required<sup>13</sup> and would place an undesirable and unnecessary emphasis upon the blurred borderline line between interpretation and implication.<sup>14</sup>
16. I respectfully submit that the common law rule, which takes an objective approach to determining the parties’ common intention, without imposing an arbitrary restriction as to the locus of the term or the methods by which the court deduces that intention, is perfectly satisfactory and fit for purpose. The Law Commission acknowledges ([2.77]) that its proposed rule would restrict party autonomy, but appears to have formed the opinion that those restrictions are necessary or desirable to protect the parties from exercising their power to choose the law applicable to their relationship without “eyes wide open”. That interventionist instinct seems contrary to the prevailing modern attitude in English contract law that experienced parties negotiating at arms length should be left to judge for themselves what is in their best interests.<sup>15</sup>
17. I accept that there are aspects of the majority’s reasoning on the choice of law issue in *Enka* that do require further elucidation. In particular, the majority’s discussion of the potential significance of choice of law rules set out in legislation in force in the seat of the arbitration and the presumption in favour of validity leaves a number of questions open. As Lords Hamblen and Leggatt recognised, however, these factors merely provide part of the context within which the terms of the instrument are to be interpreted and any necessary implications drawn by the court by a conventional process of reasoning.<sup>16</sup> They are not exceptions to the common law choice of

<sup>12</sup> *Enka*, [52]; *Kabab Ji*, [37]-[39].

<sup>13</sup> Would a case such as *Kabab-Ji* (text to nn 7 and 11 above), in which the Supreme Court considered the parties’ common intention to be “absolutely clear” (ibid, [39]) satisfy any test imposed?

<sup>14</sup> See para 11 above. Such difficulties have bedevilled the application of s 1 of the Contracts (Rights of Third Parties) Act 1999, insofar as it requires certain matters to be stated expressly. See eg *Chudley v Clydesdale Bank Plc* [2019] EWCA Civ 344, [2020] QB 284.

<sup>15</sup> *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, 848 (Lord Diplock); *Goodlife Foods Ltd v Hall Fire Protection Ltd* [2018] EWCA Civ 1371, (2018) 178 Con LR 1, [61]-[63] (Coulson LJ).

<sup>16</sup> *Enka*, [70]-[72], [95]-[109] (see paras 10-13 in the Annex).

law rule. Legislation is not needed to resolve these residual matters, which can be left to be resolved by the courts in the normal way.

18. It is unfortunate that the Consultation Paper presents ([2.63]ff) the arguments against reform of the common law rule allowing the parties to choose the law applicable to their arbitration agreement as an expression of the views of a single 'dissenting' consultee. Those arguments are formidable. If the Law Commission's proposed rule were adopted, (a) the parties' legitimate expectations would be liable to be frustrated,<sup>17</sup> and (b) the restrictions upon party autonomy would increase the risk of a mis-alignment of the law governing the matrix contract and the law governing the arbitration agreement (a prospect that should be taken as seriously as the risk of mis-alignment of the law governing the law governing the matrix contract and the law governing the procedural aspect of the arbitration).<sup>18</sup>
19. The Consultation Paper also fails to address the important question whether the proposed new rule would be compatible with the international conflict of laws rule laid down in Art V(1)(a) of the New York Convention, adopted in s 103 of the 1996 Act.<sup>19</sup> In *Kebab-ji*, the Supreme Court interpreted that provision (approaching the question from first principles in the absence of a clear consensus among Contracting States) as supporting the proposition that "an express agreement as to the law which is to govern the arbitration agreement is not required and ... any form of agreement will suffice", with the consequence that "a general choice of law clause in a written contract containing an arbitration clause will normally be a sufficient 'indication' of the law to which the parties subjected the arbitration agreement".<sup>20</sup> In light of that clear, and it is submitted compelling, conclusion, legislation in the terms proposed would risk placing the UK in breach of its international obligations.<sup>21</sup> It would in any event, as pointed out in *Enka*,<sup>22</sup> be illogical to take a different approach to choice of law in matters to which the New York Convention applies, so (even assuming that there were no issue of compliance with the treaty) it would be necessary to bring s 103 into line with any new rule.
20. In addition to s 103, the proposed restrictions upon the parties' autonomy to choose the law applicable to their arbitration agreement cannot easily be reconciled with (a) the prominent role given to party autonomy in s 1(b) of the 1996 Act "subject only to such safeguards as are necessary in the public interest",<sup>23</sup> (b) the explicit reference in s 4(5) to an *express or implied* choice of a law other than English or Northern Irish law as warranting a derogation from non-mandatory provisions,<sup>24</sup> and (c) s 46, which directs the arbitrators to apply "the law chosen by the parties", without qualification, in deciding the dispute.
21. The Supreme Court has recently ruled on the matter not once, but twice, and the Consultation Paper presents no evidence that their Lordships' approach to the application of longstanding conflict of laws rules to arbitration agreements has given rise to significant difficulties that require

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<sup>17</sup> See the discussion of this point in the Annex.

<sup>18</sup> In addition to the reasoning of the majority in *Enka*, see Lord Sales, at [269]-[271].

<sup>19</sup> The rule extends beyond the recognition of Convention awards to stays to give effect to Convention arbitration agreements (see *Enka*, [130]).

<sup>20</sup> *Kebab-ji*, [35]. See also *Enka*, [129].

<sup>21</sup> See *Kebab-ji*, [31].

<sup>22</sup> *Enka*, [135]-[136].

<sup>23</sup> The Consultation Paper does not clearly identify any such "public interest".

<sup>24</sup> In this regard, I do not agree with the Law Commission's view that s 4(5) would not require amendment if this reform were to be pursued.

legislative intervention.<sup>25</sup> Indeed, the arguments presented in favour of reform seem weak. The complaint ([2.52]) that there may be an increased need for English courts to consider foreign law is one that may be made of any conflict of laws rule that applies a law other than the law of the forum. It is plainly an inadequate reason for legislative reform. The point made about scope ([2.59]) seems to elevate what is no more than a factor to be taken into account in interpreting English law governed dispute resolution provisions<sup>26</sup> into a principle of public policy overriding the parties' choice of the law to govern all aspects of their arbitration agreement (including interpretation). As to the point about added complexity, our courts are well used to dealing with the sometimes difficult issues of characterisation that arise at the interface of two choice of law rules, and (in this particular instance) have the advantage of the significant guidance given in *Enka* on the application of s 4(5) where the law applicable to the arbitration agreement and the procedural law diverge.<sup>27</sup> As noted above (para 18), the proposed new rule would generate its own boundary dispute between the law applicable to the arbitration agreement and the law chosen to govern the matrix contract.

22. Obligations of confidentiality ([2.60]) may arise otherwise than by agreement and the secrecy attached to arbitral proceedings can readily be characterised as a procedural as well as a substantive matter, justifying application of the law of the seat alongside the law governing the arbitration agreement.<sup>28</sup> A similar solution may be available in respect of the, admittedly more thorny, issue of separability ([2.54]-[2.56]) in light of the one-way extension of the scope of the statutory rule (s 7) in s 1(5) of the 1996 Act, which seems to contemplate that the provision may be capable of producing effects both when the law applicable to the agreement to arbitrate is English law and when the seat of the arbitration is in England. This point could (and, indeed, should) be clarified in the course of the current review, as could any concern about restrictive foreign rules on arbitrability ([2.57]-[2.58]). If these two issues (separability and arbitrability) did raise significant concerns in practice, they would be more satisfactorily addressed by specific legislative provision giving mandatory effect to the relevant rules of English law rather than through the mechanism of a problematic change to the common law choice of law rules.<sup>29</sup>
23. Overall, I see little to commend the Law Commission's proposed approach to party autonomy and much to be concerned about if the proposed restrictions were to be adopted.

#### The Default Rule

24. The Consultation Paper is focused on the question of party autonomy and does not seek to explain or justify the proposed default rule in detail.

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<sup>25</sup> The Consultation Paper suggests, without any citation, that "Lords Hamblen and Leggatt, who gave judgment in *Enka v Chubb*, have indicated their support for possible reform here". I find this surprising, given the forceful and persuasive way in which they presented their views on the question of the role of party autonomy in *Enka* and *Kabab-jir*". I note that their Lordships recognised (*Enka*, [141]), that they were not designing a system of law from scratch, but this statement was made in the context of their discussion of the default rule. Any extra-judicial expression of opinion would obviously not undermine the point made here as to the weight to be given to the Supreme Court's decisions in these two cases: the views of judges (even Supreme Court judges) should carry no greater weight than that of any other consultee.

<sup>26</sup> *Enka*, [107].

<sup>27</sup> *Enka*, [83]-[94].

<sup>28</sup> In *Enka*, Lords Hamblen and Leggatt appeared to recognise the possibility (at [78]) that issues may be capable of being characterised in more than one way.

<sup>29</sup> See Consultation Paper, [2.54], raising this possibility in relation to s 7 (a possibility discussed in the first consultation paper (see at [10.3]-[10.11] in that paper).

25. At first sight, the proposed rule in favour of the law of the seat to govern an arbitration agreement in the absence of a choice of law by the parties would seem to conform to the general approach favoured by the majority of the Supreme Court in *Enka* in identifying the law with which an arbitration agreement has its closest and most real connection in the absence of a choice of law.<sup>30</sup> The Law Commission's proposed rule would replace the general 'closest connection' test with a fixed, immutable default rule, which (if nothing else) would appear to have the advantage of certainty over the flexible common law test.
26. It is, however, important to note that the discussion of this approach in *Enka* proceeds on the assumption that "the parties have selected a place for the arbitration of disputes",<sup>31</sup> and that their Lordships acknowledged that "[t]here can also be cases where no seat has been designated, where it may be appropriate to apply the law applicable to the rest of the contract".<sup>32</sup>
27. As s 3 of the 1996 Act makes clear, there will be many cases in which the seat of the arbitration is not designated from the outset, either because the parties have left it to be determined by an arbitral or other institution or person (s 3(b)) or by the arbitral tribunal (s 3(c)) or because they have not addressed the question at all, leaving the seat to be determined "having regard to the parties' agreement and all the relevant circumstances".
28. This raises a fundamental problem with the proposed default rule. The English courts have long recognised that a contract cannot exist in a legal vacuum, and must have a governing law from the outset.<sup>33</sup> How, then, would the proposed new rule be applied in a case in which the parties did not choose the seat of the arbitration from the outset? Would the proposed default rule fall to be applied on the basis of a prediction, having regard to the information reasonably available to the parties at the date of contracting, as to the way in which the seat would likely be designated or determined in accordance with the mechanism to which s 3 refers? What if the seat were subsequently to be fixed by a relevant mechanism in a way that does not conform to that prediction? Would the law of the seat, as designated or determined, then be applied retrospectively, for example, to questions of validity and effect of the arbitration agreement? These questions would need to be addressed and satisfactorily resolved if a reform proposal along the lines proposed were to be pursued. By contrast, the common law's approach of identifying the law with which the arbitration agreement has its closest and most real connection at the time of its formation does not produce these difficulties.
29. A further issue concerns the effect of s 4(5) of the 1996 Act, under which the parties may agree that a law other than the law of the seat should apply to any non-mandatory procedural matter. Would the default rule apply in a case in which the parties choose a procedural law for the arbitration which is not the law of the seat? In *Enka*, Lords Hamblen and Leggatt took the view that this possibility did not undermine the case for applying the law of the seat to an arbitration agreement in default of choice,<sup>34</sup> and there is no qualification along these lines in the choice of law rule within Art 5(1)(a) of the New York Convention. That said, many of the advantages claimed for the proposed new rule would disappear if the law applicable to the arbitration agreement were not to conform to the law governing procedural matters. At the very least, the point would

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<sup>30</sup> *Enka*, [119]-[120].

<sup>31</sup> *Enka*, [119].

<sup>32</sup> *Enka*, [146].

<sup>33</sup> *Amin Rasheed Shipping Corp v Kuwait Insurance Co* [1984] AC 50, 65.

<sup>34</sup> *Enka*, [124].

deserve serious consideration if (contrary to the view canvassed in this response) the Law Commission were persuaded that it should proceed with the proposed reform.

30. Nevertheless, for the reasons set out above, I would urge the Law Commission not to adopt its proposed choice of law rule.

Professor Andrew Dickinson<sup>35</sup>

18 April 2023

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## Annex Party Autonomy Revisited

1. In this Annex, I consider the view, which I understand to be expressed by some consultees, that the approach taken by the Supreme Court in *Enka* and *Kabab-ji* in determining the effect of choice of law provisions in the matrix contract does not accord with the intentions of the parties, subjectively or objectively ascertained.
2. The Supreme Court's approach is neatly summarised as follows (*Enka*, at [60]):

“[A] clause such as ‘This Agreement is to be governed by and construed in accordance with the laws of [a named country]’ is naturally and sensibly understood to mean that the law of that country should govern and determine the meaning and effect of all the clauses in the contract which the parties signed including the arbitration clause.”
3. If I understand correctly, the counter-argument proceeds as follows:
  - (a) The parties have evinced a clear intention to have their disputes resolved by arbitration in a particular country (in England or elsewhere), and not by court proceedings.
  - (b) When the parties choose the law applicable to their matrix contract, that choice should not be understood in such a way as to undermine the intention to settle disputes by way of arbitration.
  - (c) Given that some legal systems are more receptive to international commercial arbitration than others, there are significant risks that the choice of a law other than the law of the seat of the arbitration may exclude or restrict the parties' ability to resort to arbitration in order to settle disputes. In particular, that law may take an approach to separability, arbitrability or scope of the arbitration agreement that is less favourable than the law of the seat (see the discussion in the Consultation Paper, at [2.54]-[2.59]).
  - (d) In light of those risks, the Supreme Court's willingness to draw an inference that the parties intended the law applicable to their matrix contract to govern also their arbitration agreement does not align with the parties' true intentions in a significant number of cases.
  - (e) A rule such as that proposed by the Law Commission will ensure greater fidelity to the parties' intentions.
4. As it was described to me, at least some of the consultees who have raised this argument are willing to accept that the approach of the Supreme Court in *Enka* and *Kabab-ji* conforms to the objective principle generally applied in English contract law and in the conflict of laws, but seek to argue that the parties' subjective intentions should be given a more prominent role with respect to arbitration agreements than they would have in those other areas (for example, through rectification or the principle that a party cannot rely on an objective meaning which it knows not to reflect its counterparty's actual intention: *Smith v Hughes* (1871) LR 6 QB 597; *FSHC Group Holdings Ltd v Glas Trust Corporation Ltd* [2019] EWCA Civ 1361, [2020] Ch 365). I would respectfully suggest that such expressions of opinion be treated with the utmost caution, for fear of upsetting well-settled and well-founded principles of commercial law (and contract law more generally) in England. If this approach were to be countenanced, the detail as well as the possible implications would need to be very carefully considered.
5. The strongest version of the argument presented at para 3 above, as it seems to me, is that the express choice of an arbitral seat (or, possibly, the choice of arbitration with a clear mechanism for designating the seat) counteracts the force of the inference from language and from other

considerations such as certainty and coherence (see *Enka*, at [53], [269]-[271]) to the extent that it is no longer possible for a reasonable bystander to conclude that the parties' intended their choice of law for the matrix contract to extend to their arbitration agreement.

6. This argument was considered by the Supreme Court in *Enka*. The majority considered at length (at [64]-[94]) what they described as 'the overlap' argument, which they described in the following terms (at [64]):

"[T]his argument rests on the premise that the curial law which governs the arbitration process is so closely related to the law governing the arbitration agreement that a choice of law to govern the contract should generally be presumed not to apply to an arbitration clause when the parties have chosen a different curial law"

7. In its most potent form (as favoured by the Court of Appeal in *Enka*) the overlap argument not only counteracts any inference that might otherwise be drawn from the terms of a choice of law provision for the matrix contract, but also supports the positive conclusion that it is natural to regard a choice of seat as an implied choice of law applicable to the arbitration agreement (see *Enka*, at [66]). The Supreme Court expressly rejected the overlap argument in that form (see *Enka*, at [94]):

"[W]e do not consider the overlap argument as accepted by the Court of Appeal to be well founded. While a choice of seat and curial law is capable in some cases (based on the content of the relevant curial law) of supporting an inference that the parties were choosing the law of that place to govern the arbitration agreement, the content of the Arbitration Act 1996 does not support such a general inference where the arbitration has its seat in England and Wales."

8. The Supreme Court also rejected the less potent (negative) form of the overlap argument under consideration here (see *Enka*, at [170(v)]):

"The choice of a different country as the seat of the arbitration is not, without more, sufficient to negate an inference that a choice of law to govern the contract was intended to apply to the arbitration agreement."

9. At the same time, however (and as the words "without more" emphasise) the majority acknowledged that there may exist circumstances, in the reasonable contemplation of the parties that could entitle a court to draw the conclusion that the parties' choice of law does not extend to the arbitration agreement (see *Enka*, at [170(vi)]):

"Additional factors which may, however, negate such an inference and may in some cases imply that the arbitration agreement was intended to be governed by the law of the seat are: (a) any provision of the law of the seat which indicates that, where an arbitration is subject to that law, the arbitration agreement will also be treated as governed by that country's law; or (b) the existence of a serious risk that, if governed by the same law as the main contract, the arbitration agreement would be ineffective. Either factor may be reinforced by circumstances indicating that the seat was deliberately chosen as a neutral forum for the arbitration."

10. The Supreme Court considered the first type of case at [70]-[72]. The reasoning is not fully developed, and not entirely straightforward to follow. The Supreme Court considered the second type of case, under the heading "Avoiding invalidity", in much greater detail at [95]-[109]. As Lords Hamblen and Leggatt made clear from the outset (at [95]), they were seeking to give effect to

ordinary principles of contractual interpretation. This led them to analyse the position as follows (at [106]):

“The principle that contracting parties could not reasonably have intended a significant clause in their contract, such as an arbitration clause, to be invalid is a form of purposive interpretation, which seeks to interpret the language of the contract, so far as possible, in a way which will give effect to - rather than defeat - an aim or purpose which the parties can be taken to have had in view. The strength of the inference that an interpretation of the contract would defeat an aim of the parties is, however, a matter of degree. An interpretation which would without doubt mean that an arbitration clause is void and of no legal effect at all gives rise to a very powerful inference that such a meaning could not rationally have been intended.”

11. As they acknowledged, there might also be a countervailing inference (although less powerful than the case of invalidity) in circumstances where the law chosen by the parties to govern the matrix contract would give interpret the scope of the arbitration agreement restrictively (*Enka*, at [108]):

“To the extent that a putative applicable law fails to recognise this presumption that arbitration has been chosen as a one stop method of dispute resolution, it is inherently less likely that reasonable commercial parties would have intended that law to determine the validity and scope of their agreement to arbitrate (rather than litigate) disputes.”

Here, the considerations that led the House of Lords to give a broad interpretation to arbitration and choice of court agreements in *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40 (see *Enka*, at [107]) are also relevant to the interpretation of choice of law provisions in contracts, justifying in this case giving them a more restrictive scope of application (compare *Fiona Trust*, at [27]).

12. Importantly, however, Lords Hamblen and Leggatt emphasised that this question of interpretation (and the impact of any potential impairment of the parties’ wish to resort to arbitration upon the interpretation of a choice of law provision in the matrix contract) was one that would need to be resolved on the facts of the particular case (at [109]):

“What degree of impairment to the commercial purpose of an arbitration agreement will be enough to negate the assumption that a choice of law to govern the contract is intended to apply to the arbitration agreement is not a question which can be answered in the abstract. As with any question of construction, it will be necessary to have regard to the particular words used in the contract and the surrounding circumstances, as well as the nature and extent of the risk that the purpose of the arbitration agreement would be undermined if its validity and scope were governed by the relevant system of law. We cannot improve on the formulation of Moore-Bick LJ in the *Sulamérica* case, para 31, that commercial parties are generally unlikely to have intended a choice of governing law for the contract to apply to an arbitration agreement if there is ‘at least a serious risk’ that a choice of that law would ‘significantly undermine’ that agreement.”

13. As these extracts make clear, the view of the Supreme Court in *Enka* was that English law is already perfectly well equipped to take account of risks of the kinds described at para 3(c) above. The existence of such risks, as part of the ‘factual matrix’ taken to have been in the reasonable contemplation of the parties at the time that they concluded their contract, may well support the conclusion that they did not intend that the law that they chose to govern their substantive relationship would also apply to their agreement to arbitrate. Whether that conclusion can be

drawn will, very properly, depend on a detailed examination of ‘the particular words used in the contract and the surrounding circumstances, as well as the nature and extent of the risk that the purpose of the arbitration agreement would be undermined if its validity and scope were governed by the relevant system of law’. This subtlety is the hallmark of the approach taken in English law to the interpretation of any commercial agreement (see *Wood v Capita* [2017] UKSC 24, [2017] AC 1173, at [10]-[13] (Lord Hodge); Lord Hoffmann, ‘Language and Lawyers’ (2018) 134 LQR 553).

14. By contrast, the argument described at para 3 above lacks this subtlety (or any subtlety at all). It proceeds from the premise that *some* legal systems are or may be more restrictive of international commercial arbitration than others (and, in particular, than the legal system in England and Wales) to the conclusion that *any inference* that the parties intended that the law expressed to apply to their matrix contract should also apply to their arbitration agreement is unwarranted. If its premises and conclusions were to be accepted, they would prevent such an inference being drawn in a case in which the law chosen by the parties does not impose any significant impediment on the parties’ ability to resolve disputes by arbitration, and even in a case in which the law chosen by the parties is more receptive to arbitration than the law of the seat,<sup>36</sup> or in a case (such as *Kabab-jj*) in which the parties unambiguously make clear their wish to extend their choice to each and every provision within the body of their contractual instrument without explicitly reference to the arbitration agreement. In so doing, it distorts rather than elucidates the parties’ objective intentions.
15. For the reasons, as well as those set out in the main part of this response, I do not agree that the approach of the Supreme Court in *Enka* to the choice of law issue is liable to frustrate or undermine the parties’ intentions or that the parties’ autonomy should be restricted in the way that the Law Commission proposes.

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<sup>36</sup> Here, it is to be noted that (a) the Law Commission’s proposal would in terms apply not only when English law is the law of the seat (Consultation Paper, [2.77]), and (b) many other legal systems are at least as receptive, if not more receptive, to the resolution of disputes by arbitration than England and Wales. The assumption underlying the argument under discussion, that the choice of a law other than that of the seat to govern an arbitration agreement is liable to undermine the commercial purpose of the arbitration agreement, seems highly questionable.

Submitted to Law Commission second consultation on the Arbitration Act 1996  
Submitted on 2023-05-21 21:20:26

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[REDACTED]  
[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.

Tell us why you regard the information as confidential:

## Proper law

### Consultation Question 1

Yes

Please give your reasons::

The law of the seat governs the procedural aspects of the arbitration proceedings. If the seat applies its law, it would be the most efficient choice. Unless parties agreed otherwise, there is no reason to change this efficiency.

In this way, we can also protect the validity of arbitration agreements whenever parties choose London as an arbitration seat. In the Sulamerica case, Brazilian law was tainting the arbitration agreement and making the agreement invalid. However, judges applied the law of the seat which is England and Wales and survived the arbitration agreement. With this proposed change, it will be certain that the English law will apply to the arbitration agreement and other laws will not be able to taint the validity of the arbitration agreement.

## Section 67

### Consultation Question 2

Yes

Please give your reasons::

This will give limited grounds to the Section 67 challenge. The exceptions seem reasonable to save the challenge if there is any misconduct of the justice in the decision of the arbitral tribunal

### Consultation Question 3

Yes

Please give your reasons::

The proposed change is in line with the trend of becoming a more arbitration-friendly jurisdiction. The arbitration tribunal will have stronger authority and control to rule its jurisdiction, which is a positive development for a stronger arbitration culture.

## Discrimination

### Consultation Question 4

Yes

Please give your reasons::

To have a truly international character of international arbitration, arbitrators must be a nationality different than parties. Thus, I agree with the proposal.

### Consultation Question 5

Yes

Please give your reasons::

Discrimination of any kind should be prohibited in international arbitration to safeguard a better and truly international arbitration practice.

### Consultation Question 6

Please give your answer::

There are several remedies we can think of. Some are:

- 1- Not allowing that arbitrator to be appointed in arbitration proceedings for a certain period of time, or a complete ban depending on the severity of the discrimination.
- 2- Making the discrimination publicly available for future parties to be aware of the situation. This is also important for parties to make a better arbitrator choice and a more transparent regime.
- 3- The arbitrator should be removed from the panel of arbitrators if he/she acts in a discriminatory manner.

Submitted to Law Commission second consultation on the Arbitration Act 1996  
Submitted on 2023-04-05 09:46:11

## 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?

[REDACTED]  
[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.

Tell us why you regard the information as confidential:

## Proper law

### Consultation Question 1

Yes

Please give your reasons::

Although issues regarding the law of the arbitration agreement rarely arise in domestic property arbitrations (which is the sphere in which we practise, which represents a significant number of the arbitral disputes in England and Wales), we agree with the proposal, essentially for the reasons given in paragraph 2.75 of the Paper.

We do however have a number of points to make about the wording of the the proposal in paragraph 2.6 and 2.78 of the Paper that "a new rule be included in the Arbitration Act 1996 to the effect that the law of the arbitration agreement is the law of the seat".

We respectfully agree with the underlying reasoning for that suggestion, but not with its expression. We have three comments.

(1) First, it is our experience that the requirement (often ignored) to state the "seat" of the arbitration is routinely misunderstood, with parties and their representatives specifying anything from "London" to "England" to "UK". Section 3, which defines this expression, lacks the clarity which characterises the remainder of the Act.

(2) Secondly, the wording of the proposal is ambiguous, it not being clear whether the law of the seat should govern the law of the arbitration agreement, or vice versa.

(3) Thirdly, noting the view advanced in paragraph 2.9 of the Paper that "the seat is where the arbitration is legally deemed to occur", we question how this essentially circular view is to be applied in practice, especially given that (as paragraph 2.9 also states), "A physical hearing might happen anywhere, or it might be online". If a physical test is not determinative, then who is to carry out the deeming process; what if the parties disagree; and what if nothing is said? The Supreme Court resolved these questions in *Enka* in a way that does not translate easily into a simple drafting formula.

To cure the first two points, we consider that it would be better to propose that the new rule be that "the law of the arbitration agreement is governed by the law of the jurisdiction in which the arbitration takes place. (unless the parties expressly agree otherwise in the arbitration agreement itself)." We regret to say that we are unable to resolve the third point, the remedy for which strays outside the scope of the consultation paper. In the vast majority of domestic arbitrations, this question will not arise, it being common ground that the seat is where the arbitration occurs. But a different formula with guidance on this point will, we suggest, be necessary in order to provide a satisfactory test, which might most conveniently be carried out by amendment of section 3.

## Section 67

### Consultation Question 2

Yes

Please give your reasons::

We remain of the view that challenges to decisions on substantive jurisdiction should be circumscribed in the manner outlined. Further, we regard the substance of the current proposal as essentially unchanged from the thrust of that previously put forward; the changes are basically terminological rather than fundamental.

### Consultation Question 3

Yes

Please give your reasons::

That said, whether the proposed restrictions are embodied in the Act or in rules of court is, we believe, of little consequence, although we recognise that rules of court may be more easily revised in the future, if necessary or appropriate.

## Discrimination

### Consultation Question 4

Other

Please give your reasons::

In the context of domestic property arbitrations, issues regarding the nationality of the arbitrator are most uncommon.

As we said before, arbitral appointments should plainly be free from discrimination, and we acknowledge that this potentially includes the nationality of the arbitrator.

If the proposal is to allow parties to an arbitration agreement to agree in the terms of the arbitration agreement (or even subsequently) that the arbitrator must have a nationality different from the parties, we have no objection to that, although we do not foresee any such opportunity being taken frequently (if at all) in standard domestic property arbitration settings.

If, however, the proposal (namely, that it should be deemed justified to require an arbitrator to have a nationality different from that of the arbitral parties) is intended to, or would, permit any party to an existing arbitration agreement (including a domestic property arbitration) unilaterally to insist that the arbitrator must be a different nationality from the parties, we disagree with the proposal.

In the field of domestic property arbitrations, unsurprisingly at least one (if not both) of the parties is often British, and the arbitrator is likewise, and we are not aware of any issues generated by this. Indeed, (in view of the subject-matter of such arbitrations and the desire to appoint arbitrators who are experienced in the domestic property field) it is likely (although certainly not inevitable or necessary) that the arbitrator may in practice be British.

We are concerned that, if a party to an extant domestic property arbitration agreement were able to veto the appointment of a British arbitrator, this could potentially be used by a recalcitrant respondent as a means of derailing or frustrating the intended arbitral process by denying the claimant the ability to secure the ready and expeditious appointment of a suitably qualified, experienced arbitrator with expertise in the sector, simply on the basis of the otherwise appropriate appointee's nationality and despite there being no actual basis to impugn the would-be arbitrator's impartiality on that ground. Such a tactic – to rule a very substantial pool of domestic property arbitrators out of the equation – could be deployed even by a British respondent, just for nakedly disruptive purposes. If that were possible, it would clearly be a most unfortunate state of affairs.

We are not persuaded that the international football match analogy (Paper, para.4.28) is germane or carries force in relation to domestic property arbitrations.

A non-German football referee will be fully equipped to referee an England-Germany match because the rules of football are global and are mastered by any internationally accredited referee, and there is no shortage of such referees available for that purpose.

By contrast, domestic football matches are usually refereed by domestic referees, and indeed it would scarcely be viable or appropriate if either team could demand that the referee for such a match be an international referee. We suggest that this state of affairs is unhesitatingly accepted in the domestic context, even where the teams in the domestic league are owned by foreign bodies.

The same should apply in relation to domestic property arbitrations. Otherwise, there is a risk that parties who do not wish to play ball with the arbitral process may be able to reject as of right skilled domestic arbitrators, thereby materially impeding such arbitrations and bringing the system into disrepute.

Additionally, we question the premise that arbitrators, especially in domestic arbitrations, must be of neutral nationality (or that one party can so insist). Parties to litigation in domestic courts and tribunals have no entitlement to demand that the judge is of neutral nationality. We see no valid distinction between arbitrators and judges in this regard, notwithstanding that arbitral parties may legislate in the arbitration agreement in relation to the



characteristics of the arbitrator and the pool from which they are drawn.

In our view, what matters is not the nationality of the arbitrator per se but whether they are independent and impartial (Paper, para.4.28, first part of the third sentence).

Moreover, in relation to domestic property arbitrations, based on our experience we do not believe that there are many (if any) nationality-based objections. Therefore, providing for neutral nationality would not in practice preclude many objections (Paper, para.4.28, final sentence). Further, as explained above, there is a risk that the proposal would backfire and enable exploitation and abuse.

Of course, in line with our previously expressed view that appointments must not be discriminatory, if the appointment of a given individual as arbitrator were in fact discriminatory in a particular case on the basis of person's nationality (or otherwise), that would and should necessarily be prohibited. However, we suggest that the relevant assessment is best and most appropriately made in a context-specific setting, rather than imposing absolute rules or entitlements in relation to neutral nationality.

#### Consultation Question 5

Yes

Please give your reasons::

Just as the terms regarding the appointment of the arbitrator should not be discriminatory, in the same way the appointment itself should not be discriminatory. Indeed, as a matter of basic justice, the entire arbitral process should itself be free from discrimination (which should thus be generally prohibited).

#### Consultation Question 6

Please give your answer::

If discrimination occurs in the context of arbitration, we believe that the remedies should be: (a) removal of the arbitrator; (b) a challenge to the award for serious irregularity. In our view, it is neither necessary nor appropriate to incorporate Equality Act 2010 type remedies.

**Law Commission**

1st Floor, Tower,  
52 Queen Anne's Gate,  
London  
SW1H 9AG  
[arbitration@lawcommission.gov.uk](mailto:arbitration@lawcommission.gov.uk)

18<sup>th</sup> May 2023

Dear Sir/Madam,

**FCA Second 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: British Coffee Association, International Cotton Association, Gafta, Global Pulses Confederation, Federation of Cocoa Commerce, The Federation of Oils, Seeds and Fats Association (FOSFA International), and The Rubber Trade Association of Europe.

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 this second consultation.

**Consultation Question 1 (5.1) We provisionally propose that a new rule be included in the Arbitration Act 1996 to the effect that the law of the arbitration agreement is the law of the seat, unless the parties expressly agree otherwise in the arbitration agreement itself. Do you agree? (Para 2.78)**

The members of the FCA named above, agree with this proposal.

All our Contracts are based on the law of England and Wales. Gafta's Arbitration rules 125 (para 1.2) already explicitly state that the seat of the Arbitration is England. A number of other Gafta clauses also have specific reference to the law of England and Wales (e.g. insurance

clause). Nevertheless, we also agree with the principle of ‘Freedom of Contract’ and that parties can change these if they wish.

Gafta Contracts Effective 1 September 2018

[https://www.gafta.com/write/MediaUploads/Contracts/2022/March2022/125\\_March\\_2022.pdf](https://www.gafta.com/write/MediaUploads/Contracts/2022/March2022/125_March_2022.pdf)

FOSFA International’s system of arbitrations and appeals is based on the standard Domicile and Arbitration Clauses incorporated in every FOSFA International form of contract. They read:

*“**DOMICILE:** This contract shall be deemed to have been made in England and the construction, validity and performance thereof shall be governed in all respect by English law. Any dispute arising out of or in connection therewith shall be submitted to arbitration in accordance with the Rules of the Federation. The serving of proceedings upon any party by sending same to their last known address together with leaving a copy of such proceedings at the offices of the Federation shall be deemed good service, rule of law or equity to the contrary notwithstanding.”*

Furthermore, the FOSFA International Rules of Arbitration and Appeal state in the **PREAMBLE** as follows:

*“Any dispute arising out of a contract or contracts subject to these Rules, including any questions of law arising in connection therewith, shall be referred to arbitration in London (or without prejudice to the juridical seat elsewhere if so agreed) in accordance with the Arbitration Act 1996 and any statutory modification or re-enactment thereof for the time being in force. The juridical seat of the arbitration shall be and is hereby designated pursuant to Section 3 of the Arbitration Act 1996 as, England.”*

In Gafta and FOSFA International, experience, it is rare that parties change the domicile law of the governing sales contract. However, from time to time, we do see changes made to the Arbitration Clause for example “*Arbitration as per Gafta 125 but Saskatchewan law to apply*”. This creates all kinds of legal issues as outlined in your Consultation. Not only are our arbitrators not necessarily experts in the law of foreign jurisdictions (which might then require the services of outside and expensive, legal advisers) but a fundamental tension may be created between the governing law of the contract, and that of the arbitration. For example, Gafta contracts are international sales contracts, and an oral (or increasingly) a contract concluded via WhatsApp, is a valid contract. This may cause issues with Arbitrations held under a different legal jurisdiction, that requires contracts to be signed and stamped. Gafta runs a number of face-to-face and online training courses all around the world, and we actively

discourage parties from changing the domicile clause for both the contract and arbitration, because of the many issues that may arise. We strongly suggest that if the Law Commission makes the change it is proposing, that it considers providing written guidance and/or a webinar to business groups and legal advisers about the implications of changing the law of the Arbitration Agreement from that of the seat.

**Consultation Question 2. 5.2 We provisionally propose the following approach to a challenge under section 67 of the Arbitration Act 1996. Where an objection has been made to the tribunal that it lacks jurisdiction, and the tribunal has ruled on its jurisdiction, then in any subsequent challenge under section 67 by a party who has participated in the arbitral proceedings: (1) the court will not entertain any new grounds of objection, or any new evidence, unless even with reasonable diligence the grounds could not have been advanced or the evidence submitted before the tribunal; (2) evidence will not be reheard, save exceptionally in the interests of justice; (3) the court will allow the challenge where the decision of the tribunal on its jurisdiction was wrong. Do you agree? (para 3.128)**

The members of the FCA named above, notes the arguments made by the Law Commission and agrees with this proposal.

**Consultation Question 3. 5.3 We provisionally propose that the Arbitration Act 1996 be amended to confer the power to make rules of court to implement the proposals in CQ2 above. Do you agree? Paragraph 3.129**

The members of the FCA named above, notes the arguments made by the Law Commission and agrees with this proposal.

**Consultation Question 4. 5.4 We provisionally propose that it should be deemed justified to require an arbitrator to have a nationality different from that of the arbitral parties. Do you agree? Paragraph 4.62**

The members of the FCA named above, note that the consultation para 4.61 states “*To be clear, we are not proposing that an Arbitrator must always have a different nationality from the parties, only that it is justified to require this.*” However, this is not what the question (or indeed the summary paper) says, and we think the phrasing of the question is misleading and suggests this is being proposed for all arbitrations.

We are, therefore, concerned that respondents to the consultation may not properly understand the question being posed and that, in turn, this may impact on the validity of the process and any final recommendations made.

In any event, we strongly disagree with this proposal. Despite concerns being raised about the perception of impartiality of arbitrators with the same nationality as the parties, there are many reasons where it may not be *perceived* as being appropriate for arbitrators with different nationalities, to adjudicate on the disputes of those from other countries. These may include countries that have long standing political/territorial disputes and even those which are currently at war with each other. As international arbitration associations, this is a topic that we are particularly cognisant of. Impartiality and independence in arbitration is vital and must be seen to be upheld, but we believe that this particular issue is one for the parties and the Arbitral Association to decide. Our objection to this proposal is founded on a number of grounds:

- It impugns the reputation of individual arbitrators to suggest they are not capable of being impartial in a dispute involving parties of the same nationality.
- It suggests that nationality is necessarily in conflict with impartiality, and it will therefore encourage spurious challenges on nationality grounds to arbitral appointments and introduce unnecessary and costly delays.
- It creates a hierarchy within the Equality Act 2010 nine protected characteristics as only ‘Nationality’ (described by the UK government and EHCR as a subset of ‘Race’) is deemed as being significant enough to warrant a potential exception or exemption to the rules.

<https://www.equalityhumanrights.com/en/advice-and-guidance/race-discrimination>

<https://www.gov.uk/discrimination-your-rights>

- It is contrary to the operations (and laws) of the English and Welsh Courts. Would a party that objected to the nationality of an Arbitrator be then able insist on the nationality of a Judge, should the case come to Court? This effectively create a ‘two tier’ legal system, with litigants in arbitration having greater ‘rights’ than litigants in the civil courts.
- It reduces party autonomy in arbitral appointments.

We suggest this Consultation Question addresses an issue which is best left to the rules of individual Arbitral Associations, and not as an amendment to the Act.

**Consultation Question 5. 5.5 Do you think that discrimination should be generally prohibited in the context of arbitration? Paragraph 4.64**

**Consultation Question 6. 5.6 What do you think the remedies should be where discrimination occurs in the context of arbitration? Paragraph 4.68**

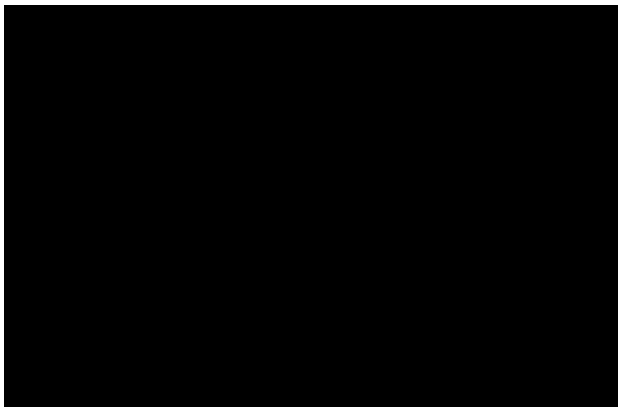
The members of the FCA named above, reiterate our previous comments to the first consultation:

*“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.”*

We believe that there is sufficient legal protection in both the Arbitration Act 1996 and the Equality Act 2010, as well as within arbitral bodies existing rules, to cover allegations of discrimination and their remedies. It would be unhelpful to establish separate (and potentially competing) legislation in the field of discrimination and equality.

We hope these comments are helpful and look forward to hearing from you.

Yours faithfully,



# THE FEDERATION OF COMMODITY ASSOCIATIONS

*(Founded in 1943)*

## logos of all supporting FCA members:

### Gafta



### British Coffee Association



### International Cotton Association



### GPC



### FoSFA International



### The Rubber Trade Association of Europe



### Federation of Cocoa Commerce



FEDERATION OF  
COCOA COMMERCE

Submitted to Law Commission second consultation on the Arbitration Act 1996  
Submitted on 2023-04-10 16:19:04

## About you

What is your name?

Name:

[REDACTED]

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?

Response on behalf of organisation

If other, please state::

What is your email address?

[REDACTED]  
[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.

Tell us why you regard the information as confidential:

## Proper law

Consultation Question 1

Yes

Please give your reasons::

It will reduce conflict in this area and a distraction which often diverts energy from the real dispute. Enka v Chubb has demonstrated how this issue is over complicated.

Such reform would in my view provide welcome clarity on this issue.

## Section 67

Consultation Question 2

Yes

Please give your reasons::

I liked the idea that challenge should take the form of an appeal instead of a rehearing. I see that the new proposal tones down this approach a bit, but still continuing with the 'appeal' style approach, but permitting new evidence to be heard in very narrow circumstances. Challenging jurisdiction through a change in the CPR rather than a change to the Arbitration Act 1996 looks neater.

Consultation Question 3

Yes

Please give your reasons::



For reasons given above.

## Discrimination

### Consultation Question 4

Yes

Please give your reasons::

Generally I agree.

### Consultation Question 5

Yes

Please give your reasons::

I am pleased the Law Commission has listened to the responses to the original consultation that excluding an arbitrator of the same nationality as any arbitral party to avoid any perception of bias can continue to be permitted given that nationality is a "protected characteristic" under the Equality Act. It should ensure that the practice of parties choosing an arbitrator with a different nationality can continue, thereby protecting neutrality.

### Consultation Question 6

Please give your answer::

I agree with the Law Society's stance that the appointment of an arbitrator should not be open for challenge on the basis of their protected characteristic. Justice (including equality, diversity and inclusion) and the rule of law are paramount underpinnings of our domestic law, but it is also at the heart of the UK's international reputation and reach and therefore of huge value economically and strategically.

Any agreement between the parties as to their protected characteristics should thus 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.

**RESPONSE ON BEHALF OF THE BUSINESS & PROPERTY COURTS TO  
LAW COMMISSION CONSULTATION PAPER “REVIEW OF THE  
ARBITRATION ACT 1996 – SECOND CONSULTATION PAPER”**

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**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. It is supplementary to our response dated 13 December 2022 to the Law Commission’s first Consultation Paper on this subject.
2. We welcome the Law Commission’s measured and thoughtful response, in its second Consultation Paper, to the observations received on the three important topics on which it focusses. Once again we are grateful for the opportunity to contribute our comments.

**2. Law governing arbitration agreements**

(2<sup>nd</sup> CP Chapter 2; Consultation Question 1)

3. We support the Law Commission’s conclusion that this is an important topic for potential reform, and we agree with the Commission’s reform proposal.

4. We do not repeat the arguments in favour of reform set out in section 2 (§§ 5-15) of our previous response, but request that they continue to be borne in mind when the Commission finalises its proposals. In this response, we merely touch briefly on some of the arguments that the Commission records as being against the proposed reform.
5. First, we note the suggestion that parties may have an expectation that the law they have chosen to govern their contract will govern the arbitration clause. However, where parties have not specifically and expressly selected a law to govern their arbitration agreement, we think it more realistic to regard their expectations as being (a) that disputes should be arbitrated in the chosen forum, under the rules applicable there, and (b) that such arbitration should provide an effective and valid resolution of any disputes. These expectations will be significantly furthered by the Commission's proposal.
6. Secondly, we doubt that the problem identified in 2<sup>nd</sup> CP § 2.66, of someone being party to the arbitration clause under its governing law yet not a party to the matrix contract under its own governing law, is likely to be at all frequent. *Dallah Real Estate & Tourism Holding Company v Ministry of Religious Affairs* [2010] UKSC 46 was not an example of this, nor indeed of different laws taking different approaches to the question of who was a party: both the UK Supreme Court and the French Cour d'Appel applied French law, as the law governing the arbitration agreement. The matrix contract and arbitration agreement may be governed by different laws, whether by express party choice, implied or imputed choice, or by application of a closest connection test; and, very occasionally, this could give rise the problem identified. It is not, however, a reason against presuming the arbitration agreement to be governed (absent explicit agreement to the contrary) by the law of the seat.
7. Thirdly, as to 2<sup>nd</sup> CP § 2.67, the potential need for evidence of foreign law is not a primary reason in favour of the Commission's proposal. For completeness, we note that under the current law, treating an arbitration agreement as governed by the foreign law applicable to the matrix contract can sometimes necessitate foreign law evidence that would not otherwise be required. This can arise on applications under section 9 (stay of legal

proceedings), 32 (preliminary point of jurisdiction), 44 (or section 37 of the Senior Courts Act 1981) (when the court is asked to grant an arbitral anti-suit injunction), or 67/72 (challenge to substantive jurisdiction), in each of which the court will generally not be concerned with the matrix contract.

8. Fourthly, as regards any concerns about foreign public policy, we would reiterate the points made in § 11 of our previous response<sup>1</sup>, as well as endorsing the points made in 2<sup>nd</sup> CP §§ 2.71 and 2.72.
9. Fifthly, we do not regard the Supreme Court's decision in *Enka* as a point against reform. The issue was one on which views could reasonably differ, as the decisions below indicated. Further, the Supreme Court's statement of the existing law is not, logically, a reason not to reform it (as illustrated by the support for the Commission's proposal from the authors of the majority judgment in *Enka* ).

### 3. Jurisdiction challenges to arbitration awards

(2<sup>nd</sup> CP Chapter 3; Consultation Questions 2 and 3)

10. For the reasons set out in section 3 of our previous response, we do not favour the original proposal of legislative restriction of the right to challenge an arbitral tribunal's substantive jurisdiction. From that standpoint, the modification of the proposal, in favour of a largely procedural solution to those cases in which the existing approach might be said to cause problems, is a positive development. However, we continue to have serious concerns, for the reasons outlined below.

#### (a) *Dallah*

11. As a preliminary matter, we do not agree that *Dallah* can realistically be distinguished in the way discussed in 2<sup>nd</sup> CP §§ 3.30-3.38. It was a decision on enforcement under section 103 of the Act, and the challenger had not

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<sup>1</sup> Specifically the last sentence: “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.”

participated in the arbitration. However, a key premise of the reasoning was that domestically there was “*no doubt*” about the right to a full judicial determination on evidence, “*whether or not a party’s challenge to the jurisdiction has been raised, argued and decided before the arbitrator*” (§ 26). The question was whether the same approach should apply in a section 103 case (§ 27).

12. The fact that, as noted in *Dallah* § 98, a determination by the *court* of the seat can give rise to an issue estoppel or other preclusive effect (2<sup>nd</sup> CP §§ 3.30 and 3.120) in no way supports the view that *the arbitral tribunal’s* own decision on jurisdiction (or, indeed, a court judgment that does not give rise to *res judicata*, issue estoppel or an abuse of process argument) should be entitled to any particular weight.<sup>2</sup> Equally, the fact that the parties can agree to make an arbitral tribunal the final judge of its own jurisdiction (as noted in *Dallah* §§ 24 and 90) does not assist in the far more typical case where they have not done so.<sup>3</sup>

*(b) Case management powers*

13. Turning to the substance of the revised proposals, 2<sup>nd</sup> CP § 3.51 somewhat underestimates the potency of case management powers. Parties to civil litigation do not have an unfettered right to adduce any admissible evidence they wish: the court can control the content or length of evidence on proportionality and other grounds.

*(c) Oral evidence and deference*

14. We agree that rules of court could helpfully make clear that, where an arbitration claimant or respondent has already adduced oral evidence before the tribunal on a jurisdiction issue, the court may conclude that it can safely rely on transcripts

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<sup>2</sup> We note in passing that *Kei v Hua She Asset Management (Shanghai)* [2022] EWHC 662 (Comm), cited in 2<sup>nd</sup> CP § 3.31, touches in § 44 on potential abuse of process arguments, in the context of a section 103 application, where a challenge could have been made in the foreign supervisory court. That passage summarises the position as stated in *Carpathy Petroleum Corp. v Ukrnafta* [2020] EWHC 769 (Comm) §§ 120-126. It is clear from the discussion there, in particular §§ 123 and 124, that a potential abuse of process argument only where an unsuccessful challenge has in fact been made in the local supervisory court. Parties still have a choice between active and passive remedies (cf *Astro v Lippo* [2013] SGCA 57.)

<sup>3</sup> Further, any dispute about whether the parties had or had not in fact made such an agreement would ultimately have to be determined by the court, as a jurisdictional issue.

of the evidence. This would be a helpful “prompt” to both the parties, and the judges, and encourage greater use of these powers. However, we consider that a rule permitting the court to rehear oral evidence only ‘exceptionally’ would be unduly restrictive. For example, in a case where contract formation is in issue and oral evidence is critical, the court may think it appropriate to rehear oral evidence even if the case could not be described as exceptional.

15. Linked to the above point, there is in our view no cogent basis on which the court should be expected to give deference to a tribunal’s conclusions on question of jurisdiction, nor to any conclusions it may have reached about witnesses (demeanour, credibility or reliability) relevant to issues of jurisdiction. The competence-competence principle (2<sup>nd</sup> CP § 3.93ff) allows the tribunal to make an initial decision on its own jurisdiction. That has the advantages that (i) it enables the tribunal to conclude at an early stage that it lacks jurisdiction, thereby saving time and costs, and (ii) in many cases, after a tribunal has concluded that it has jurisdiction and proceeds to determine the merits, the parties will settle or will accept the award without any jurisdiction challenge being brought (particularly if the grounds for any such challenge are not very strong): we agree with the point made in 2<sup>nd</sup> CP § 3.59.
16. It does not follow, however, that the court should afford deference to the tribunal’s jurisdictional decision if a challenge does occur. The suggested analogy with the position of appeals courts under the CPR is not sound. The first instance court in such circumstances undoubtedly had jurisdiction to decide the case, and appropriate deference may therefore be given to its findings on factual or evidential matters. By contrast, there is no such logic and, indeed, it would be wrong in principle – for the court to be expected to give similar deference to a tribunal who may have had no right to be considering the case at all. That point applies whether or not the tribunal has been required to observe the standards set out in the Arbitration Act 1996, as contemplated by 2<sup>nd</sup> CP § 3.61 (which will not always be the case).
17. *A fortiori*, deference to a private tribunal would not be appropriate on an issue of public policy e.g. as to arbitrability.

18. In addition, if there are no transcripts of oral evidence given to the tribunal on jurisdictional issues, as often occurs in LMAA or small commodities arbitrations, then the court must be entitled to rehear the evidence. Even where transcripts exist, appellate courts have long recognised the disadvantage they have in assessing contested issues of fact on transcripts alone as compared with the tribunal which heard the oral evidence.
19. We do not believe there to be any inconsistency between the above points and the proposition that the court may gain some assistance from the tribunal's analysis of the jurisdiction issue, particularly if the arbitrators were experienced and well-regarded. The court may be persuaded by the logical force of the tribunal's reasoning, but it does not follow that it should be required to give deference to the tribunal's legal or factual findings.

*(d) New evidence*

20. A rule barring new evidence unless it could not with reasonable diligence have been submitted before the tribunal might be workable, subject to the following points.
  - i) Any rule clearly should not bar evidence that was not admitted before the tribunal merely because the tribunal (or the rules under which the tribunal was operating) did not allow its admission: as 2<sup>nd</sup> CP § 3.106 seems to recognise.
  - ii) The court must retain the power to order disclosure on a wider basis than the tribunal has chosen to do (assuming it has ordered disclosure) which may in turn provide a basis for additional evidence to address.
  - iii) If that in turn gives rise to further evidence (e.g. witness evidence about documents disclosed for the first time before the court or responsive documents), then the court must be entitled to admit that further evidence.
  - iv) A party who has participated in the arbitration for section 72 purposes but has not participated in the evidence phase of the hearing (including

on issues relevant to jurisdiction) should not be barred from adducing evidence to the court.

*(e) New grounds of objection*

21. Section 31 and 73 both require the ground of jurisdictional objection to have been taken before the tribunal: see *Primetrade v Ythan* [2005] EWHC 299 § 59; *JSC Zestafoni G Nikoladze Ferroalloy Plant v Ronly Holdings* [2004] EWHC 245(Comm) § 64; *Athletic Union Constantinople v National Basketball Association* [2002] 1 All ER (Comm) 70 §§ 26 and 72. Section 73 already contains a due diligence test. It is unclear how the proposed new rule would sit alongside these provisions.

*(f) Other matters*

22. We agree that conferring a right to a preliminary determination under section 32 would be undesirable, for the reasons the Commission gives (2<sup>nd</sup> CP § 3.81).
23. We also agree that a party with a jurisdictional objection cannot reasonably be expected to decline to participate in the arbitration at all, thus preserving the right to challenge jurisdiction pursuant to section 72 (2<sup>nd</sup> CP § 3.84).
24. We do not consider that the analogy of an appellate decision meets the potential objection about failure to create an issue estoppel that would otherwise be appropriate (2<sup>nd</sup> CP § 3.112). In the appellate context, there is no doubt as to the first instance court's jurisdiction. In the context of arbitral jurisdiction, the potential problem would be that the decision of the English court, if its powers to determine arbitral jurisdiction were unduly restricted, would be regarded by an overseas court as not have involved a binding decision on the merits on all the relevant jurisdictional issues, and therefore as not giving rise to an issue estoppel. The point made in 2<sup>nd</sup> CP § 3.113 by reference to *Dallah* does not assist: the topic here is redetermination of an issue that has already been decided by a court, as opposed to an issue that has been addressed only by the tribunal whose jurisdiction is in issue.



25. Consideration may need to be given to whether legislative change is needed for any new rule, or whether the Rules Committee's existing delegated powers would enable them to enact whatever changes may ultimately be proposed, even if they depart from existing case law (2<sup>nd</sup> CP § 3.126).

#### 4. Discrimination

(2<sup>nd</sup> CP chapter 4; Consultation Questions 4-6)

26. We set out our general approach to this topic in our previous response (§§ 40-42).
27. Lawyers and litigants who are active in the arbitration sector will be better placed to offer input as to the potential impact of this reform (if any) on the attractiveness of London as an arbitral seat. We confine ourselves to two technical matters relating to the proposed rule, and the new proposed deemed justification regarding the nationality of arbitrators.
28. First, it is provisionally suggested that it be deemed justified to require an arbitrator to have "*a nationality different from that of the arbitral parties*".
29. Two relevant types of arbitration clause need to be considered:
- i) a clause in which the parties agree that the arbitration should not be of either of their nationalities: e.g. he/she should not be French or Russian, those being the nationalities of the parties; and
  - ii) a clause in which the parties specify what the arbitrator's nationality should be: e.g. he/she should be Swiss.
30. As indicated in our previous response at § 41, parties may agree such provisions in an attempt to secure a degree of perceived impartiality. That objective could be defeated unless both of the above types of clause were permitted: a party might legitimately wish to ensure that the arbitrator not only was not a national of the other party's country but that he/she was also not a national of a close ally of that country.

31. Secondly, 2<sup>nd</sup> CP §§ 4.58 and 4.59 suggest that limiting any justification by reference to “*the context of that arbitration*” is appropriate by analogy with the Equality Act 2010. However, do not find any support in the Equality Act for an approach whereby validity is assessed in the context of later events in a comparable way. To the contrary, Schedule 9 § 1 to the Equality Act permits occupational requirements where they are a proportionate means of achieving a legitimate aim “*having regard to the nature or context of the work*”. The requirements of the work will be considered prospectively, at the time at which the requirement is imposed. The appropriate analogy in the arbitration context would be to have regard to the matters covered by the arbitration clause, i.e. the types of dispute that could reasonably be contemplated as likely to arise under the matrix contract, rather than making the validity of clause contingent on future events (viz the features of whatever individual dispute later happens to arise). As noted § 41 of our previous response, the precise characteristics of the dispute will *ex hypothesi* not have arisen when the arbitration clause is agreed. A criterion focussed on such characteristics would significantly undermine the parties’ ability to justify seemingly justifiable arbitration clauses.

**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**

**21 May 2023**

## Response ID ANON-44ZW-8X6H-7

Submitted to Law Commission second consultation on the Arbitration Act 1996  
Submitted on 2023-03-31 22:34:34

### About you

What is your name?

Name:  
Bruce V Friedman

What is the name of your organisation?

Enter the name of your organisation:

Attorney, Sole Practitioner: Law office of Bruce Victor Friedman  
and  
Southern States Forwarding, Inc.

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.

Tell us why you regard the information as confidential:

### Proper law

Consultation Question 1

Yes

Please give your reasons::

This appears to be a prudent move to help shore up enforcement of awards.

### Section 67

Consultation Question 2

No

Please give your reasons::

Because the appeal can be based on more than just jurisdiction, the court should be allowed to hear and rule on all legitimate grounds. An Appeals court should be competent to decide if the appellant is attempting to take a second try at hearing matters of fact versus matters that would be grounds for appeal. To me, this could result in a limitation to the ability to appeal.

Consultation Question 3

No

Please give your reasons::

See my reasoning to question 2.

## Discrimination

### Consultation Question 4

No

Please give your reasons::

When selecting an arbitrator, one should be allowed to select the best available. The best should have the ability to listen, understand, and write a well reasoned award.

The best person should not be discriminated against based on his or her age, race, nationality, gender, or anything else.

If we force parties to choose arbitrators who are foreign and unknown, we could be undermining the integrity of the arbitration process.

### Consultation Question 5

No

Please give your reasons::

It depends.

The goal should be to bolster the integrity of the arbitration process.

### Consultation Question 6

Please give your answer::

To what extent do we classify discrimination? A party receiving an unfavorable ruling will feel discriminated against.

The more egregious and blatant the discrimination, the harsher the remedy.



Law Commission  
1st Floor, Tower,  
52 Queen Anne's Gate,  
London  
SW1H 9AG  
[arbitration@lawcommission.gov.uk](mailto:arbitration@lawcommission.gov.uk)

17 May 2023

Dear Sirs,

### **Gafta's Second 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 can amount to up to 1000 cases a year. The value of an average Gafta arbitration claim 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 second consultation.

**Consultation Question 1 (5.1) We provisionally propose that a new rule be included in the Arbitration Act 1996 to the effect that the law of the arbitration agreement is the law of the seat, unless the parties expressly agree otherwise in the arbitration agreement itself. Do you agree? (Para 2.78)**

Gafta agrees with this proposal.

All Gafta Contracts are based on the law of England and Wales, also our Arbitration rules 125 (para 1.2) already explicitly state that the seat of the arbitration is England. A number of other Gafta clauses also have specific reference to the law of England and Wales (e.g. insurance clause). Nevertheless, we also agree with the principle of 'Freedom of Contract' and that parties can change these if they wish.

[https://www.gafta.com/write/MediaUploads/Contracts/2022/March2022/125\\_March\\_2022.pdf](https://www.gafta.com/write/MediaUploads/Contracts/2022/March2022/125_March_2022.pdf)

## Promoting international trade

In our experience, it is rare that parties change the domicile law of the governing sales contract. However, from time to time, we do see changes made to the Arbitration Clause – for example – “*Arbitration as per Gafta 125 but Saskatchewan law to apply*”. This creates all kinds of legal issues as outlined in your Consultation. Not only are our arbitrators not necessarily experts in the law of foreign jurisdictions (which might then require the services of outside and expensive, legal advisers) but a fundamental tension may be created between the governing law of the contract, and that of the arbitration. For example, Gafta contracts are international sales contracts, and an oral (or increasingly) a contract concluded via WhatsApp, is a valid contract. This may cause issues with arbitrations held under a different legal jurisdiction, that requires contracts to be signed and stamped. Gafta runs face-to-face and online training courses all around the world, and we actively discourage parties from changing the domicile clause for both the contract and arbitration, because of the many issues that may arise. We strongly suggest that if the Law Commission makes the change it is proposing, that it considers providing written guidance and/or a webinar to business groups and legal advisers about the implications of changing the law of the Arbitration Agreement from that of the seat.

**Consultation Question 2. 5.2 We provisionally propose the following approach to a challenge under section 67 of the Arbitration Act 1996. Where an objection has been made to the tribunal that it lacks jurisdiction, and the tribunal has ruled on its jurisdiction, then in any subsequent challenge under section 67 by a party who has participated in the arbitral proceedings: (1) the court will not entertain any new grounds of objection, or any new evidence, unless even with reasonable diligence the grounds could not have been advanced or the evidence submitted before the tribunal; (2) evidence will not be reheard, save exceptionally in the interests of justice; (3) the court will allow the challenge where the decision of the tribunal on its jurisdiction was wrong. Do you agree? (para 3.128)**

Gafta notes the arguments made by the Law Commission and agrees with this proposal.

**Consultation Question 3. 5.3 We provisionally propose that the Arbitration Act 1996 be amended to confer the power to make rules of court to implement the proposals in CQ2 above. Do you agree? Paragraph 3.129**

Gafta notes the arguments made by the Law Commission and agrees with this proposal.

**Consultation Question 4. 5.4 We provisionally propose that it should be deemed justified to require an arbitrator to have a nationality different from that of the arbitral parties. Do you agree? Paragraph 4.62**

Gafta notes that the consultation para 4.61 states “*To be clear, we are nor proposing that an arbitrator must always have a different nationality from the parties, only that it is justified to require this.*” However, this is not what the question (or indeed the summary paper) says, and we think the phrasing of the question is misleading and suggests this is being proposed for all arbitrations. We are, therefore, concerned that respondents to the consultation may not properly understand the question being posed and that, in turn, this may impact on the validity of the process and any final recommendations made.

## Promoting international trade

In any event, Gafta strongly disagrees with this proposal. Firstly, we believe it is incorrect to imply that an arbitrator with the same nationality as the party/parties may not be perceived to be impartial. Parties may wish to appoint an arbitrator of the same nationality as them to hear the case because of the degree of specialisation the arbitrator may have in understanding that local market, and/or particular language skills which may be helpful when interviewing witnesses. For specialist trade Arbitral bodies like Gafta, an expectation that arbitrators from different nationalities to the parties would always be used, may be impossible to fulfil with a defined pool of arbitrators.

Equally, there is no guarantee that selecting an arbitrator from a different nationality will necessarily inspire confidence in their independence and impartiality. There are many reasons where it may not be *perceived* as being appropriate for arbitrators with particular nationalities, to adjudicate on disputes of those from other countries. These may include countries that have long standing political/territorial disputes and even those which are currently at war with each other. As an international arbitration association, this is a topic that Gafta is particularly cognisant of. Impartiality and independence in arbitration is vital and must be seen to be upheld, but we believe that this issue is one for the parties and the Arbitral Association to decide. Gafta's objection to this proposal is founded on a number of grounds:

- It impugns the reputation of individual arbitrators to suggest they are not capable of being impartial in a dispute involving parties of the same nationality.
- It suggests that nationality is necessarily in conflict with impartiality, and it will therefore encourage spurious challenges on nationality grounds to arbitral appointments and introduce unnecessary and costly delays.
- It creates a hierarchy within the Equality Act 2010 nine protected characteristics – as only 'Nationality' (described by the UK government and EHCR as a sub-set of 'Race') is deemed as being significant enough to warrant a potential exception or exemption to the rules.

<https://www.equalityhumanrights.com/en/advice-and-guidance/race-discrimination>

<https://www.gov.uk/discrimination-your-rights>

- It is contrary to the operations (and laws) of the English and Welsh Courts. Would a party that objected to the nationality of an Arbitrator be then able insist on the nationality of a Judge, should the case come to Court? This effectively create a 'two tier' legal system, with litigants in Arbitration having greater 'rights' than litigants in the civil courts.
- It reduces party autonomy in arbitral appointments.

We suggest this Consultation Question addresses an issue which is best left to the rules of individual Arbitral Associations, and not as an amendment to the Act.

**Consultation Question 5. 5.5 Do you think that discrimination should be generally prohibited in the context of arbitration? Paragraph 4.64**

**Consultation Question 6. 5.6 What do you think the remedies should be where discrimination occurs in the context of arbitration? Paragraph 4.68**

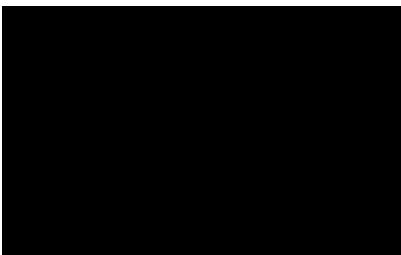
## Promoting international trade

Gafta reiterates our previous comments to the first consultation:

*“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 believes that there is sufficient legal protection in both the Arbitration Act 1996 and the Equality Act 2010, as well as within Arbitral bodies existing rules, to cover allegations of discrimination and their remedies. It would be unhelpful to establish separate (and potentially competing) legislation in the field of discrimination and equality.

Yours faithfully,





## Response ID ANON-44ZW-8XFJ-S

Submitted to Law Commission second consultation on the Arbitration Act 1996  
Submitted on 2023-05-21 22:22:59

### About you

What is your name?

Name:  
Robert Gay (Dr RJ Gay)

What is the name of your organisation?

Enter the name of your organisation:

I am a Supporting Member of the London Maritime Arbitrators Association, but this is a personal response

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.

Tell us why you regard the information as confidential:

### Proper law

Consultation Question 1

Yes

Please give your reasons::

I believe it is correct as a matter of the principles of private international law and highly desirable that (in the absence of express agreement to the contrary by the parties) questions of arbitrability be governed by the law of the seat and not by the law governing the matrix contract. As to private international law, in my view it is a mistake to think in terms of "the law governing the arbitration agreement". It is only for a limited purpose that an arbitration agreement is to be treated as a separate contract, and that limited purpose does not require the arbitration agreement to have its own separate governing law. Rather, in my view, it should be recognised that in a contract containing an arbitration agreement, some questions with regard to the arbitration are more closely connected with the law governing the contract, and so are to be governed by that law (for instance, the question who can be a party to the arbitration proceedings should be determined by who can be a party to the contract itself) while other questions (most clearly, questions of evidence and procedure) must be governed by the law of the seat. However, given the way the law has developed in terms of the law governing the arbitration agreement, the only reliable way of achieving the result that (in the absence of express agreement otherwise) arbitrability is to be governed by the law of the seat is by making "the law governing the arbitration agreement" be the law of the seat, and so I support the answer "Yes". (Something of the same result may be achieved by the validation principle -- if the parties show an intention to refer disputes of a type to arbitration, and the law governing the matrix contract would make such disputes non-arbitrable, that is a reason to hold that the arbitration agreement is governed by a different system of law. But this route is not reliable -- in some cases, there may be other reasons for holding that the arbitration agreement is governed (say) by Indian law, and then, as demonstrated by a recent judgment from the Singapore Court of Appeal, the language by which the parties delimited what disputes will be referred to arbitration falls to be interpreted to fit in with Indian law's rules as to what types of dispute are non-arbitrable. As to what is desirable, it is desirable that parties be free to agree that their contract and relationship be governed by a particular system of law (say, Ruritanian law) but that disputes be determined by an external tribunal rather than by the Ruritanian courts (which may be as slow as the Indian courts, or may be suspected of not being impartial as between Ruritanian parties and foreigners) and that requires that parties be free to agree that disputes be resolved by the external tribunal regardless of Ruritanian law on arbitrability. There is nothing immoral or improper in this, any more than there is in having a contract be governed by Ruritanian domestic law to the exclusion of renvoi.

## Section 67

### Consultation Question 2

Not Answered

Please give your reasons::

### Consultation Question 3

Not Answered

Please give your reasons::

## Discrimination

### Consultation Question 4

Yes

Please give your reasons::

I just think this is obviously justified. I would wish also to see a statutory list of other situations in which arbitration provisions which restrict appointments by reference to a protected characteristic will be deemed justified, to spare parties the risk that they may have to fight test cases for instance with regard to religious tribunals.

### Consultation Question 5

Other

Please give your reasons::

Perhaps I should answer "No". I can see the validity of the principle but I am very uneasy about how it could work in practice. First, it would add a way in which losing parties may make unmeritorious challenges to awards (for instance, alleging that the tribunal rejected the evidence of the losing party's witnesses because the witnesses were Arabs, or were women, and so forth). Secondly, with regard to discrimination in the appointment of arbitrators, the fact of discrimination could only be proved by forcing disclosure of the file of the other party's lawyers and then there will be issues about privilege and also if English solicitors will be forced to disclose their files in response to such a challenge, that is likely to become a reason for a party to employ a foreign lawyer rather than an English solicitor. Thirdly, with regard to discrimination by arbitrators, the consultation paper appears not to discuss the relation between this proposal and the provision in the 1996 Act by which an arbitrator is only liable if they are not acting in good faith. IF this proposed provision is enacted, cases relating to alleged discrimination in international arbitrations (including maritime and commodity arbitrations) should have to be brought in the Commercial Court, we judges are familiar with how arbitration works (and with how losing parties in arbitration may behave)>

### Consultation Question 6

Please give your answer::



## **Bar Council response to the Law Commission Review of the Arbitration Act 1996 Second 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 Second Consultation Paper entitled Review of the Arbitration Act 1996<sup>1</sup>. This response supplements the Bar Council's response dated 15 December 2022 to the Law Commission First Consultation Paper.
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 remain 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.

**Q1. We provisionally propose that a new rule be included in the Arbitration Act 1996 to the effect that the law of the arbitration agreement is the law of the seat, unless the parties expressly agree otherwise in the arbitration agreement itself. Do you agree?**

5. We agree. Such a new rule would create greater certainty, avoid the problems which arise from *Enka v Chubb*<sup>2</sup>, reduce delay and save costs.

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1 Consultation Paper 258 dated March 2023. <https://www.lawcom.gov.uk/project/review-of-the-arbitration-act-1996/>

2 *Enka Insaat ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38, [2020] 1 WLR 4117.

**Q2. We provisionally propose the following approach to a challenge under section 67 of the Arbitration Act 1996.**

**Where an objection has been made to the tribunal that it lacks jurisdiction, and the tribunal has ruled on its jurisdiction, then in any subsequent challenge under section 67 by a party who has participated in the arbitral proceedings:**

**(1) the court will not entertain any new grounds of objection, or any new evidence, unless even with reasonable diligence the grounds could not have been advanced or the evidence submitted before the tribunal;**

**(2) evidence will not be reheard, save exceptionally in the interests of justice;**

**(3) the court will allow the challenge where the decision of the tribunal on its jurisdiction was wrong.**

**Do you agree?**

6. We agree. As we noted in paragraph 35 of our response to the First Consultation Paper<sup>3</sup>, on balance, we favour the proposed reform of section 67 both on the basis of fairness and finality, and practical considerations.

**Q3. We provisionally propose that the Arbitration Act 1996 be amended to confer the power to make rules of court to implement the proposals in CQ2 above. Do you agree?**

7. We agree.

**Q4. We provisionally propose that it should be deemed justified to require an arbitrator to have a nationality different from that of the arbitral parties. Do you agree?**

8. We agree.

**Q5. Do you think that discrimination should be generally prohibited in the context of arbitration?**

9. Yes. As previously stated in our response to the First Consultation Paper, we welcome the Law Commission's intention to stamp out discrimination. We also take the view that the requirement of a protected characteristic in an arbitrator should be unenforceable unless that requirement can be justified as a proportionate means of achieving a legitimate aim.

**Q6. What do you think the remedies should be where discrimination occurs in the context of arbitration?**

---

<sup>3</sup> <https://www.barcouncil.org.uk/uploads/assets/67d27022-e762-43e7-b0ec471e78d1634d/Bar-Council-response-to-the-Law-Commission-Review-of-the-Arbitration-Act-1996-consultation-paper-to-submit.pdf>

10. We consider that in the context of arbitration, the existing remedies of removal of the arbitrator under section 24 of the Arbitration Act 1996 and a challenge to the award under section 68 are sufficient. Other remedies may exist under the Equality Act 2010 but that is a separate matter. As the Law Commission rightly observes, “discrimination is wider than arbitration.”<sup>4</sup> Care should be taken not to clutter the Arbitration Act with provisions that are already legislated for elsewhere.

**Bar Council<sup>5</sup>**  
**22 May 2023**

[REDACTED]

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<sup>4</sup> See the Second Consultation Paper, paragraph 4.59.

<sup>5</sup> Prepared by the Law Reform Committee and Alternative Dispute Resolution Panel

## Response ID ANON-44ZW-8X6P-F

Submitted to Law Commission second consultation on the Arbitration Act 1996  
Submitted on 2023-03-30 12:15:34

### 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::

What is your email address?

[REDACTED]  
[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.

Tell us why you regard the information as confidential:

### Proper law

Consultation Question 1

No

Please give your reasons::

In practice, a directly appointed arbitrator or an identified appointing authority can determine the law of the arbitration agreement by reference to the facts. A place may be chosen to suit the Parties and but the arbitration may relate to e.g. construction in a third place. The Hew York Convention 1958 makes no mention of a 'seat'.

### Section 67

Consultation Question 2

No

Please give your reasons::

In my opinion the wording of 3 "the court will allow the challenge where the decision of the tribunal on its jurisdiction was wrong." is overly precise and enables too much intervention by the Court. As a layman, I favour a qualification such as " ... obviously wrong."

Consultation Question 3

No

Please give your reasons::

I am not clear that it would be necessary.

## Discrimination

### Consultation Question 4

No

Please give your reasons::

Where necessary, the parties are free to so provide in their agreement. Institutional rule are adopted in some agreements and have such provisions,

Every curb on party autonomy drags the process into the arena of the Law.

### Consultation Question 5

Other

Please give your reasons::

An imprecise question, Every decision discriminates in one way or another.

### Consultation Question 6

Please give your answer::

See reply to Q5

**Submission to the Law Commission of England and Wales**

**Consultation Paper 258: Review of the Arbitration Act 1996 – Second Consultation Paper**

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1. I am writing to provide my response to the **Law Commission's Consultation Paper 258: Review of the Arbitration Act 1996 – Second Consultation Paper (March 2023)**, focusing on **Questions 1-3**. These questions concern the proper law of the arbitration agreement (Question 1) and challenging jurisdiction under section 67 (Questions 2 and 3).

**Consultation Question 1**

2. My response to Question 1 will cover four points: (1) arguments for reform; (2) arguments against reform; (3) the relationship between the Law Commission's provisional proposal and the New York Convention; and (4) potential issues that may arise from the provisional proposal and should be addressed by the Law Commission.

**I Arguments for Reform**

3. The Law Commission advances the following arguments for reform:
  - The proper law approach, as developed in *Enka*<sup>1</sup> and *Kabab-Ji*,<sup>2</sup> is unclear and uncertain.<sup>3</sup>
  - Applying the proper law approach likely leads to a greater number of arbitration agreements being governed by foreign law, which can result in added costs and delays.<sup>4</sup>

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<sup>1</sup> *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38, [2020] 1 WLR 4117.

<sup>2</sup> *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2021] UKSC 48, [2022] 2 All ER 911.

<sup>3</sup> Law Commission, *Review of the Arbitration Act 1996 – Second Consultation Paper* (Law Com CP 258, 2023) paras 2.75, 2.77.

<sup>4</sup> *Ibid* para 2.52.



- When foreign law is applied, it excludes the application of English law<sup>5</sup> on several important issues, including separability,<sup>6</sup> arbitrability,<sup>7</sup> scope<sup>8</sup> and confidentiality.<sup>9</sup>
  - The application of section 4(5) can introduce considerable complexity since it necessitates a distinction between substantive and procedural issues, which is not always straightforward to make.<sup>10</sup>
4. I agree that the proper law approach comes with a degree of uncertainty and unclarity. For example, in *Enka*, the UKSC held that the law chosen by the parties to govern the matrix contract does not apply to an arbitration agreement contained therein if there is a serious risk that the law governing the matrix contract would render the arbitration agreement ineffective, invalid, not binding on the parties,<sup>11</sup> or (according to the majority) of reduced scope.<sup>12</sup> In *Kabab-Ji*, the UKSC confirmed that ‘the validation principle does not apply to questions of validity in the expanded sense in which that concept is used in art V(1)(a) of the [New York] Convention and s 103(2)(b) of the 1996 Act to include an issue about whether any contract was ever made between the parties to the dispute’.<sup>13</sup> This means that if there is a disagreement about the formation and validity of an arbitration agreement when parties have opted for foreign law to govern the matrix contract, these two issues may be governed by different laws. Parties and their legal advisers may find this too uncertain.
  5. The concerns regarding costs and delays associated with applying foreign law in this context may be overstated. This is because when foreign law governs the merits of a dispute, the determination of the merits already involves costs and delays associated with applying foreign law.
  6. I agree that the application of the proper law approach likely leads to a greater number of arbitration agreements being governed by foreign law, thereby excluding the application of English law to important issues such as separability, scope and confidentiality. However, as I explained in my response to the Law Commission’s First Consultation Paper, I do not find the ousting of the English rules on separability problematic, given that the principle of validity is built into the determination of the law governing the arbitration agreement.<sup>14</sup> The same can be said regarding the issue of scope, given that the majority in *Enka* stated that the principle of validity applies to this issue.<sup>15</sup> Furthermore, I disagree that applying foreign law necessarily ousts the English rules on arbitrability. As Danov concluded in his study on the law governing

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<sup>5</sup> References to ‘England’ and ‘English’ in this submission should be read as references to ‘England and Wales’ and ‘English and Welsh’.

<sup>6</sup> Law Commission, *Review of the Arbitration Act 1996 – Second Consultation Paper* (Law Com CP 258, 2023) paras 2.54-2.26.

<sup>7</sup> *Ibid* paras 2.57-2.28.

<sup>8</sup> *Ibid* 2.59.

<sup>9</sup> *Ibid* para 2.60.

<sup>10</sup> *Ibid* paras 2.32-2.36, 2.61.

<sup>11</sup> *Enka* [170(i)], *per* Lord Hamblen and Lord Leggatt JJSC, with whom Lord Kerr JSC agreed, [257(iv)], *per* Lord Burrows JSC, with whom Lord Sales JSC agreed, [277], *per* Lord Sales JSC.

<sup>12</sup> *Ibid* [108], *per* Lord Hamblen and Lord Leggatt JJSC, with whom Lord Kerr JSC agreed.

<sup>13</sup> *Kabab-Ji* [52], *per* Lord Hamblen and Lord Legal JJSC, with whom Lord Hodge DP, Lord Lloyd-Jones and Lord Sales JJSC agreed. See also *DHL Project and Chartering Ltd v Gemini Ocean Shipping Co Ltd* [2022] EWCA Civ 1555 [80(5)], *per* Males LJ.

<sup>14</sup> U Grušić, ‘Submission to the Law Commission of England and Wales: Consultation Paper 257: Review of the Arbitration Act 1996’ (14 December 2022) paras 43-46.

<sup>15</sup> N 12 above.

arbitrability under the Arbitration Act 1996, 'arbitrability under English law must always be considered by the English courts and arbitral tribunals based in England'.<sup>16</sup>

7. While some may express concerns about the complexities associated with distinguishing between substantive and procedural issues under section 4(5), such concerns may be overstated. Case law provides guidance on which provisions of the Act are substantive and which are procedural, which indicates that only a limited number of provisions of the Act fall under the category of substantive issues.<sup>17</sup>

## II Arguments against Reform

8. The Law Commission notes the following arguments against reform advanced by one of the consultees:
  - Parties expect the law chosen to govern the matrix contract to apply to all the terms of the contract, including any arbitration agreement.<sup>18</sup>
  - Applying different laws to the matrix contract and an arbitration agreement contained therein can potentially create problems such as holding a party bound by the arbitration agreement but not by the matrix contract.<sup>19</sup>
  - If the matrix contract is governed by foreign law, evidence of that law will be before the tribunal or court anyway.<sup>20</sup>
  - The UKSC has already provided guidance regarding the complexities associated with distinguishing between substantive and procedural issues under section 4(5).<sup>21</sup>
  - We do not want our arbitration law to be viewed as something analogous to money laundering, as a means of circumventing foreign public law restrictions on arbitrability and scope.<sup>22</sup>
  - The Law Commission should not overturn the unanimous view of a recent UKSC judgment.<sup>23</sup>

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<sup>16</sup> M Danov, 'Law Governing Arbitrability under the Arbitration Act 1996' [2008] LMCLQ 536.

<sup>17</sup> See Law Commission, *Review of the Arbitration Act 1996 – Second Consultation Paper* (Law Com CP 258, 2023) para 2.34: 'Sections 12 to 13, 30, 49, 58 and 66 to 68 are procedural, while section 7 concerns arbitration agreements; other procedural matters may include the power to remove or replace an arbitrator, to enforce or set aside an arbitral award, and to grant injunctions to support the arbitration including anti-suit injunctions: *Enka* [2020] UKSC 38, [2020] 1 WLR 4117 at [81], [89], [92], [193(vi)], [249]. See too the commentary in: *Russell on Arbitration* (24th ed 2015) paras 2-122 and 2-131; *Davidson: Arbitration* (2nd ed 2012) paras 9.06 and 9.08.' See also Arbitration Act, s 2(5).

<sup>18</sup> Law Commission, *Review of the Arbitration Act 1996 – Second Consultation Paper* (Law Com CP 258, 2023) para 2.65.

<sup>19</sup> *Ibid* para 2.66.

<sup>20</sup> *Ibid* para 2.67.

<sup>21</sup> *Ibid* para 2.68.

<sup>22</sup> *Ibid* para 2.69.

<sup>23</sup> *Ibid* para 2.73.

9. The Law Commission has only addressed the fifth and sixth arguments in its response.<sup>24</sup> The other arguments will also have to be addressed in its final recommendations.
10. As the editors of *Dicey, Morris and Collins* note: ‘The main justification for the conflict of laws is that it implements the reasonable and legitimate expectations of the parties to a transaction or an occurrence.’<sup>25</sup> This means that it is not the actual expectations of the parties, but rather their reasonable and legitimate expectations that form the main justification for the conflict of laws. Thus, the question should not be whether parties actually expect the law chosen to govern the matrix contract to apply to all the terms of the contract, including any arbitration agreement. Rather, the question should be whether parties *reasonably and legitimately* expect the law chosen to govern the matrix contract to apply to all the terms of the contract, including any arbitration agreement. However, the problem with arguments based on reasonable and legitimate expectations is that they are circular in nature. The content of choice-of-law rules shapes the parties’ expectations. If a choice-of-law rule points to the application of a particular law, the parties, particularly well-advised commercial parties, will expect, or at least should expect, that law to apply. Therefore, the first argument against reform does not persuade. If the Law Commission’s provisional proposal is adopted, parties, particularly well-advised commercial parties, who agree to arbitrate in England will expect or should expect English law to govern the arbitration agreement by default.
11. The second argument has some merit. But it is important to note that in the related field of international commercial litigation, a distinction between the law governing the matrix contract and the law governing a jurisdiction agreement contained therein is often made. The 2005 Hague Convention on Choice of Court Agreements, for example, provides that the material validity of a jurisdiction agreement falling within the scope of the convention is governed by the law of the state of the chosen court.<sup>26</sup> Similarly, under Article 25(1) of the Brussels Ia Regulation,<sup>27</sup> which was binding on the English courts before the expiry of the Brexit transition period, the material validity of a jurisdiction agreement falling within its scope is governed by the law of the state of the chosen court. While both instruments refer to the choice-of-law rules of the chosen court,<sup>28</sup> it is clear that this approach can result in the matrix contract and a jurisdiction agreement contained therein being governed by different laws.
12. The third argument also has some merit, but is limited to situations where arbitral jurisdiction is decided at the same time as the merits of the dispute.
13. While it is true that the UKSC has provided guidance on the complexities associated with distinguishing between substantive and procedural issues under section 4(5), this does not negate the fact that the need to make such distinctions introduces a degree of complexity that the Law Commission’s provisional proposal would eliminate.

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<sup>24</sup> Ibid paras 2.71, 2.72.

<sup>25</sup> Lord Collins and Jonathan Harris (eds), *Dicey, Morris and Collins on the Conflict of Laws* (Sweet and Maxwell 2022) para 1-006.

<sup>26</sup> Convention of 30 June 2005 on Choice of Court Agreements (entry into force 1 October 2015), Art 9(a).

<sup>27</sup> Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L351/1.

<sup>28</sup> T Hartley and M Dogauchi, ‘Explanatory Report Accompanying the Convention of 30 June 2005 on Choice of Court Agreements’ (Hague Conference of Private International Law 2005) para 94; Brussels I Regulation, Recital 20.

14. The Law Commission has not noted that the UKSC in *Enka* has also advanced several principled arguments in favour of its approach, which can be regarded as arguments against reform. The Law Commission should also engage with these arguments in its final recommendations:

- the approach in *Enka* provides a degree of certainty.<sup>29</sup> This is similar to the first argument in paragraph [8] above.
- it achieves consistency.<sup>30</sup> This is similar to the second argument in paragraph [8] above.
- it avoids complexities and uncertainties. Applying different laws to the matrix contract and an arbitration agreement contained therein can pose significant problems in delineating their boundaries, particularly in cases where the arbitration agreement is part of a multi-tier dispute resolution clause.<sup>31</sup> This is an original argument that would need to be addressed.
- it avoids artificiality.<sup>32</sup> This is similar to the first argument in paragraph [8] above.
- it ensures coherence between the treatment of arbitration agreements, jurisdiction clauses and choice-of-law clauses.<sup>33</sup> But, as paragraph [11] above shows, it is not unusual for the matrix contract and a jurisdiction agreement contained therein to be governed by different laws in some situations.

### III Relationship between the Law Commission’s Provisional Proposal and the New York Convention

15. A key factor in assessing the Law Commission’s provisional proposal is its relationship with the New York Convention.
16. The New York Convention plays a crucial role in the enforcement of arbitration agreements and recognition and enforcement of foreign arbitral awards. It applies to two situations: when a party brings a substantive claim before the court of a Contracting State that is covered by an arbitration agreement and when a party wants to recognise or enforce a foreign arbitral award before the court of a Contracting State. In both situations, the issue of material validity of an arbitration agreement may arise. The New York Convention provides a choice-of-law rule for determining the material validity of an arbitration agreement when the issue arises at the stage of recognition or enforcement of a foreign arbitral award. According to Article V(1)(a), this issue is governed by ‘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’. However, the New York Convention does not expressly provide a choice-of-law rule for determining the material validity of an arbitration agreement when the issue arises at the stage of enforcement of an arbitration agreement under Article II(3). Furthermore, Article VII(1)

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<sup>29</sup> *Enka* [53](i), *per* Lord Hamblen and Lord Leggatt JJSC, with whom Lord Kerr JSC agreed, [269], *per* Lord Sales JSC.

<sup>30</sup> *Ibid* [53](ii), *per* Lord Hamblen and Lord Leggatt JJSC, with whom Lord Kerr JSC agreed, [245], [246], *per* Lord Burrows JSC, with whom Lord Sales JSC agreed, [270], *per* Lord Sales JSC.

<sup>31</sup> *Ibid* [53](iii), *per* Lord Hamblen and Lord Leggatt JJSC, with whom Lord Kerr JSC agreed, [235]-[239], *per* Lord Burrows JSC, with whom Lord Sales JSC agreed, [274], *per* Lord Sales JSC.

<sup>32</sup> *Ibid* [53](iv), *per* Lord Hamblen and Lord Leggatt JJSC, with whom Lord Kerr JSC agreed, [232]-[234], *per* Lord Burrows JSC, with whom Lord Sales JSC agreed, [275], *per* Lord Sales JSC.

<sup>33</sup> *Ibid* [53](v), *per* Lord Hamblen and Lord Leggatt JJSC, with whom Lord Kerr JSC agreed, [254], *per* Lord Burrows JSC, with whom Lord Sales JSC agreed.

permits the courts of the Contracting States to rely on more arbitration-friendly domestic choice-of-law solutions.

17. The implementation of the New York Convention into English law is carried out by the Arbitration Act 1996. The convention's rules on enforcement of arbitration agreements are implemented in section 9 in Part I of the Act, which like Article II(3) of the convention does not provide a choice-of-law rule for the material validity of an arbitration agreement. The convention's rules on recognition and enforcement of foreign arbitral awards are implemented in Part III of the Act. Article V(1)(a) of the convention is implemented in section 103(2)(a) and (b) of the Act. Section 103(2)(b) faithfully reproduces the choice-of-law rule for the material validity of an arbitration agreement from Article V(1)(a) of the convention. Article VII of the convention is implemented in section 104 of the Act in the form of a saving clause for other bases of recognition or enforcement of foreign arbitral awards, which means that it does not apply to the enforcement of arbitration agreements.
18. In *Enka*, the UKSC suggested that the first limb of Article V(1)(a) (that is, section 103(2)(b) of the Act) encompasses both express and implied choice, 'for example from a choice of law to govern the contract in general'.<sup>34</sup> The UKSC further suggested that, 'There is...a strong and widely accepted argument that the Convention is to be interpreted as requiring the same conflict rules to be applied in relation to article II(3) [that is, to section 9 of the Act] as are specifically required at the stage of enforcement by article V(1)(a) [that is, by section 103(2)(b) of the Act]'.<sup>35</sup>
19. The Law Commission's provisional proposal raises questions regarding its scope of application. There are three possibilities. First, it applies to all situations where the material validity of an arbitration agreement is raised. Second, it applies to all situations where the material validity of an arbitration agreement is raised, except for the recognition or enforcement of a foreign arbitral award, where the choice-of-law rule from section 103(2)(b) of the Act continues to apply. Third, it applies to all situations where the material validity of an arbitration agreement is raised, except for the enforcement of an arbitration agreement under section 9 and recognition or enforcement of a foreign arbitral award, where the choice-of-law rule from section 103(2)(b) continues to apply. The scope of application of the Law Commission's provisional proposal will depend on whether the Law Commission intends to depart from the UKSC's interpretation of the New York Convention, in particular the interpretation of the choice-of-law rule in Article V(1)(a) and the relationship between Articles II(3) and V(1)(a).
20. It is worth noting that there is no universally accepted interpretation of Article V(1)(a) of the New York Convention and its relationship with Article II(3). As the UKSC noted in *Kabab-Ji*,  

If...there was a clear consensus among national courts and jurists about whether or when a choice of law for the contract as a whole constitutes a sufficient indication of the law to which the parties subjected the arbitration agreement, in particular where it differs from the law of the seat, that would provide a cogent reason for the English

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<sup>34</sup> *Ibid* [129], *per* Lord Hamblen and Lord Leggatt JJSC, with whom Lord Kerr JSC agreed. Similarly, *Kabab-Ji* [35], *per* Lord Hamblen and Lord Legal JJSC, with whom Lord Hodge DP, Lord Lloyd-Jones and Lord Sales JJSC agreed.

<sup>35</sup> *Enka* [130], *per* Lord Hamblen and Lord Leggatt JJSC, with whom Lord Kerr JSC agreed.

courts to adopt the same approach. It is apparent, however, that there is nothing approaching a consensus on this question.<sup>36</sup>

21. This indicates that the UKSC’s interpretation of Article V(1)(a) of the New York Convention and its relationship with Article II(3) is not the only possible interpretation. Given this, the Law Commission could extend the scope of application of its provisional proposal to situations governed by the New York Convention and the UK would still comply with its obligations under the convention. However, it is unclear whether the Law Commission intends to depart from the UKSC’s interpretation of Article V(1)(a) of the New York Convention and its relationship with Article II(3).
22. If the Law Commission intends to depart from the UKSC’s interpretation of the New York Convention, it has two options. First, it can extend the scope of application of its provisional proposal to all situations where the material validity of an arbitration agreement is raised. To achieve this, the Law Commission would need to word its proposed choice-of-law rule in a way that specifically covers cases falling under section 103(2)(b) and amend section 103(2)(b) accordingly. The second option is it to extend the scope of application of the Law Commission’s provisional proposal to all situations where the material validity of an arbitration agreement is raised, except for the recognition or enforcement of a foreign arbitral award. In other words, the Law Commission could clarify that its proposed choice-of-law rule covers cases falling under section 9.
23. Alternatively, the Law Commission may choose not to depart from the UKSC’s interpretation of the New York Convention. To avoid ambiguity, the Law Commission could clarify that its proposed choice-of-law rule does not cover cases falling under section 9, thus eliminating the risk of litigation on this point. However, the Law Commission must also consider, even if it does not want to depart from the UKSC’s interpretation of the New York Convention, whether a party should be able to rely on the proposed choice-of-law rule in cases falling under sections 9 and 103(2)(b) if it is more arbitration-friendly than the UKSC’s interpretation of the New York Convention, as permitted by Article VII of the New York Convention.
24. The above discussion shows that the arguments for and against reform are finely balanced. Overall, I find the arguments for reform more persuasive. To reduce fragmentation, inconsistency and incoherence, I would advise the Law Commission to clarify that its provisional proposal covers cases falling under section 9, not to amend section 103(2)(b) and to clarify that a party should be able to rely on the proposed choice-of-law rule in cases falling under section 103(2)(b) if it is more arbitration-friendly than the UKSC’s interpretation of this provision.

#### IV Potential Issues Arising from the Law Commission’s Provisional Proposal

25. Should the Law Commission choose to move forward with its provisional proposal, it would be prudent to also address – in addition to its relationship with the New York Convention – two additional issues: (1) the scope of an express choice of law by the parties to govern the

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<sup>36</sup> *Kabab-Ji* [32], *per* Lord Hamblen and Lord Legal JJSC, with whom Lord Hodge DP, Lord Lloyd-Jones and Lord Sales JJSC agreed.

matrix contract; and (2) the determination of the applicable law in the absence of an agreed-upon seat of the arbitration.

26. Parties often use broad choice-of-law clauses when expressly choosing the governing law. In some cases, a broad choice-of-law clause and an arbitration agreement are incorporated in one article of a matrix contract dealing with dispute resolution. While such clauses may not expressly state that they cover the arbitration agreement, they may be interpreted of being of such breadth. As the UKSC noted in *Enka*,

we do not agree that it is only in a minority of cases that an express choice of law to govern the contract should properly be construed as being a choice of law to govern an arbitration agreement included in the contract. As we have discussed, a clause such as ‘This Agreement is to be governed by and construed in accordance with the laws of [a named country]’ is naturally and sensibly understood to mean that the law of that country should govern and determine the meaning and effect of all the clauses in the contract which the parties signed including the arbitration clause. It is unclear to us why more should be needed...to make it clear that a phrase such as ‘This Agreement’ means the whole agreement and not just part of it.<sup>37</sup>

The Law Commission similarly notes in its Second Consultation Paper that the choice-of-law clause in the UKJT Digital Resolution Rules v 1.0 (2021), r 16 ‘might be wide enough to include disputes about the arbitration agreement’.<sup>38</sup>

27. If the Law Commission’s provisional proposal is adopted, choice-of-law disputes may take a different form, namely the form of disputes about the scope of express choice-of-law clauses. To avoid such disputes, the Law Commission should clarify that ‘an express agreement otherwise’ in the proposed new rule should specifically refer to the arbitration agreement.
28. The Law Commission should also explain more clearly what happens in the rare cases when parties have not chosen a seat for their arbitration. If this scenario is left unregulated, there is a risk that the courts will fall back on the common law, with its rules on express and implied choice, the principle of validity<sup>39</sup> and the closest and most real connection test.<sup>40</sup>
29. There are two basic options. The first involves the court determining the arbitral seat in accordance with section 3, which would then lead to the law governing the arbitration agreement. The second is to provide that, when parties have not chosen a seat for their arbitration, the arbitration agreement is governed by a particular law. The obvious candidates are English law and the law governing the matrix contract in which the arbitration agreement is contained. Given that parties should be able to know their rights and obligations in advance, the second option appears to be the better choice. The application of English law in this scenario is the most certain and foreseeable solution. However, if the seat has been

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<sup>37</sup> *Enka* [60], per Lord Hamblen and Lord Leggatt JSC, with whom Lord Kerr JSC agreed.

<sup>38</sup> Law Commission, *Review of the Arbitration Act 1996 – Second Consultation Paper* (Law Com CP 258, 2023) para 2.45, fn 65.

<sup>39</sup> Which, according to the majority of the UKSC in *Enka*, could point to English law: [95]-[105], per Lord Hamblen and Lord Leggatt JSC, with whom Lord Kerr JSC agreed. And which, according to the minority of the UKSC, could point to ‘another relevant jurisdiction’: [257(iv)], per Lord Burrows JSC, with whom Lord Sales JSC agreed, [291], per Lord Sales JSC.

<sup>40</sup> Which, according to the minority of the UKSC in *Enka*, could point to the law governing the matrix contract: [257(i), (ii)], per Lord Burrows JSC, with whom Lord Sales JSC agreed, [282]-[286], per Lord Sales JSC.

determined in accordance with section 3 before the court has been seised of the dispute, the law of the seat should take over.

#### V Conclusion

30. My answer to Question 1 is that I agree with the Law Commission's provisional proposal that a new rule be included in the Arbitration Act 1996 to the effect that the law of the arbitration agreement is the law of the seat, unless the parties expressly agree otherwise in the arbitration agreement itself. However, I would advise the Law Commission to clarify that its provisional proposal covers cases falling under section 9, not to amend section 103(2)(b) and to clarify that a party should be able to rely on the proposed choice-of-law rule in cases falling under section 103(2)(b) if it is more arbitration-friendly than the UKSC's interpretation of this provision. I further advise the Law Commission to clarify that 'an express agreement otherwise' in the proposed new rule should specifically refer to the arbitration agreement and that, when parties have not chosen a seat for their arbitration, the arbitration agreement is governed by English law, unless the seat has been determined in accordance with section 3 before the court has been seised of the dispute.

#### Consultation Questions 2 and 3

31. In my Response to the Law Commission's First Consultation Paper, I expressed my disagreement with the proposed changes to section 67 of the Arbitration Act 1996. Additionally, I advocated for clarity in the Law Commission's definition of 'appeal'.<sup>41</sup> Fortunately, the Law Commission has now provided clarification of the nature of the proposed challenge. In this part of my Response to the Law Commission's Second Consultation Paper, I will discuss the nature of the proposed challenge. Following that, I will evaluate whether the proposed changes should be accepted.

#### I Nature of the Proposed Challenge

32. In my Response to the Law Commission's First Consultation Paper, I analysed the nature of the proposed 'appeal' by asking the following questions: Is an appeal available as of right? Who selects the issues to be decided? Can new issues be introduced? Can new arguments be introduced? Can oral evidence or new evidence be admitted? Is there any flexibility regarding

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<sup>41</sup> U Grušić, 'Submission to the Law Commission of England and Wales: Consultation Paper 257: Review of the Arbitration Act 1996' (14 December 2022) paras 2-42.



the admissibility of evidence and conducting a rehearing?<sup>42</sup> The challenge proposed in the Law Commission’s Second Consultation Paper can also be analysed by asking the same questions.

33. While the Law Commission does not address this point, it appears that the proposed challenge would be available as of right, as is currently the case under section 67. The Law Commission’s First Consultation Paper did not put forward any suggestions for change in this regard.
34. Likewise, it appears that the party challenging the jurisdiction of the tribunal would decide which of the admissible jurisdictional issues will be reviewed by the courts under the proposed challenge. This mirrors the current approach under section 67. The Law Commission’s First Consultation Paper did not propose any changes in this respect.
35. According to the Law Commission’s preliminary proposal, ‘the court will not entertain any new grounds of objection..., unless even with reasonable diligence the grounds could not have been advanced’. This aligns with the current approach under section 67.<sup>43</sup> The Law Commission’s First Consultation Paper did not suggest any modifications regarding this aspect.
36. Parties seem to retain the freedom to present the admissible jurisdictional issues that the court is asked to review in whatever manner they choose, within certain limitations. One such limitation is the rule in *Henderson v Henderson*,<sup>44</sup> which the Commercial Court recently confirmed also applies in arbitration.<sup>45</sup> This is the current approach under section 67. The Law Commission’s First Consultation Paper did not suggest any changes regarding this matter.
37. The main changes put forth by the Law Commission concern the admissibility of evidence and rehearings. According to the Law Commission’s preliminary proposal, ‘the court will not entertain...any new evidence, unless even with reasonable diligence...the evidence [could not have been] submitted before the tribunal’ and ‘evidence will not be reheard, save exceptionally in the interests of justice’. This differs from the current approach under section 67, which permits the repeat of oral evidence, the introduction of new evidence and rehearings. Additionally, this differs from the Law Commission’s First Consultation Paper, which did not provide any flexibility regarding the admissibility of oral and new evidence and rehearings. As a result, the challenge proposed in the Law Commission’s Second Consultation Paper is closer to appeal because the appeal court can order to receive oral evidence or evidence which was not before the lower court, although the Civil Procedure Rules do not restrict the admissibility of new evidence to that which could not have been submitted before the tribunal even with reasonable diligence.<sup>46</sup> Furthermore, 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 do so.<sup>47</sup>
38. According to the Law Commission’s preliminary proposal, ‘the court will allow the challenge where the decision of the tribunal on its jurisdiction was wrong’. This is another departure from the current approach under section 67. The Law Commission believes that ‘the decision of the tribunal should be accorded some legal and evidential value...at least to include the usual reluctance to interfere with a finding of fact based on the credibility or reliability of the

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<sup>42</sup> Ibid para 7.

<sup>43</sup> Arbitration Act 1996, s 73. Law Commission, *Review of the Arbitration Act 1996 – Second Consultation Paper* (Law Com CP 258, 2023) para 3.104.

<sup>44</sup> (1843) 3 Hare 100, 67 ER 313.

<sup>45</sup> *Union of India v Reliance Industries Ltd* [2022] EWHC 1407 (Comm).

<sup>46</sup> Civil Procedure Rules, r 52.21(2).

<sup>47</sup> Civil Procedure Rules, r 52.21(1)(a).

oral evidence which was evaluated by the tribunal’.<sup>48</sup> In contrast, currently, ‘the tribunal's own view of its jurisdiction has no legal or evidential value’,<sup>49</sup> although it can be considered by the court if it is ‘helpful’,<sup>50</sup> and the court is deciding the jurisdictional issue afresh.

39. On the whole, the nature of the challenge proposed in the Law Commission’s Second Consultation Paper has become much clearer. Although the proposed challenge represents a departure from the current approach under section 67, it is not a radical one. While the current approach permits the repeat of oral evidence, the introduction of new evidence and rehearings, it also grants the court the powers to reject oral and new evidence and to deal with a section 67 application without a hearing in certain circumstances. Moreover, although ‘the tribunal's own view of its jurisdiction has no legal or evidential value’ under the current approach, it can still be considered by the court if it is ‘helpful’. In contrast, under the proposed challenge, the default position is that oral and new evidence is inadmissible and that there is no rehearing, although the court retains the discretion to allow them. Additionally, the tribunal's own view of its jurisdiction is always relevant and its findings of fact are usually not to be interfered with under the proposed challenge.

40. One suggestion to improve the Law Commission’s initial proposal is to reconsider the limitations on the admissibility of new evidence only to that which could not have been submitted before the tribunal even with reasonable diligence. The Law Commission acknowledges in its Second Consultation Paper that there may be circumstances where ‘the tribunal might have excluded evidence which a court might nevertheless feel the need to consider’.<sup>51</sup> However, under the current preliminary proposal, such evidence would be inadmissible. To address this issue, the Law Commission could make one of two changes to its proposal. First, it could adopt an approach similar to the Civil Procedure Rules<sup>52</sup> and provide that ‘unless it orders otherwise, the court will not receive oral evidence or evidence which was not before the tribunal’. Alternatively, the Law Commission could rephrase paragraphs 1 and 2 of the preliminary proposal so that paragraph 2 provides that ‘evidence which was not before the tribunal will not be admitted and evidence will not be reheard, save exceptionally in the interests of justice’. Either of these changes would provide flexibility in allowing the court to consider oral or new evidence in appropriate cases, while maintaining the default position of not admitting oral or new evidence.

## II Should the Proposed Changes to Section 67 be Accepted?

41. The answer to this question depends on the strength of the Law Commission’s arguments. As I explained in my Response to the Law Commission’s First Consultation Paper, ‘if the current position is “unlikely to be having any significant negative impact...or cause significant

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<sup>48</sup> Arbitration Act 1996, s 73; Law Commission, *Review of the Arbitration Act 1996 – Second Consultation Paper* (Law Com CP 258, 2023) para 3.108.

<sup>49</sup> *Dallah Real Estate & Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2010] UKSC 46, [2011] 1 AC 763 [30], *per* Lord Mance JSC.

<sup>50</sup> *Ibid* [31], *per* Lord Mance JSC, [160], *per* Lord Saville JSC.

<sup>51</sup> Law Commission, *Review of the Arbitration Act 1996 – Second Consultation Paper* (Law Com CP 258, 2023) para 3.106.

<sup>52</sup> Civil Procedure Rules, r 52.21(2).

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.<sup>53</sup>

42. The Law Commission now puts forth four arguments for reform: that its provisional proposal is consistent with *Dallah* and *Azov*;<sup>54</sup> that the court’s case management powers are insufficient to address any concerns about fairness or efficiency; that the *Kompetenz-Kompetenz* doctrine justifies a degree of deference to the tribunal; and that its provisional proposal is compatible with the current language of section 67 and is in line with the case law. I address these arguments in turn.
43. The Law Commission’s analysis of *Dallah* is unconvincing. While it is true that this case concerned the enforcement of a French arbitral award in a situation where the award debtor had not participated in the arbitral proceedings, this does not support the Law Commission’s conclusion that *Dallah* ‘properly considered, is [not] inconsistent with the idea of restricting the nature of a hearing under section 67’.<sup>55</sup> First, the Law Commission writes that ‘the Supreme Court also accepted that the standard of review under section 103 might vary according to the circumstances’.<sup>56</sup> But the doctrines of issue estoppel and the rule in *Henderson v Henderson*,<sup>57</sup> which are invoked in support of this argument,<sup>58</sup> do not concern the *standard* of review of the tribunal’s determination of jurisdiction. These are well-established principle of private international law that concern the finality and conclusiveness of foreign decisions. Second, the Law Commission writes that the Supreme Court ‘said that an arbitral tribunal could still be the final arbiter of its own jurisdiction in some circumstances, for example where the parties have agreed to this’.<sup>59</sup> Again, this does not concern the *standard* of review of the tribunal’s determination of jurisdiction. If there is an arbitration agreement that covers the jurisdictional issue, its negative effect is that the courts cannot decide the jurisdictional issue. Finally, the Law Commission writes that it is contradictory to say that the tribunal’s own view of its jurisdiction both ‘has no legal or evidential value’ and may be ‘helpful’.<sup>60</sup> But this takes Lord Mance’s statement out of context. The fact that the tribunal’s own view of its jurisdiction ‘has no legal or evidential value’ does not necessarily mean that the court ‘will not examine, both carefully and with interest, the reasoning and conclusion of an arbitral tribunal which has undertaken a similar examination’.<sup>61</sup> Courts often do this, for example when they examine decisions of foreign courts on the legal issue that is before the court or in related litigations.
44. The Law Commission’s analysis of *Azov*, however, is persuasive. The Rules of the Supreme Court at the time specifically permitted the court, in an arbitration claim, to give directions for oral evidence and cross-examination, which distinguishes *Azov* from later cases governed by

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<sup>53</sup> U Grušić, ‘Submission to the Law Commission of England and Wales: Consultation Paper 257: Review of the Arbitration Act 1996’ (14 December 2022) para 4.

<sup>54</sup> *Azov Shipping Co v Baltic Shipping Co (No 1)* [1999] 1 All ER 476.

<sup>55</sup> Law Commission, *Review of the Arbitration Act 1996 – Second Consultation Paper* (Law Com CP 258, 2023) para 3.45.

<sup>56</sup> *Ibid* para 3.30.

<sup>57</sup> (1843) 3 Hare 100, 67 ER 313.

<sup>58</sup> Law Commission, *Review of the Arbitration Act 1996 – Second Consultation Paper* (Law Com CP 258, 2023) paras 3.30, 3.31, 3.120.

<sup>59</sup> *Ibid* para 3.33.

<sup>60</sup> *Ibid* para 3.35.

<sup>61</sup> *Dallah* [31], *per* Lord Mance JSC.

the Civil Procedure Rules. However, this also means that *Azov* is not directly relevant for the present discussion.

45. As I show in paragraph [37] above, the current approach under section 67 permits the repeat of oral evidence, the introduction of new evidence and rehearings, but also grants the court the powers to reject oral and new evidence and to deal with a section 67 application without a hearing in certain circumstances. Conversely, the proposed challenge reverses the starting point. Both the proposed challenge and the current approach involve a balancing of competing considerations and strike the balance at different point. Therefore, whether the proposed challenge is better than that current approach is largely an empirical question. As I said in my Response to the Law Commission's First Consultation Paper, '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.'<sup>62</sup> I stand by this observation. Without empirical evidence, it is difficult to know whether the proposed challenge or the current approach strikes a better balance.
46. It is to be welcomed that the Law Commission has addressed the Kompetenz-Kompetenz doctrine in its Second Consultation Paper. The Law Commission argues that its proposed changes to section 67 'would give competence-competence some substance'.<sup>63</sup> This is a strange statement. English law already gives effect to positive Kompetenz-Kompetenz by granting the tribunal competence to rule on its own competence.<sup>64</sup> Negative Kompetenz-Kompetenz is not generally accepted under English law, but the courts do have some discretion in allowing arbitrators to decide the issue of arbitral jurisdiction first and, thus, give a degree of deference to the tribunal.<sup>65</sup> The crucial question here is whether the Kompetenz-Kompetenz doctrine should be construed to support a degree of preclusive effect to a prior jurisdictional ruling by a tribunal in section 67 applications. According to Born, 'many national courts apply a *de novo* standard of judicial review to jurisdictional determinations of tribunals. That is true, for example, in UNCITRAL Model Law jurisdictions, the United States, France, England and elsewhere', although sometimes a degree of deference is given to the tribunal's determination of factual issues as, for example, in Canada, Singapore and the US.<sup>66</sup> Similarly, 'Swiss courts review jurisdictional rulings by arbitrators on a *de novo* basis, although only after according a substantial degree of deference to the factual findings of arbitral tribunals'.<sup>67</sup> Therefore, it appears that the Kompetenz-Kompetenz doctrine does not necessarily support a preclusive effect of prior jurisdictional rulings in section 67 applications.
47. The question of whether a prior jurisdictional ruling by a tribunal should have a degree of preclusive effect in section 67 applications is a complex matter that involves balancing competing considerations. The suggestion in *Dallah* that the tribunal's own view of its

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<sup>62</sup> U Grušić, 'Submission to the Law Commission of England and Wales: Consultation Paper 257: Review of the Arbitration Act 1996' (14 December 2022) para 17.

<sup>63</sup> Law Commission, *Review of the Arbitration Act 1996 – Second Consultation Paper* (Law Com CP 258, 2023) para 3.64.

<sup>64</sup> Arbitration Act, s 30.

<sup>65</sup> Law Commission, *Review of the Arbitration Act 1996 – Second Consultation Paper* (Law Com CP 258, 2023) para 3.76 and cases cited in the footnotes in this paragraph.

<sup>66</sup> G Born, *International Commercial Arbitration* (3rd edn Kluwer Arbitration 2021) para 25.04[a][8].

<sup>67</sup> *Ibid.*

jurisdiction can be considered by the court if it is ‘helpful’ implies that the courts already have some discretion in this regard. While attempting to clarify this issue through the Civil Procedural Rule may be a positive step, the proposed wording (‘the court will allow the challenge where the decision of the tribunal on its jurisdiction was wrong’) is unclear and uncertain. Nonetheless, without empirical evidence, it is difficult to know whether the proposed challenge or the current approach strikes a better balance between competing considerations.

48. The Law Commission’s positive argument for its provisional proposal relies on reducing costs and delays.<sup>68</sup> However, without empirical evidence, it is difficult to ascertain the extent to which the current approach creates excessive costs and delays. It is important to note in this respect that the Law Commission’s First Consultation Paper said 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.<sup>69</sup>

The Law Commission’s Second Consultation Paper does not present any new evidence that suggests that this impression was wrong.

49. Finally, the Law Commission suggests that its preliminary proposal is justified with respect to arbitral claimants because they are always happy for the tribunal to rule on its own jurisdiction and can only challenge the jurisdictional determination on the basis that the tribunal got it wrong.<sup>70</sup> The Law Commission also suggests that its preliminary proposal is justified with respect to arbitral defendant where they can only challenge the jurisdictional determination on the basis that tribunal got it wrong: ‘If the essential complaint, even of the arbitral respondent, is that the tribunal got it wrong, that is compatible with something less than a full rehearing before the court.’<sup>71</sup> However, in cases where the tribunal has determined that it has jurisdiction and the arbitral defendant challenges this determination, the arbitral defendant is essentially arguing that the tribunal should never have been ruling in the first place, rather than simply disagreeing with the decision. As a result, the Law Commission’s argument on this point is not convincing.

50. In sum, without empirical evidence, the Law Commission cannot show that the current approach is not working well. However, this does not necessarily mean that its provisional proposal is not an improvement over the current approach. We do not know 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. We do not know to what extent the courts find the tribunal's own view of its jurisdiction

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<sup>68</sup> Law Commission, *Review of the Arbitration Act 1996 – Second Consultation Paper* (Law Com CP 258, 2023) paras 3.88-3.89.

<sup>69</sup> Law Commission, *Review of the Arbitration Act 1996 – First Consultation Paper* (Law Com CP 257, 2022) para 8.33.

<sup>70</sup> Law Commission, *Review of the Arbitration Act 1996 – Second Consultation Paper* (Law Com CP 258, 2023) paras 3.96, 3.99.

<sup>71</sup> *Ibid* para 3.100.

'helpful'. We do not know to what extent the current approach creates excessive costs and delays.

51. This, in turn, indicates that no solution should be set in stone and that there should be some flexibility to fine-tune any solution. This, as the Law Commission rightly points out, can in theory be done through the development of case law or through empowering a body such as the Civil Procedure Rule Committee to monitor the situation and fine-tune the adopted solution, if necessary. I agree with the Law Commission that the first approach is probably unrealistic given the weight of *Dallah*,<sup>72</sup> but also given the slow and haphazard development of case law. In other words, there is merit in the Law Commission's provisional proposal to let the Civil Procedure Rule Committee lay down the procedural requirements for making a section 67 application.
52. One question that arises is whether the Civil Procedure Rule Committee is the best body to be making these kinds of decisions. Ultimately, this is a matter for Parliament to decide when presented with the Law Commission's proposal.

### III Conclusion

53. My answer to Question 2 is that I agree, in principle, with the Law Commission's provisional proposal to a challenge under section 67 of the Arbitration Act 1996. I also think that the Law Commission should not propose to limit the admissibility of new evidence only to that which could not have been submitted before the tribunal even with reasonable diligence. Instead, the Law Commission could either (1) adopt an approach similar to the Civil Procedure Rules<sup>73</sup> and provide that 'unless it orders otherwise, the court will not receive oral evidence or evidence which was not before the tribunal' or (2) rephrase paragraphs 1 and 2 of the preliminary proposal so that paragraph 2 provides that 'evidence which was not before the tribunal will not be admitted and evidence will not be reheard, save exceptionally in the interests of justice'.
54. My answer to Question 3 is that I agree with the Law Commission's provisional proposal that the Arbitration Act 1996 be amended to confer the power to make rules of court to implement the proposals in Question 2.

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<sup>72</sup> Ibid para 3.123.

<sup>73</sup> Civil Procedure Rules, r 52.21(2).

## Response to Second Consultation Paper on the Arbitration Act 1996

Hilary Heilbron KC

6 June 2023

1. I apologise for the short delay in submitting my response to the Second Consultation Paper of the Law Commission.
2. I have already associated myself with the Brick Court Chambers' response to this consultation paper and only want to elaborate on one point concerning Section 67 of the Arbitration Act 1996 ("**1996 Act**").
3. As I said at the Brick Court Conference on the reform of the 1966 Act, the real issue is about procedure: not powers. The former are for rules, and courts to decide: the latter are for statutes.
4. The Law Commission has endorsed this approach, but seems in the process to have raised some new issues. The questions asked are these:

### Consultation Question 2

We provisionally propose the following approach to a challenge under section 67 of the Arbitration Act 1996.

Where an objection has been made to the tribunal that it lacks jurisdiction, and the tribunal has ruled on its jurisdiction, then in any subsequent challenge under section 67 by a party who has participated in the arbitral proceedings:

- i. the court will not entertain any new grounds of objection, or any new evidence, unless even with reasonable diligence the grounds could not have been advanced or the evidence submitted before the tribunal;
- ii. evidence will not be reheard, save exceptionally in the interests of justice;
- iii. the court will allow the challenge where the decision of the tribunal on its jurisdiction was wrong.

Do you agree?

### Consultation Question 3

We provisionally propose that the Arbitration Act 1996 be amended to confer the power to make rules of court to implement the proposals in CQ2 above.

Do you agree?

5. The power to make rules of court is exercised by the Rules Committee which derives its powers from the Civil Procedure Act 1997, principally Sections 1-3, (See also Section 45 of the Constitutional Reform Act 2005 and Section 5 of the Civil Procedure Rules re Practice Directions). It was intended to be comprehensive.

6. There is no provision in the 1996 Act to make rules of procedure. Therefore, to provide for the 1996 Act to make rules of court, as appears to be suggested, would be inconsistent with the legislative position as it currently exists. Rule 62 of the Civil Procedure Rules is the relevant Rule concerning the 1996 Act (see in particular Rule 62.2, which makes it clear that the Rule concerns “*any application to the court under the 1996 Act*”).
7. To have another statute embracing a rule-making power would involve consequential amendments to the Civil Procedure Act and, to avoid inconsistency, would need to provide for the overriding objective etc. I do not know if other statutes have such provisions, but I would be very surprised if they do, given the comprehensive nature of the Civil Procedure Act, its purpose and the wide powers of the Rules Committee. See e.g. <https://www.gov.uk/government/organisations/civil-procedure-rules-committee/about#our-responsibilities>
8. In any event the Civil Justice Procedure Rules have provisions, apart also from Practice Directions, dealing with a variety of specific types of claims from admiralty to arbitration, to estates, trusts and charities. In none of these, so far as I am aware, are there separate statutory rules-making provisions.
9. If the procedure is not working, then the Rules Committee can look at the matter. However, I would argue that the recommendations in Question 2 are for the statutorily based Rules Committee to consider in the normal way following consultation and with the input from the judges who hear such cases: not for a new statutory provision under the 1996 Act which somehow gives additional rule-making powers to those under the Civil Procedure Act.
10. The rules proposed are rules that are already considered by the courts on a case to case basis and to impose the suggested restrictions would make the procedure far too prescriptive and tie the hands of judges and are otiose. So I would answer “no” to the above questions.



Submitted to Law Commission second consultation on the Arbitration Act 1996  
Submitted on 2023-05-22 09:45:21

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Herbert Smith Freehills LLP

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## Proper law

### Consultation Question 1

Yes

Please give your reasons::

Whilst we recognise that this proposal may be perceived as protectionist, we consider it to be a pragmatic solution in light of the criticism of and uncertainty created by the decision in *Enka v Chubb*. It may be helpful to clarify the meaning of "express agreement in the arbitration agreement itself" and whether this includes incorporation by reference of institutional rules which also deal with this issue. Whilst this proposal is consistent with, for example, the current version of the LCIA rules, the Law Commission may wish to consider a scenario in which this proposal would result in a conflict with other institutional rules (e.g. where the institutional rules provide as a matter of default that, in case of no agreement, the law of the arbitration agreement should match the governing law of the contract). An alternative approach would be to make this provision mandatory, such that it would override any contradictory provision in the applicable institutional rules.

## Section 67

### Consultation Question 2

Yes

Please give your reasons::

As per our original response, we agree with this proposal, save for the language in point 2. We consider this should be changed to read "save where necessary in the interests of justice". The proposal is that the default position should be that no hearing will take place. If the court determines that a hearing is necessary, there should not be an extra high bar set on the admission of evidence, particularly one which is a relative concept. Using "necessary" rather than "exceptionally" grounds the decision on whether or not to rehear evidence in an assessment of the specific case at hand.

### Consultation Question 3

Yes

Please give your reasons::

We agree that these changes fit more naturally in court rules, as they are largely procedural. We also understand the concern that the Dallah judgment did not specifically apply to s67 of the Act. The Law Commission has not clarified where such rules would sit – we assume that they would be incorporated into CPR 62 and/or the relevant sections of the Commercial Court guide in order to limit the number of rules to which parties must refer when making arbitration-related court applications. This would be in line with the recent procedural changes in respect of applications under s67-69, which have been addressed in the Commercial Court guide.

We have some concern about the suggestion in paragraph 3.125 that such proposals may only be piloted and amended should that prove necessary. This is a significant shift in approach - parties should be given the time to adapt to it. Certainty and perceived certainty are important to England's reputation as a seat of arbitration.

### Discrimination

#### Consultation Question 4

Yes

Please give your reasons::

We have reflected further on our first submission, and in particular, on our suggestion that parties look to appoint "English KCs". On reflection, this was intended to be a short-hand for English qualification, and not nationality. We have also reflected on the Law Commission's comments regarding party autonomy (paragraphs 4.35-4.36) and recognise the tension between supporting party autonomy and limiting objectionable behaviour.

Accordingly, we agree with this proposal. It is common practice in arbitration for parties to agree that a sole arbitrator or chair will have a nationality that is different to that of the parties in order to ensure neutrality. This proposal strikes the right balance between preserving the parties' desire for neutrality but ensuring that parties cannot simply designate a specific preferred nationality for their arbitrator without a legitimate basis for doing so.

If the Law Commission proceeds with this approach, it will be important to provide clear rules as to how a person's relevant nationality will be determined (see, for example, LCIA Rules Articles 6.2 and 6.3). Furthermore, the Law Commission may wish to consider further guidance on what may constitute an exception – for example, would a designation of nationality to ensure expedited security clearance be an exception?

#### Consultation Question 5

Other

Please give your reasons::

The second consultation paper moves very quickly from a discussion of the potential merits of prohibiting discrimination in the appointment of arbitrators to the suggestion that discrimination in arbitration should be prohibited "more generally". At this stage there is very little to indicate what the Law Commission has in mind, both in terms of substance but also in terms of what legislative changes would be required.

In principle, we are very much in favour of prohibiting discrimination in arbitration, both in the context of arbitrator appointments and generally. As a firm, we pride ourselves on fostering an inclusive culture, and this culture extends to the matters in which we are involved. Legislating against discrimination in the context of arbitrator appointments would send a strong message about improving the quality of the arbitrators and ensure that parties have access to the broadest possible pool of talent. This will ensure better access to justice and better outcomes. Although there are various initiatives in place for improving the diversity of arbitrator appointments such as the Equal Representation in Arbitration Pledge, the whole community recognises that the current statistics on arbitrator diversity are in need of improvement. A general prohibition on discrimination would also be a positive demonstration of the values inherent in the access to and administration of justice in England.

However, we question whether introducing legislation to tackle discrimination in the context of this review of the Arbitration Act is the most effective approach, particularly given the Law Commission's publicly-stated intention that they move to their final report within a tight timetable. This topic also requires considerable input from employment lawyers who are also familiar with how arbitration works in practice. We have concerns that this input has not yet been sought.

Nonetheless, if the Law Commission were to proceed with prohibiting discrimination in arbitration, numerous overarching questions present themselves. By way of example, and from discussions with our employment team:

- What gaps are we seeking to fill? This requires an enquiry into the extent to which, in practice, discrimination would already fall within the safeguards of the existing arbitration framework. For example, an arbitrator could be challenged and removed by the parties under s24 on the basis that it is not fulfilling its duty to the parties (s33) if he or she acted in a discriminatory manner. Similarly, discriminatory behaviour in the arbitral process could lead to a challenge to an arbitral award under s68. In addition, discrimination is prohibited for English-qualified barristers and solicitors as part of their professional conduct obligations and under s44 to 47 of the Equality Act.

- If gaps do exist, we must ask whether the Arbitration Act is the right tool through which to introduce new legislation, or whether this should be done through amendments to the Equality Act or indeed guidance such as the Equal Treatment Bench Book that applies to judges – could something similar be

introduced for arbitrators?

- Do any of the gaps relate to the behaviour of parties, or are we only seeking to regulate arbitrator behaviour, given that this is about ensuring a fair arbitration process for the parties? For example, s40 of the Act may not be sufficiently broad as to encompass discriminatory acts by the parties to the arbitration. The Act does not currently contain any duties on any other participants. Introducing a prohibition on discrimination by other participants in the arbitral process (including institutions, party representatives, witnesses, experts etc) within the Act would be a significant change in approach and could lead to far wider consequences than intended.
- Would changes need to be made to sections 29 and 74 of the Act regarding institutional and arbitrator liability? Bad faith may potentially be sufficient to cover intentional direct discrimination but is unlikely to encompass many forms of discriminatory conduct.
- Would any changes cover only direct discrimination as indicated by paragraph 4.32 of the consultation paper? If so, would this achieve the Law Commission's aim, given the difficulty of proving direct discrimination in this context, as such discrimination is unlikely to be overt (and all the more so in this context – see below). Such discrimination is likely to flow from the criteria set by the parties for the appointment of arbitrators, e.g., experience or availability, which would not be direct discrimination but potentially indirect discrimination.
- More broadly, the Law Commission would also need to consider how to limit any negative repercussions on the attractiveness of England as a seat of arbitration, specifically the risk of satellite litigation, which has the potential to undermine the perceived certainty of the process. Further, what would be the impact of English discrimination legislation on the enforceability of foreign-seated awards in England?

In addition to the above questions, we have also identified further questions with regard to prohibiting discrimination in the context of arbitrator appointments specifically. These include:

- Appointment process: In a standard appointment process, parties are unlikely to write or specify a "job spec" (or it might be vague, e.g. a lawyer qualified in England & Wales with experience in the energy sector). Subjective criteria might be applied to the appointment, such as positive direct experience with arbitrators. A potential arbitrator is also unlikely to know that they were being considered for appointment; at best, only the final few potential candidates may be approached to provide information about conflicts or availability. Even were a potential arbitrator to know they were being considered for a party appointment, for example by making a data subject access request, any correspondence between clients and law firms on this is likely to be covered by privilege (except for limited exceptions). Accordingly, as it stands, potential arbitrators are unlikely to know whether they were being considered for an appointment. Therefore, it would be impossible for them to bring a claim for discrimination unless the process for appointment of arbitrators is made sufficiently transparent for the necessary evidence for discrimination to be available. This also impacts on knowledge of claims for limitation purposes. However, introducing requirements such as job specifications, requirements as to short-lists and informing unsuccessful candidates as to who was appointed and why would be entirely unworkable in the context of arbitration for reasons of efficiency and practicality.
- Who would face discrimination claims: This highlights the need to focus on the extent to which all the provisions of the Equality Act would be applied, in particular whether liability would be restricted to primary liability or whether the secondary liability provisions (e.g. sections 109-112) would also be applied. A potential arbitrator claiming discrimination may have a cause of action against the party who made the discriminatory appointment – i.e. either a party to the arbitration or an institution. Law firms who make recommendations to parties could also have secondary liability (e.g. if they put together a discriminatory short-list). The evidentiary issues of bringing a claim against a law firm are discussed above. However, since no privilege would apply to any institutional appointment process, institutions would need to adopt even more rigorous processes in order to avoid finding themselves vulnerable to claims. Given that the most progress in achieving gender parity in arbitral appointments has come from arbitral institutions, this would be unfortunate. We also note our query above regarding institutional immunity.
- Forum: Would a claim for discrimination be heard by the High Court rather than the Employment Tribunal or county courts? This is particularly important given the current backlog in the Employment Tribunal, the need for familiarity with the arbitrator appointment process by any decision-maker and the lack of availability of expedited hearings in the Employment Tribunals (at least for discrimination claims).
- Confidentiality: Claims would usually be public – rules on anonymisation would need to be considered. For example, what would this mean for an arbitrator who is faced with the choice of bringing a claim or being labelled a trouble-maker? Or what if someone does not want to reveal a protected characteristic publicly? (It is of course accepted that these are potential barriers to any putative claimant who alleges that they are either a whistle-blower or have been subjected to unlawful discrimination).

In light of the above, we would be keen to have the opportunity to provide further input once the Law Commission has clarified its proposals.

## Consultation Question 6

Please give your answer::

Usually the remedies for discrimination claims are a declaration of rights (which includes a declaration of unenforceability, which can in turn include a declaration as to the unenforceability of a term of a contract - see s142 of the Equality Act - albeit this can only be sought in the County Court, or a collective agreement, which can be sought from the Tribunal - s145-146 of the Equality Act), compensation for loss of earnings and injury to feelings, or a "recommendation" to take certain steps. However, the suite of remedies available within the existing employment law framework is unlikely to be appropriate for arbitration. By way of example, requirements as to characteristics of arbitrators may not constitute contractual terms (of the arbitration agreement or of the arbitrator appointment). Recommendations, particularly a recommendation that the arbitrator appointment process be re-run, may also be ignored in the context of arbitration where parties are keen to expedite the process. This is likely to mean that any remedies would most likely need to be of a financial nature – see s124(7) of the Equality Act.

To the extent that any new legislation is introduced, we consider that the priority should be to ensure that arbitrations are not derailed by parallel discrimination claims/satellite litigation. The Law Commission would need carefully to consider introducing bespoke remedies which would address the

problems that it is seeking to resolve, whilst also ensuring that resolving discrimination allegations does not adversely affect the arbitral process. For example, the Law Commission would need to ensure that judges can exercise discretion in favour of ensuring an effective and efficient arbitration process when considering appropriate remedies and ensuring that an expedited process is available.

## Response ID ANON-44ZW-8XF3-2

Submitted to Law Commission second consultation on the Arbitration Act 1996  
Submitted on 2023-05-22 17:04:29

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### Proper law

Consultation Question 1

Not Answered

Please give your reasons::

### Section 67

Consultation Question 2

Not Answered

Please give your reasons::

Consultation Question 3

Not Answered

Please give your reasons::

### Discrimination

Consultation Question 4

Other

Please give your reasons::

ICC restates its position from the first consultation paper : 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.

Should discrimination provisions be included, ICC agrees with the above proposal and restates its position from the first consultation paper as relating to nationality:

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.

#### Consultation Question 5

Other

Please give your reasons::

In the second consultation paper, the Law Commission has widened the scope of potential discrimination provisions, from a discussion confined to protected characteristics of an arbitrator, to now cover the entire appointment process and arbitral procedure.

ICC restates its position from the first consultation paper : ICC does not see a need to amend the current common law position. While diversity is important to ICC and it stands against all forms of discrimination, legislation may not be the best means of addressing this issue. The concerns raised by ICC in the first consultation paper as to the introduction of such legislation are repeated.

Outside of the issue of provisions within arbitration agreements discussed in the first consultation paper, the type of direct discrimination the Law Commission is seeking to address is not an issue ICC is encountering. The examples cited in the second consultation paper centred around discrimination by an arbitrator (towards a party or legal representative) and it is this situation we focus our comments on. ICC has dealt with challenges based on impartiality or procedural impropriety where there are allegations or suggestions of discrimination. However, these are very rare and often accompanied by other grounds for a challenge.

The Arbitration Act already contains provisions to safeguard the arbitration procedure where an arbitrator may discriminate against a party (or its representatives).

The Law Commission highlights remedies already available when an arbitrator fails in his or her duty to act fairly and impartially (through s.24 or s.68). ICC agrees that these would be the appropriate remedies and there is thus no need to introduce additional provisions in the Arbitration Act or seek additional remedies within the arbitration procedure.

At ICC, parties who feel they are the subject of arbitrator discrimination have recourse to the ICC Court by way of filing a challenge. Such challenges are dealt with by examining each element of the alleged misconduct on a case by case basis. Where the ICC Court considers that an arbitrator is not fulfilling his or her obligations of independence or impartiality (as required under the ICC Rules), the ICC Court may accept the challenge. The Court may also replace an arbitrator on its own initiative if it considers the arbitrator is not fulfilling his or her obligations in accordance with the Rules. The conduct of the arbitrator may then be taken into consideration when fixing the fees of the arbitrator.

In relation to the general prohibition of discrimination during the arbitrator appointment process, the ICC Court has control over all arbitrator confirmations and appointments. As such, the ICC Court will address any objection to the confirmation or appointment of an arbitrator on the basis of discrimination (whether relating to allegations of an individual's behaviour or allegations of criteria for selection by a party or parties which are considered discriminatory). The ICC Court has the option to not confirm or appoint any candidate nominated by a party if such candidate or the nomination process does not conform with the ICC Rules.

We consider that these remedies within the context of the arbitration proceedings (i.e., the challenge and replacement of an arbitrator) are sufficient to deal with any issue of alleged discrimination by an arbitrator.

With these safeguards already well established, it is unclear what practical advantage would result from additional discrimination provisions in the Arbitration Act. Furthermore, the proposed procedures do not seem well suited to international arbitration proceedings and may undermine some of the advantages for which parties agree to arbitrate.

In relation to the Law Commission's suggestion to take cues from the remedies in the Equality Act, this would appear to take remedies from outside the context of the arbitrator procedure and widen the scope for actions against arbitrators.

ICC would raise the following concerns and questions for consideration:

- Where will such claims be brought?
- The Supreme Court in *Jivraj* found that arbitrators are not employees and employment law rules do not apply to arbitrator appointments. As such, arbitrators would not be subject to employment tribunals (as would be the usual case for claims under the Equality Act).
- Would jurisdiction to decide allegations of discrimination against an arbitrator then fall to UK Courts (in the context of an arbitration or as a civil suit)?
- As discussed above, ICC, like other institutions, deals with procedural challenges for lack of impartiality which may contain allegations of discrimination but does not possess powers to apply the remedies as suggested in the Equality Act. Should an institution reject a challenge, would the door nonetheless be left open to a party to claim discrimination in another forum and what effect would that have on the arbitration procedure?
- Who can bring a claim? The example in the report refers to discrimination by an arbitrator. Is it envisaged that other actors may bring a claim / have a claim brought against them?
- Compensation may be appropriate in a civil case between an arbitrator and a party, although it remains to be seen what the financial damage would be if the arbitrator is to be replaced in any event.
- The other remedies of declaration of a complainant's rights or recommendation of how the respondent should act do not appear suited to arbitration proceedings. These presuppose that where an arbitrator has been found to have breached discrimination provisions he/she may nonetheless continue to

act under certain conditions. However, as discussed above, a s.24 removal appears to be the more appropriate remedy to protect the integrity of the arbitral proceedings.

Consultation Question 6

Please give your answer::

Please refer to the comments in Question 5

The Arbitration Strategy Committee ('ASC') of the International Cotton Association ('ICA') wishes to add its broad support to the Federation of Commodity Associations ('FCA') response to the Law Commission's ('LC') Second Consultation concerning the Arbitration Act 1996.

The ASC consulted with the 'Arbitrators Forum' a body consisting of ICA arbitrators. They agreed upon the importance of maintaining impartiality when arbitrating and are opposed to discrimination of any kind.

The ASC would also like to point out that:

in order to maintain impartiality and avoid conflicts of interest, the ICA arbitration team proactively requests every arbitrator to declare if they have any conflict of interest when they are appointed to new ICA arbitration tribunals.

the parties also have the right to object to the appointment of arbitrators and there is a process within the ICA arbitration Bylaws for objections to be considered and arbitrators removed if necessary.

the ICA has the following mandatory rule within the Arbitrators Code of Conduct, to ensure impartiality:

"An arbitrator must only accept an appointment to act as Arbitrator if he has sufficient time to allow the arbitration to be conducted in a competent and timely manner. In order to avoid the perception of bias or justifiable doubts as to impartiality in any calendar year an arbitrator may only accept up to and including 3 appointments to act as arbitrator for the same party or related party whether such appointments are made by the party (or related party) itself or by the President in default of a party appointment. An arbitrator should not be able to have more than 8 active first tier cases open at any



one time. These limits (this criteria) will be reviewed regularly (at least annually) by the Arbitration Strategy Committee (ASC) taking into account the recent numbers of applications for arbitration. Any changes will be recommended to the Directors. Those appointments from a party or related party, where the arbitration has been withdrawn / discontinued, without the publication of an Award, do not count against the '3 or 8 rule'."

## Response ID ANON-44ZW-8XFZ-9

Submitted to Law Commission second consultation on the Arbitration Act 1996  
Submitted on 2023-05-22 17:59:04

### About you

What is your name?

Name:  
Paul Key K.C.

What is the name of your organisation?

Enter the name of your organisation:  
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::

What is your email address?

[REDACTED]  
[REDACTED]

What is your telephone number?

Telephone number:  
[REDACTED]

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Tell us why you regard the information as confidential:

### Proper law

Consultation Question 1

Yes

Please give your reasons::

I am content with this, largely for the reasons given in the consultation paper. However, I do not feel strongly about the debate - and I would, alternatively, be content also for the law to remain as stated in *Enka v Chubb*,

### Section 67

Consultation Question 2

Other

Please give your reasons::

I certainly agree with the move away from the proposal put forward in the earlier consultation. However, as I stated in my response to the earlier consultation, I consider that this should all be dealt with by the court case managing the application via an exercise of its discretion. The current proposal imposes more of a strait-jacket on the Court than I consider is required or appropriate. For example, the proposal that "evidence will not be reheard, save exceptionally in the interests of justice" seems to me to be too strict a test. Can the value of the dispute be a relevant factor in assessing the "interests of justice"? (I.e. a multi-billion case may justify the extra court time, but it is not obvious that this would be a relevant factor under the proposed test.)

Consultation Question 3

Other

Please give your reasons::

I have no problem with the Arbitration Act being amended to confer power to make rules of court, but I do not agree that the proposals in CQ2 are the appropriate rules (nor do I consider that there should be a straight adoption of proposals for rules of court from the Law Commission).

## Discrimination

### Consultation Question 4

Yes

Please give your reasons::

This is a point I made in my lengthy response in relation to the earlier consultation (in which I opposed more generally the proposals in that earlier consultation).

### Consultation Question 5

No

Please give your reasons::

I have already given a lengthy response in relation to the earlier consultation. The same points apply here more generally.

A specific example of the satellite litigation which will arise is reflected in paragraphs 4.46 to 4.49 of the Consultation. The answer to the question of whether faith-based arbitrations would be precluded is not at all clear - and it is still less clear when one comes to the many potential permutations of faith-based arbitration clauses.

Nor is the discussion at paragraphs 4.52 and 4.53 of "positive discrimination" one which I find persuasive or clear. I agree with the concern apparently expressed by the ICC Court summarised at paragraph 4.52 of the consultation. I made a similar point in my response to the earlier consultation, namely that the proposal would likely or potentially lead to an agreement requiring the appointment of a woman arbitrator (or an arbitrator of a particular under-represented race) ineffective.

### Consultation Question 6

Please give your answer::

I disagree with the premise of the question (see response to question 5 above),

## Response ID ANON-44ZW-8XFS-2

Submitted to Law Commission second consultation on the Arbitration Act 1996  
Submitted on 2023-05-22 15:34:04

### 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 Group Practice), and sole practitioner in 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?

[REDACTED]  
[REDACTED]

What is your telephone number?

[REDACTED]  
[REDACTED]

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Tell us why you regard the information as confidential:

### Proper law

#### Consultation Question 1

Other

Please give your reasons::

I agree on the proposed policy, for the reasons articulated in the Second Consultation Paper. This all the more so having been counsel in the Supreme Court in the *Enka v Chubb* case, and having been the architect and one of the draftsmen of s.4(5) of the 1996 Act.

However, there is a major difficulty with the suggested wording of the exception to the new rule, namely:

"... unless the parties expressly agree otherwise in the arbitration agreement itself". This proviso is designed to safeguard and enforce an express choice of governing law of the arbitration agreement. But it is unclear why such an express choice will only be respected and enforced if it is contained "in the arbitration agreement itself". What if (e.g.) Clause 3 of a contract is headed "Governing Law" and provides expressly that the arbitration agreement shall be governed by French law, and Clause 10 of the contract is headed "Arbitration" and makes no mention of governing law? Why should the parties' express choice of law be invalid in such a case? Surely the critical factor is that only an express choice will suffice (to avoid all the existing complications of implied choice)? Whether or not that express choice happens to be "in" the arbitration agreement itself, or elsewhere, ought not to matter. Indeed, invalidating an express choice of law would surely be damaging to England as an international seat.

### Section 67

#### Consultation Question 2

Yes

Please give your reasons::

I believe this is an excellent compromise.

I do not entirely agree with the analysis in the Second Consultation Paper of the Supreme Court's judgment in *Dallah v Govt of Pakistan* (in which I was counsel for Pakistan), or indeed the DAC's approach to Kompetenz-Kompetenz. But I do think that the three propositions usefully accommodate the various concerns that have been expressed in relation to s.67 in the years since 1996.

### Consultation Question 3

Other

Please give your reasons::

I agree that the proposals would be best reflected in Rules of Court.

I am not convinced, however, that the 1996 Act needs any amendment in this regard, since (a) Rules of Court can already be made in this regard (just as Rules of Court have been made on many aspects of the Act over the past 25 years) and (b) to single out s.67 in this way may lead to the unintended conclusion that Rules of Court on any other aspects of the Act are impermissible. This would be regrettable indeed.

### Discrimination

#### Consultation Question 4

Yes

Please give your reasons::

For the reasons articulated in the Second Consultation Paper.

#### Consultation Question 5

Yes

Please give your reasons::

#### Consultation Question 6

Please give your answer::

I would not allow remedies beyond those that are already carefully crafted in the 1996 Act itself, namely removal of an arbitrator under s.24, challenge to an award for serious irregularity under s.68, and resisting recognition and enforcement under s.66.

Anything further would risk opening up further channels for recalcitrant parties to attack the arbitral process, and upset the very carefully calibrated balance with respect to court supervision that is reflected in the 1996 Act.

Submitted to Law Commission second consultation on the Arbitration Act 1996  
Submitted on 2023-05-22 10:23:28

## About you

What is your name?

Name:

[REDACTED]

What is the name of your organisation?

Enter 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?

Response on behalf of organisation

If other, please state::

What is your email address?

[REDACTED]  
[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.

Tell us why you regard the information as confidential:

## Proper law

### Consultation Question 1

Yes

Please give your reasons::

We believe this proposal to be a pragmatic solution when considering the complex process set out in the Supreme Court decision in *Enka v Chubb* (2020). We recognise however that this approach may create some problems, as identified by the Law Commission. In particular, there may be a negative impact on the reputation of England as a seat if parties do not appreciate that such a rule exists and assume that the law of the matrix contract will also apply to the arbitration agreement, but then discover the rule after a dispute has arisen (noting also that such a rule is not common in international arbitration laws). There might also be some debate, initially at least, about whether the incorporation of an applicable law provision (for example, through the adoption of arbitration rules that contain such a provision) is a sufficiently express agreement on applicable law to displace the default rule. Nonetheless, on balance we consider that the advantage of certainty that the proposed rule would bring would outweigh any disadvantages.

## Section 67

### Consultation Question 2

Yes

Please give your reasons::

In our answer to the Law Commission's first consultation paper, we said that we are concerned about the increased costs resulting from the repetition of arguments in a rehearing. We also expressed a preference that the court upon hearing a challenge should give due weight to the findings of the arbitrators on jurisdictional questions. Our view has not changed, and we still favour limiting the scope of a challenge.

### Consultation Question 3

No

Please give your reasons::

Our preference would be that such changes be included directly in the Act. One of the benefits of the Act is that it is a clear statement of arbitration law in England, generally speaking, and that makes it easier for foreign parties in particular (who may be unfamiliar with English law and the English legal system) to identify the relevant provisions.

We recognise that some aspects of English arbitration law feature in court rules and caselaw, as a result of discrete changes over time, but the Act should be the focus for any substantial change as part of this revision process.

## Discrimination

### Consultation Question 4

Yes

Please give your reasons::

This is a nuanced issue. The practice of having an arbitrator who has a different nationality to the parties has become common throughout international arbitration, and in many situations a different nationality might be a reasonable indication of neutrality (as well as being an outward demonstration of neutrality, which can be important, as the Law Commission notes). However, the stipulation that an arbitrator should have a different nationality does not guarantee neutrality. For example, the arbitrator may have a different nationality to the parties but could have lived in the country of one of the parties for many years. Further, an arbitrator might adopt a new nationality but remain closely aligned (for example through family connections) with a particular country which may be the residence of one of the parties. On the other hand, an arbitrator's nationality or residence might influence them in a way that is adverse to a party from a particular country, because of geopolitical or other reasons. In today's world, a binary approach to questions of nationality (i.e., an arbitrator is either of the same nationality as the parties or not) might not be entirely appropriate.

The context for this question of course is the Law Commission's suggestion that there be an exception to the proposed anti-discrimination provision combatting discriminatory terms in arbitration agreements. On balance we agree with this suggestion, meaning that the nationality of arbitrators should not fall foul of the proposed new provision, but instead the question of whether there is any rule about nationality may be left to the parties or to arbitral institutions to decide.

### Consultation Question 5

No

Please give your reasons::

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. Also, the Law Society advocates for greater equality, diversity, and inclusion across the legal profession. A general prohibition on discrimination would therefore be in line with our ethos and would be a positive demonstration of the values inherent in the administration of justice in England.

Discrimination means preventing less favourable treatment on the grounds of a particular protected characteristic. Relevant characteristics in arbitrator appointments are likely to be age, gender, race and disabilities. Indirect discrimination means applying the same criteria to everyone, but which are more difficult for someone with a particular protected characteristic to satisfy. That would include, for example, a requirement of a certain number of years' experience might apply to everyone but adversely impact on younger arbitrators. Exceptions might apply where the characteristic is required as a proportionate means of achieving a legitimate aim.

As far as arbitrator appointments are concerned, legislating against discrimination in such appointments would send a strong message about improving the quality of the arbitrator appointment process to ensure that parties have access to the broadest possible pool of talent. This will ensure better access to justice and better outcomes. Although there are various initiatives in place for improving the diversity of arbitrator appointments, it is commonly recognised that the current statistics on arbitrator diversity are still in need of improvement.

That said, we have considered carefully how such an anti-discrimination provision might be introduced into the Arbitration Act 1996 (particularly in response to Consultation Question 6 below) in order to address possible discrimination in arbitrator appointments and we think there are considerable obstacles to this in practice, as explained below. On balance therefore we recommend that there should not be a general anti-discrimination prohibition in the Act, and that the change to legislation affecting the appointment of arbitrators be limited to the one suggested in the Law Commission's first consultation paper, namely that a term in an arbitration agreement be unenforceable which requires an arbitrator to be appointed by reference to a protected characteristic, unless that requirement can be objectively justified as a proportionate means of achieving a legitimate aim. We also suggest that there might be a change to the Act to address discriminatory behaviour by an arbitrator, as explained in response to question 6 below.

Notwithstanding this relatively limited change to the legislation (if implemented), we consider that there is a benefit arising from shining a spotlight on the issue as a result of the Law Commission's consultation process, and the publication by the Law Commission of the responses to the consultation might provide useful support and guidance for relevant organisations, such as arbitral institutions, to issue guidelines and other "soft law" instruments in order to address the issue of diversity in arbitral appointments in a form that hopefully will achieve the desired outcome over time without the potential complications arising from statutory amendments. Please also see the comment below about the commitment of the Law Society in opposing discrimination.

## Consultation Question 6

Please give your answer::

We divide our answer to this question into two parts, namely (i) remedies for discrimination in arbitrator appointments and (ii) remedies for discriminatory behaviour in arbitration more generally (i.e. other than in relation to arbitrator appointments). This helps highlight the obstacles to legislative change in relation to the first category.

### (i) Discrimination in arbitrator appointments

If a statutory prohibition against discrimination in arbitrator appointments were to be introduced, we can envisage that there may be a cause of action against the party who was making the appointment – i.e. either a party to the arbitration or an institution. Law firms who make recommendations to parties could also have secondary liability (e.g. if they put together a discriminatory short-list). However, obtaining evidence for such a remedy may be problematic (more so than in a normal recruitment scenario). An arbitrator may not know that they were being considered for appointment. Also, subjective criteria might be applied, which may be hard to pin down (and may not necessarily be discriminatory) such as positive direct experience with arbitrators. Parties may not write or specify a "job spec" (or it might be vague, e.g. a lawyer qualified in England & Wales with experience in the energy sector) and any correspondence between clients and law firms on this is likely to be covered by privilege (except for limited exceptions).

To address this problem one could imagine a formal process for arbitrator appointments which would apply to institutions and parties alike. Everyone would need to adopt steps such as creating a job specification, putting together a shortlist and contacting everyone on that shortlist to tell them that they are being considered, and then inform the unsuccessful candidates as to who was appointed and why. However, this would be a sea-change in how arbitrators are currently appointed and might require a change in approach across the world (since arbitrators can be appointed for English-seated arbitration by parties anywhere in the world). There would also need to be an overhaul of the appointments system for institutions because they would need even more rigorous processes, and could suddenly find themselves vulnerable to claims, particularly as no privilege would apply to their appointment procedures. In addition, it would mean introducing more legislation than simply a change to the Arbitration Act – in particular, there might need to be a change to the Equality Act (making special provision for arbitrators just as there is for barristers), possibly along with secondary legislation and explanatory guidance, and the legislation might need to have extra-territorial effect.

Usually, the remedies for discrimination claims are a declaration of rights (which includes a declaration of unenforceability – i.e. in this context, that the original arbitrator appointment no longer stands), compensation, or a "recommendation" to take certain steps. However, it is likely that it would be difficult to resolve a claim sufficiently quickly for there to be an impact on the arbitration itself (particularly in the context of emergency arbitration).

As a result we consider overall that a legislative change that prohibits discrimination in the appointment of arbitrators (over and above the change suggested in the Law Commission's First Consultation Paper) would not be practical or workable. We would like to record that we have reached this conclusion with reluctance and regret, and that it should not diminish the Law Society's commitment to opposing discrimination in all its forms. As stated above, we hope that the present consultation process should act as a springboard to a renewal of efforts outside of legislation to achieve appropriate balance in the appointment of arbitrators reflecting the composition of society as a whole.

### (ii) Discriminatory behaviour in arbitration more generally

If there is discriminatory behaviour by an arbitrator, a remedy could be achieved by the parties challenging and removing the arbitrator under section 24 of the Act on the basis that they are not fulfilling their duty to the parties under section 33 of the Act. Similarly, discriminatory behaviour in the arbitral process could possibly lead to a challenge to an arbitral award under section 68 of the Act. For these sections to have this impact, we consider that anti-discrimination wording would have to be introduced to the Act, perhaps into section 1 or section 33.

We recognise here that there may be obstacles to the gathering of evidence, particularly if there is a need to examine the deliberations of a three-person tribunal. It will also be important to factor in here the risk of increased satellite litigation, as well as the prospect of party representatives using the threat of a discrimination claim to potentially cause a chilling effect on the arbitrators in their deliberations.

If there is discrimination by other participants in the arbitral process (parties, institutions, party representatives, witnesses, etc), this may need to be addressed under the Equality Act – although we note again the problems identified above in the context of the appointment of arbitrators, and recognise that there may be a difficulty in drawing a line between appointment of arbitrators and other behaviours for the purposes of the Equality Act.

On balance we think that a change at least that prohibits discriminatory behaviour by arbitrators would be possible and would not present the substantial obstacles described above in relation to the issue of arbitral appointments. Also, it might be useful to make such a change because, like the change proposed in the Law Commission's first consultation paper, this would be a meaningful demonstration of the values inherent in the law of England & Wales and the commitment of this jurisdiction to achieve the best possible justice system; as well as marking a possible path in the future to making a statutory change in relation arbitrator appointments.



## Law Commission's Second Consultation Paper on the Arbitration Act 1996: Response from Linklaters LLP

### 1 Introduction & executive summary

1.1 Thank you for the opportunity to respond to the Law Commission's second consultation paper on the Arbitration Act 1996 (the "AA"). We're pleased to submit this supplemental response considering the three further matters raised. This response is intended to build on, and be read together with, the comments and observations made in our first response submitted in December 2022. As before, we answer from the perspective of our experience in international commercial arbitration, and investment treaty arbitration, in England. References to sections of legislation are to the AA unless otherwise stated.

1.2 In summary, our key points are as follows:

1.2.1 *Applicable law of the arbitration agreement:* We reiterate the substantive points made in our first response. Further, whilst the Law Commission's proposal might, ostensibly, be simpler than *Enka*, it may, practically, be a less user-friendly approach. Taken together, we are not convinced of the case for reform.

1.2.2 *Challenging jurisdiction under s.67:* As previously stated, on balance, we support reform in this area and the type of limitations that the Law Commission have now proposed. The mechanics of the change need to be clear to avoid the effect of *Dallah*.

1.2.3 *Discrimination:* In principle, we support the Law Commission's new general proposal. It may help to increase consideration of equality issues at the appointments stage, which, in our view, is the key point at which such matters should be addressed. The scope, and detail, of such reform, however, needs careful consideration.

1.3 In the rest of this response, we consider those issues in more detail.

### 2 Applicable law of the arbitration agreement

2.1 Our first response focussed on whether there was anything about the UKSC's approach in *Enka* manifestly justifying reform. We concluded that there was not. We are grateful to the Law Commission for taking those observations into account and summarising them in its second consultation paper.

2.2 To those, we only add the following observations. These are responsive to the perceived advantages of reform that the Law Commission sets out. At the core of the proposed reform is the idea that it would promote simplicity and certainty and that, if the parties wish to do otherwise, they can do so with "*eyes wide open*". The implication of this is that the Law Commission's proposal is a simpler "default" rule for the situation where the chosen law of the matrix contract is foreign but the seat of arbitration is England (being the circumstances where, in practice, issues arise). We query this assumption on the basis of what the different approaches imply for users at the point of contracting.

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## Linklaters

- 2.3** The starting point is the argument made in favour of reform which points out that *Enka* promotes a result under which certain issues concerning the operation of the arbitration agreement, such as scope and separability, are more likely to be referred to a foreign law. These are, however, specific, discrete issues concerning the operation of an arbitration clause that a contracting party might reasonably be supposed to consider in the same way as the operation of any contractual clause. Therefore, practically speaking, what the *Enka* approach requires of such a party is that it should give some consideration to these from the point of view of the law applicable to the contract; in a similar manner to the workings of any other clause of the contract. These aspects of the arbitration agreement might work in a satisfactory way under that law.
- 2.4** By contrast, the Law Commission's default rule inserts an English law governed arbitration agreement into the process. This swaps the discrete task outlined above for a more complex question; whether an English law arbitration agreement has been formed/operates as expected within the context of a foreign law governed contract. This is a less straightforward, more contextual, more bespoke, piece of analysis (given that English law involves the application of technical principles of contract law). The result is also more obscure. A commercial party may not appreciate that this arises as a result of a choice of English seat; it is not as obvious a flag as an ordinary applicable law clause. Furthermore, under the Law Commission's proposal, the validation principle endorsed by *Enka* is no part of the rule; it would therefore be a default rule with a harder edge to it for the unwary.
- 2.5** In other words, in comparison with the position under *Enka*, it is the process effected by the Law Commission's proposal which a party needs enter into with its "eyes open" because, despite the apparent simplicity of the rule, its (contractual) outcomes are less intuitive and less straightforward. A default rule can usefully be the one which lessens the potential for unexpected consequences by being consistent with what commercial parties are likely to expect that they are doing at the point of contracting. In *Enka* the UKSC recognised, consistently with this, that commercial parties are likely to expect that their choice of law applies across the whole contract.<sup>1</sup> In this context, party expectation is less about an abstract concept. It is, instead, a point concerning the practical process of how arbitration agreements are likely to be concluded in their wider contractual context.
- 2.6** Do the perceived shortcomings of *Enka* justify a different conclusion? As stated above, the desire to widen the reach of English law over issues such as separability and scope overlooks the fact that these are things on which it is possible for the parties to have considered and reached an appropriate conclusion (there is something of a paradox in the rationale for the proposed reform in that, whilst it seems to lack confidence in the ability of parties to manage such issues through the selection of an appropriate applicable law, it nonetheless would introduce the more complex approach noted above at 2.4). It is clear that the need to categorise non-mandatory sections of the AA under s.4(5) arises, but, as outlined in our previous response, in *Enka* the UKSC provided valuable guidance in making clear that the applicable law of the arbitration agreement governs its "validity and scope"; so it follows that non-mandatory sections of the AA concerning such matters fall to be disapplied where a foreign law governs the arbitration agreement.<sup>2</sup>
- 2.7** Therefore, in conclusion, we remain of the view that there is not a compelling case for reform.

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<sup>1</sup> [2020] UKSC 38 at [53 (iv)]

<sup>2</sup> As opposed to the less specific yardstick of "substantive or procedural". The reference to "validity and scope" is repeated in *Kabab-Ji* [2021] UKSC 48 at [2].

## Linklaters

- 2.8 As a final observation, if the Law Commission's proposal is pursued, we note that the ability of parties to choose otherwise might be more accurately worded not by reference to where they "*expressly agree otherwise in the arbitration agreement itself*" but, instead, by reference to (for example) where the parties have "*specifically agreed on a different law to govern their arbitration agreement, distinct from the law applicable to any contract of which it forms part*". A formulation along the lines of the latter approach might better encapsulate the point of principle (that the choice should be distinct). By contrast, "*in the arbitration agreement*" might be seen as introducing a more restrictive formalistic requirement (for example, parties might conceivably express this wish elsewhere in their main contract).

### 3 Challenging jurisdiction under s.67

- 3.1 In our initial response, on balance, we were supportive of the principle that, where jurisdiction before the tribunal is contested, it would be acceptable to limit a challenge to the award on jurisdiction before the court to an appellate process. The substance of the Law Commission's new proposals generally reflect that and, accordingly, we think that they are likely to help strike a better balance between cost/efficiency of proceedings and doctrinal issues.
- 3.2 In relation to the proposed vehicle for reform, an amendment to s.67 to provide for the making of rules of court, this seems a feasible route. But careful thought needs to be given to the scope of the amendment. For example, it seems that an amendment which *simply* provides for rules of court to be made under s.67 might not be effective to facilitate the desired change. If *Dallah* represents an irreducible core of that section<sup>3</sup> then rules of court made pursuant to such a section would have to operate within that.
- 3.3 To avoid the possibility of doubt concerning the propriety of the proposed rules, it may therefore be that the amendment to s.67 would need to specifically authorise the rules of court to, without limitation, prescribe the approach that the court can take to the matters under consideration. In other words, the statute needs to clearly delegate to the subordinate legislation the ability to alter the actual scope and operation of the s.67 challenge itself.

### 4 Discrimination

- 4.1 In this part of our response, we principally address the Law Commission's new proposal to prohibit discrimination generally in an arbitration context; although as we discuss below, these observations also feed into further remarks on the Law Commission's initial proposal.
- 4.2 The exact workings and parameters of this more general approach are not set out in the consultation paper. At first glance, the width of the proposal might be thought to cut across some of the Law Commission's earlier discussion of the topic (for example, its preferred approach on indirect discrimination and nationality requirements). Our impression is that this is not intended so, for present purposes, our working assumption is that the idea would be

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<sup>3</sup> Although the Law Commission takes a different view, it does appear that there is a strong argument that *Dallah* is determinative as to the operation of s.67. In particular, although *Dallah* was technically a decision on s.103, this does not necessarily mean that what was said regarding s.67 is not binding. For the purposes of identifying *ratio decidendi* the question whether the reasoning was "*a necessary step in reaching [the judge's] conclusion*", see *R (Youngsam) v Parole Board* [2019] EWCA Civ 229 at [21-22]. In both judgments of Lords Mance and Collins (which can fairly be said to represent the view of the UKSC given Lord Clarke agreed with their analysis of the principles) it is certainly arguable that interpretation of s.67 did contribute in such a way to their conclusions on s.103 as the conclusions were part of a broader survey of principle and practice which informed the approach to s.103 itself.

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for a similar framework (i.e. a prohibition on direct discrimination with an objective justification defence) to be applied across other aspects of arbitration process/procedure.

- 4.3** Taking, for present purposes, the context of the selection and appointment of arbitrators as a starting point, we think that, in principle, such a reform could be workable and valuable. We fully support the aims of addressing discrimination, and improving representation on arbitration tribunals. This new proposal would improve on the Law Commission's initial idea by bringing such matters into play at a more relevant time; in the process of the selection of arbitrators. We also agree that the instruction of barristers is a broadly analogous process to the selection/appointment of arbitrators and that the existence of s.47(1) Equality Act 2010 ("EA") might therefore provide some indication of the type of reform that would be desirable.
- 4.4** In international commercial arbitration, we think that the impact of such a reform would likely to be felt in an incremental way at first. This is for two reasons.
- 4.5** First, in that sphere, the selection and appointment of arbitrators is generally rooted in objective criteria regarding the type of dispute, and expertise of the arbitrator.
- 4.6** The second reason is that, as mentioned in our response to the Law Commission's first consultation paper, a significant contributing factor to the lack of diversity in arbitral tribunals is the pool of experienced and available candidates tends to reflect the socio-economic make-up of the legal profession more generally, and this is not reform which can directly address these structural issues.
- 4.7** Neither of the above points are made as reasons not to implement reform. Rather it is to point out that, in international commercial arbitration, it seems to us that its principal impact will be as an important signal, and a further push in the right direction of change, by further bringing such considerations into the heart of the process and at a point that affects all participants. The benefit is likely to be in the manner in which it could promote a renewed or increased focus on the same (and of course, it would require this across all spheres of arbitral activity). At the same time, however, no one solution alone appears apt to achieving increased representation on arbitral tribunals and so the types of positive, educational, steps noted in our previous response will remain important as part of a holistic approach.
- 4.8** This leads on to a further important point; the degree to which positive action may be permitted. Arbitral institutions, and parties, may be keen to take action which helps improve representation on tribunals; for example some institutions monitor gender balance on tribunals and, in their appointments, have tried to effect better equality of outcome. Parties may also consider diversity as a factor in drawing up short-lists of potential arbitrators. However, without more, the introduction of rules on direct discrimination would also bite on these activities. Therefore, it would help such participants to have certainty as to the parameters within which such action can be taken (so as to not be put off from considering it). It is also in the general interest to ensure that any such action does not tip into unacceptable discrimination in itself.
- 4.9** This a delicate balancing act which will require careful consideration as to how it is resolved in the legislation. Leaving these matters to be dealt with under any general justification defence is likely to create confusion as this is not the route that the EA adopts. The EA sets out a specific regime for dealing with these issues (essentially action that might otherwise be unlawful direct discrimination in favour of persons with a protected characteristic is not unlawful if it falls within the requirements of s.158/159 EA). It may, therefore, be better for this proposal to follow that model so that common concepts are carried through and

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understood. Clarity in the legislation will be very important to help ensure that arbitral participants can gauge what will be regarded as legitimate in this respect <sup>4</sup>.

- 4.10** So far, we have focussed our observations on a requirement which might bite on the selection and appointment of arbitrators. This has been for the purposes of discussion, but we think that it is worthwhile, at this point, to consider the issue of scope more generally. In particular, in a contentious context, the ability of parties to use provisions to bring tactical challenges does need to be considered, even in this sphere. For this reason, we think a precise and targeted approach to reform would be preferable – rather than (if this is contemplated) a more nebulous, general, provision. For instance, to our mind, a specific rule concerning the selection and appointment of arbitrators would address, in principle, many concerns. It would also remove the need for a separate rule dealing with discriminatory terms in arbitration agreements. That would simply be treated as a factual situation upon which a main rule on appointment/selection of arbitrators bites (thereby removing the need for potentially confusing duplication and overlap of provisions). For the reasons identified by the Law Commission, the proposals concerned with nationality of arbitrators (which we support given the prevalence of this approach in international arbitration), would need to be kept within this structure.<sup>5</sup>
- 4.11** In addition to the above, it might be thought necessary to have a separate rule prohibiting discrimination in the manner in which the arbitral tribunal treats the parties. We agree that it is possible that this is already catered for. If a tribunal were to decide a matter on the basis of a party's protected characteristic then this would potentially raise issues under ss.24 and 33 in any event (as being an irrelevant consideration). Nonetheless, formal incorporation of this into those sections might be an important signal (and would enable challenge of a resultant award under s.68).
- 4.12** As to remedies more generally, there seem to be two main questions; the impact of direct, private, enforcement by a claimant who has been discriminated against (for example an arbitrator who alleges that they have been wrongfully treated in the selection process) and, second, what the consequences for the arbitration process would be. We think that, if left to the general position at law (i.e. in the first case, the possibility of bringing a discrimination claim and, in the second, the usual consequences of a breach of a mandatory rule of the seat – for example the possibility of set aside under s.68(2)) arbitral participants are likely to be sufficiently concerned by the potential consequences in both spheres. In relation to the latter, if it is contemplated that special provision should be made to insulate the arbitration process then this would seem counterintuitive to the purpose, and nature, of the reform. This

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<sup>4</sup> For a discussion of the type of issues which arise with positive action in the context of work see: [Positive action in the workplace - GOV.UK \(www.gov.uk\)](#)

<sup>5</sup> As a separate, technical, point concerning the Law Commission's general approach to a justification defence; we note that the EA does not include a general justification defence in cases of direct discrimination (in contrast with indirect discrimination, under s.19(2) (d) EA). The only situation in which it does are cases of direct age discrimination see s.13(2) EA ("*...proportionate means of achieving a legitimate aim*"). That sub-section has been given a particular interpretation, which has seen the section read down to require a public interest nature in the legitimate aim (see Harvey on Industrial Relations and Employment Law at [288.01] and [354-364] and *Seldon* [2012] UKSC 16).

Our understanding is that Law Commission's justification defence (which would apply to cases of all direct discrimination) is intended to reflect the (more general) standard of proportionality taken from the genuine occupational requirement defence in the work provisions of the EA; this being the context of the obiter section of the UKSC's judgment in *Jivraj*. If so, it may be helpful for the reform to make this expressly clear, lest the standard to be adopted be confused with the narrower approach outlined above (which may be possible given that this is the only place in the EA where, currently, direct discrimination is itself subject to a stand-alone justification defence).

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does, however, reinforce the point made above concerning importance of precision in the scope of any new rule(s).

### **5 Other observations**

- 5.1** As a final comment, we would repeat the observations made in the final paragraphs of our response to the Law Commission's first consultation paper regarding the need for appropriate transitional provisions in any reforms. The point is a general one but is particularly acute in respect of the issues discussed above as, depending on the precise content of any reform, many are areas in which arbitral participants, whether parties, arbitrators or institutions, are likely to need time to consider the implications and calibrate their actions accordingly.

**Linklaters LLP, 19 May 2023**

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## Lloyd's Market Association's submission to the Law Commission's second consultation paper – Review of the Arbitration Act 1996

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The Lloyd's Market Association (LMA) represents the 51 managing agents at Lloyd's, with 93 active syndicates underwriting insurance and reinsurance in the market, and also three members' agents which act for third party capital. Managing agents are "dual regulated" firms by the Prudential Regulation Authority (PRA) and Financial Conduct Authority (FCA) with members' agents being regulated by the FCA.

The business underwritten in the Lloyd's market is primarily international non-life insurance and reinsurance. Lloyd's is a significant international exporter of services, being licenced to do business in many countries around the world. For the 2021 calendar year, gross written premium was in excess of £38 billion, approximately 63% of which related to the Americas, 25% to the EMEA region (including UK and Europe) and 12% to Asia/Pacific.

Lloyd's is predominantly a wholesale market, with the majority of business being transacted via intermediaries both in the UK and worldwide.

We welcome the chance to respond to the Law Commission's consultation paper which contains provisional law reform proposals to the Arbitration Act 1996. We commend the Law Commission's efforts to ensure that the Arbitration Act remains state of the art. We have perused the consultation paper and the questions posed by the Law Commission and we have addressed these questions below.

### Question 1

**The Law Commission provisionally propose that a new rule be included in the Arbitration Act 1996 to the effect that the law of the arbitration agreement is the law of the seat, unless the parties expressly agree otherwise in the arbitration agreement itself. Do you agree?**

We do not agree. We are not persuaded by the case for reform and think that parties have an expectation that where they have chosen a particular law to govern their contract, that law will apply to the entirety of the agreement, including the arbitration agreement, unless they have stated otherwise. If a jurisdiction does not recognise the principle of severability of an arbitration agreement from the matrix contract, the proposal may cause additional confusion and dispute arising from a clash between the laws in relation to arbitration.

### Question 2

**The Commission provisionally propose the following approach to a challenge under section 67 of the Arbitration Act 1996.**

**Where an objection has been made to the tribunal that it lacks jurisdiction, and the tribunal has ruled on its jurisdiction, then in any subsequent challenge under section 67 by a party who has participated in the arbitral proceedings:**

- 1) **the court will not entertain any new grounds of objection, or any new evidence, unless even with reasonable diligence the grounds could not have been advanced, or the evidence submitted before the tribunal;**
- 2) **evidence will not be reheard, save exceptionally in the interests of justice;**
- 3) **the court will allow the challenge where the decision of the tribunal on its jurisdiction was wrong.**

**Do you agree?**

We agree with the proposed approach. In our response to the first consultation, we agreed with the proposal to limit challenges under section 67 in relation to the jurisdiction of the arbitral tribunal to appeals instead of full rehearings. We believe that the proposal above simply fleshes out what was the intention of that response given the ambiguity of the language of “appeal” pointed out by other respondents to the first consultation.

### **Question 3**

**The Law Commission provisionally propose that the Arbitration Act 1996 be amended to confer the power to make rules of court to implement the proposals in Q2 above. Do you agree?**

Yes.

### **Question 4**

**The Law Commission provisionally propose that it should be deemed justified to require an arbitrator to have a nationality different from that of the arbitral parties. Do you agree?**

We agree that the Law Commission's suggestion that mandating arbitrators to possess a nationality that is distinct from the arbitral parties' nationality should be deemed justified. The UNCITRAL Model Law, for example, stipulates in Article 11(5) that when a court appoints an arbitrator, it “shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties”. Likewise, several institutional arbitration rules also presume that arbitrators should have a neutral nationality. Furthermore, the choice of the arbitral parties as set out in the arbitration agreement should be respected.

### **Question 5**

**Do you think that discrimination should be generally prohibited in the context of arbitration?**

We note that the Law Commission has suggested that discrimination should be generally prohibited in the context of arbitration. We agree with this proposal since we believe that discrimination has no role in arbitration, and the Law Commission should prohibit it without seeking further consultation. Discrimination is a fundamental violation of the principles of fairness and justice, which are at the heart of any arbitration process.

### **Question 6**

**What do you think the remedies should be where discrimination occurs in the context of arbitration?**

Whilst we and our members are firmly opposed to any form of discriminatory behaviour, we do not believe that the Arbitration Act should specify remedies for arbitrators to claim that they have been



the victim of discrimination in the selection process. We think that the specification of remedies could lead to satellite litigation which will detract from the resolution of the dispute in hand.

However, we believe that where an arbitrator has behaved in a discriminatory fashion, they should face consequences for their actions (or omissions). The remedies under sections 24 and 68 of the Act are apt to deal with this situation.



## **The LCIA's Response to the Law Commission's Second Consultation Paper: Review of the Arbitration Act 1996**

The LCIA has reviewed the Law Commission's Second Consultation Paper dated 27 March 2023 ("**Second Consultation Paper**") which addresses: (i) the proper law of the arbitration agreement; (ii) challenges to awards under section 67; and (iii) discrimination. The LCIA provided comments on each of these topics in a written response on 15 December 2022. In this written response we: (i) reiterate the LCIA's position where we consider that our position remains the same; and (ii) provide additional comments to address the Law Commission's revised proposals and some of the consultation questions set out in the Second Consultation Paper.

### **1. Proper law of the arbitration agreement: Chapter 2**

We initially endorsed the Law Commission's preference not to short-list the issue of the proper law of the arbitration agreement for possible codification, not in the least because of the ability to include a contractual solution to this issue, including by means of incorporation of an institutional provision such as Article 16.4 of the LCIA Rules.

We agree with the Law Commission that the decision in *Enka v Chubb* is complex, and its application may lead to undesirable consequences. In addition, the decision appears to cause an increasing amount of unrest and unhelpful negative publicity. We therefore support the Law Commission's subsequent proposal to introduce a statutory provision on the proper law of the arbitration agreement. The introduction of an explicit provision should remove the uncertainty arising from the decision in *Enka v Chubb* and would provide the opportunity to codify a more straightforward and constructive legal framework.

However, while we agree with the Law Commission that a reference to the law of the seat would have the virtue of simplicity and certainty, hence the reference to the seat in Article 16.4 of the LCIA Rules, we are of the view that for a statutory provision much can also be said for a provision based on the "validation approach".

### **2. Section 67 (challenging jurisdiction): Chapter 3**

As previously noted, jurisdiction is at the heart of the arbitral process and the courts remain the ultimate arbiter of arbitral competence. We agree with the observation made in the consultation process that a *de novo* review of a tribunal's jurisdiction is justified as a matter of principle.

While some restrictions to the ability to review jurisdiction may be inevitable and appropriate, we have expressed the view that the *status quo* should be maintained<sup>1</sup> and that the situation would not be improved by an explicit codification of the limits of review, in particular in so far as these are established by reference to the standard applicable to appellate court proceedings.

We therefore welcome the fact that the Law Commission has moved away from the language of “appeals” in the context of section 67. Nevertheless, we remain of the view that the better approach is not to seek to codify the scope of review (by expressing limitations and exceptions to such limitations of review), but rather to leave the development of the law to the courts.

The Law Commission has set out several observations and considerations whether and if so, how, a review in court could or should be limited, such as by disallowing new arguments and/or new evidence or oral evidence, and the degree of deference that should be given to the decision of the tribunal. These are pertinent considerations and raise questions that need to be addressed in the context of relevant facts and circumstances, and they support in our view the undesirability to carve in stone the parameters of review.

As to the wording proposed by the Law Commission in para. 3.128, we are not persuaded that the limitations proposed will be effective and improve the *status quo*. For example, if one were to impose limitations arguably additional fundamental differences should be reflected, such as the distinction whether a tribunal has accepted or in fact denied jurisdiction. Furthermore, introducing standards such as “reasonable diligence” and “exceptionally”, while on their face sensible will inevitably lead to at least as much discussion as the application and interpretation of the current case law ensues. This is even more true for the introduction of the concept that the decision of the tribunal on its jurisdiction was “wrong”.

We also consider the suggestion to adopt a revision of the law in rules of court to be not only inconsistent with the notion that codification is opportune but undesirable. We refer to our earlier observations that reference to a national standard of law does not contribute to the promotion of England Wales as the seat of arbitration, and this concern extends to referral to secondary regulation such as the rules of court.

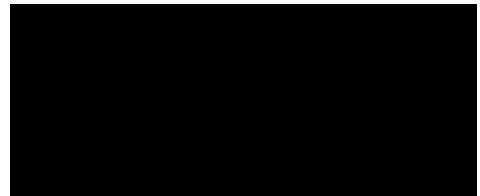
### **3. Discrimination: Chapter 4**

<sup>1</sup> Nonetheless, as noted in our response to the first consultation paper, we are in favour of the proposed reform to section 67(3) of the Arbitration Act 1996.

We support the Law Commission's revised proposal that it be deemed justified to require an arbitrator to have a nationality different from that of the arbitral parties. As the Law Commission rightly notes the appearance of impartiality matters and institutional arbitration rules, including the LCIA Rules, presume that an arbitrator should have a neutral nationality.

While we reiterate our prior feedback that we are in favour of all efforts to eradicate discrimination in arbitration, we remain of the view that it is not desirable to connect the Arbitration Act 1996 to a national standard of anti-discrimination laws, namely the Equality Act 2010. As noted previously, we do not consider it helpful, in the context of international arbitration, to tie the relevant standards to domestic legislation. Often, users of international arbitration will be from overseas and may not necessarily be represented by English qualified counsel or counsel with expertise in matters concerning the Equality Act 2010. Moreover, we can reasonably foresee parties disputing the interpretation and application of the "protected characteristics" as identified in the Equality Act 2010, which may become outdated.

Rather, we reiterate that the better approach is generally to prohibit discrimination in the context of arbitration and to allow the relevant standards to be left to evolve organically.



## Response ID ANON-44ZW-8X6Q-G

Submitted to Law Commission second consultation on the Arbitration Act 1996  
Submitted on 2023-05-11 12:35:12

### 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?

[REDACTED]  
[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.

Tell us why you regard the information as confidential:

### Proper law

Consultation Question 1

Yes

Please give your reasons::

### Section 67

Consultation Question 2

Yes

Please give your reasons::

Consultation Question 3

Yes

Please give your reasons::

### Discrimination

Consultation Question 4

Other

Please give your reasons::

We have no strong view on this. If, however, the legislation provides that this is to be deemed justified, then we think it is important that it is drafted in such a way as to make it clear that this applies only where the requirement appears in an arbitration agreement, either directly in the wording of the agreement itself, or indirectly by reference to the rules, terms or procedures of an arbitration institution or association. Otherwise, a party might use it opportunistically as a basis to seek to challenge an appointment where the arbitration agreement contained no such requirement.

#### Consultation Question 5

Other

Please give your reasons::

The LMAA as an Association does not condone, and is opposed to, discrimination on the grounds of protected characteristics. We continue to express our support for the proposal in question 7 of the first Consultation Paper.

We do, however, have serious reservations about taking a view at this stage on the current question as to a general prohibition in arbitration. The proposals in the second Consultation Paper have come late in the day. As we are a membership association and not an institution, in order to express a collective view of our members, we would have to explain the potential consequences to them and consult with them widely. The time available for the current consultation period has not enabled us to do so.

We offer the following comments in the hope that they will be helpful.

If the law on discrimination in arbitrations is to go beyond the proposals in the first Consultation Paper, then we have serious concerns about it being developed too quickly. Because of the importance of there being no discrimination in arbitration, if there is to be legislation, time should be taken to ensure that it is well drafted and effective.

As regards a general prohibition, it is not currently clear to us what this would be designed to add to the current position on misconduct and so what its effect might be. We can see that in principle it may be desirable, but only after further detailed consultation, with a view to avoiding unintended consequences. We are particularly concerned about legislation which might promote satellite litigation. At present, we do not consider that we have enough detail of what a general prohibition might entail in order for us to take a view on the question which has been asked in general terms.

We refer, for example, to the appointment of arbitrators. The LMAA itself is not an institution, but a membership association. As such, it is usually not involved in the appointment of arbitrators, or in the administration of proceedings. The President has power to appoint arbitrators in limited circumstances, usually where the arbitration agreement provides for a sole arbitrator and the parties cannot agree on a choice. In the vast majority of arbitrations on LMAA Terms and Procedures, the arbitrators are appointed by the parties themselves. Unless the arbitration agreement says so, it is not necessary for the arbitrators to be members of the LMAA, so the parties have freedom of choice.

This is very different from employment situations and in our view, little or no guidance can be taken from how discrimination has been dealt with in the context of employment. In maritime arbitration, there is no job specification or formal list of candidates. It may be that where a case concerns a particular type of issue, for example as to navigation or marine engineering, an appointing party will want someone with specialist expertise. But in our experience, most parties look for someone with general maritime arbitration experience, and preferably someone in whose abilities they have confidence.

Against that background, we would be very concerned if any general prohibition led to a requirement in practice to define a procedure or process for the selection of an arbitrator. We can see that it might be suggested that this is a way of demonstrating that there has been no improper discrimination, but it is likely to create an unrealistic burden for parties. This is not a question of party autonomy, or whether such autonomy should – as the Paper puts it – trump public interest. Not only would a defined procedure add a level of complexity, but it is not clear to us how it would operate. Any shortlist is unlikely to be based on a job specification or specialised qualifications. In those circumstances, what would be required in preparing one?

One of the great attractions of maritime arbitration in London for international parties is the ease of appointing an arbitrator. Furthermore, there are very good reasons for the ease and speed of appointment: these are regarded as hugely important to our users. In maritime arbitrations, parties often have to appoint arbitrators promptly to protect against contractual time limits, and in any event they value a straightforward process. As we noted in our response to the first Consultation Paper, Mr Justice Foxton made the following observations 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.”

In our submission, it is vital to avoid legislation which might not only detract from the attractiveness of London as a venue for maritime arbitration, but would fail to offer the ease and speed of appointment which our users regard as essential for their purposes. For that reason, we consider that any proposal as to a general prohibition would require further detailed consideration and consultation.

#### Consultation Question 6

Please give your answer::

Please see our answer to question 5. It is unclear to us what could usefully be added to the current remedies for misconduct.

## **Law Commission Review of the Arbitration Act 1996**

### **Second Consultation**

#### **Response from the London Solicitors Litigation Association**

**19 May 2023**

#### **About the LSLA**

The LSLA was formed in 1952 and currently represents the interests of a wide range of civil litigators in London. It has over 3,500 members throughout London among all the major litigation practices, ranging from the sole practitioner to major international firms. Members of the LSLA Committee sit on the Chancery Court Users Committee, the Law Society Civil Litigation Committee and the Commercial Court Users Committee to name but a few. As a consequence, the LSLA has become a first port of call for consultation on issues affecting civil and commercial litigation in London, and it has on many occasions been at the forefront of the process of change. Representatives from the City of London Law Society also sit on the LSLA Committee. This document sets out the response of the London Solicitors Litigation Association to “Review of the Arbitration Act 1996: Second Consultation Paper” published on 27 March 2023 (“**Second Consultation Paper**”).

#### **General comments**

We welcome the opportunity to respond to the Second Consultation Paper and commend the Law Commission in pursuing the aim to ensure that the Arbitration Act 1996 remains state of the art. An increasing number of our members have an arbitration practice and there is awareness of growing competition from other jurisdictions as viable alternatives for commercial parties, particularly in relation to international disputes.

Key reasons parties are choosing to arbitrate in England, in addition to the facilitation of confidentiality, are:

- to achieve finality and certainty (meaning knowing, before parties are in dispute, how the framework for the conduct of arbitrations operates, that it will be applied robustly and in a consistent manner); and
- party autonomy and control (including in the selection of the tribunal), but with the security of some judicial oversight.

The prioritisation of these considerations is linked to an anticipation that disputes will be resolved efficiently and promptly. They are at the heart of the responses outlined below.

1. **We provisionally propose that a new rule be included in the Arbitration Act 1996 to the effect that the law of the arbitration agreement is the law of the seat, unless the parties expressly agree otherwise in the arbitration agreement itself. Do you agree?**

Yes, the LSLA welcomes the proposal, which avoids the complexity of the determination required by the guidelines set out in *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb UKSC 38* and creates certainty.

In addition to the preliminary analysis thrown up by the guidelines, including in relation to public policy matters, the risk of invalidity of the agreement and issues with scope and generally in relation to the appropriate law where exceptions apply, it is widely accepted that the guidelines in *Enka vs Chubb* are likely to lead to many more English-seated arbitrations being governed by foreign law.

While it is acknowledged that international parties may not have appreciated that a different law to the governing law of the matrix contract may apply to the arbitration agreement and/or expect that the same law applies, it is equally likely that they would not have appreciated the consequences of such an outcome notwithstanding choosing London as the seat. The implications of a foreign law governed contract, including party evidence as to how foreign law governs the arbitration (which is likely to be time consuming and costly) and the ousting (unless also observed as part of foreign law) of English law on important topics often heralded as the benefits of an arbitration under English law, such as separability, arbitrability, scope and facilitation of a confidential resolution, are in many cases likely to be unintended consequences. A number of our members have expressed the view that when a party is selecting London as a seat and its curial law, they are selecting English law to govern the arbitration agreement. This is often due to the fact that there may be many factors which mandate the choice of the governing law of the matrix agreement, but the choice of seat is intended to be a deliberate decision about the law governing the arbitration agreement.

In any event, if there is a clear statement of the position as intended by the Law Commission, the parties know where they stand and any presumption can be displaced by agreement.

A number of our members, and representatives of the international arbitration community practicing in other jurisdictions such as Singapore and India, recently attended London International Disputes Week 15-19 May 2023, and it is understood from discussion at that meeting that there is widespread support for this proposal. It was also predicted that other jurisdictions are likely to follow suit.

**2. We provisionally propose the following approach to a challenge under section 67 of the Arbitration Act 1996.**

**Where an objection has been made to the tribunal that it lacks jurisdiction, and the tribunal has ruled on its jurisdiction, then in any subsequent challenge under section 67 by a party who has participated in the arbitral proceedings:**

- A. the court will not entertain any new grounds of objection, or any new evidence, unless even with reasonable diligence the grounds could not have been advanced or the evidence submitted before the tribunal;**
- B. evidence will not be reheard, save exceptionally in the interests of justice;**
- C. the court will allow the challenge where the decision of the tribunal on its jurisdiction was wrong.**



## Do you agree?

Yes, in so far as it proposes some clarity as to the limitations relating to the introduction of new evidence and new points save in exceptional circumstances. However, many of our members feel, given the issue in question goes to the heart of the parties' agreement to arbitrate, deference to the tribunal beyond this is not appropriate. That said, some procedural limitations represent a pragmatic balance and an important change to assist London to retain its arbitration crown.

Neither the first or Second Consultation outline evidence of significant abuse of process or undue delay or cost under the current regime. To the contrary, they observe that there have been a very low number of applications under this section. It has also been suggested that the possibility of discouraging such applications where a full rehearing is not available may not, in fact, reduce cost, as parties may instead wait until enforcement before raising jurisdictional challenges (notwithstanding the commentary in *Dallah Real Estate & Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2010] UKSC 46 regarding applications under section 103 of the Arbitration Act 1996 ([3.31 of the Second Consultation])).

Notwithstanding the above, serious opposition to a full rehearing has been made by reference to the expectations of parties regularly involved in arbitrations and the risk that, where the practice of the English courts becomes out of step with other jurisdictions competing for arbitration business, this may undermine London as a preferred seat for international arbitrations. Some of our members felt that competence competence is a fundamental principle underlying arbitration, and that the proposals are entirely in line with that doctrine. Many choose arbitration on the basis of finality and some commentators believe that few would understand that a determination on jurisdiction by the tribunal could, in fact, be reheard in its entirety. It is noted that in Singapore such a challenge is said to be *de novo*, but new evidence is only admitted in limited circumstances (as referenced in [8.28] of the first consultation paper).

Some of our members took a more robust stance on the basis that jurisdiction should be properly tested by a rehearing if necessary and this is supported by sufficient public policy grounds. If it is possible the tribunal does not have jurisdiction, this should be subject to a full rehearing and a party should not be penalised if the case was poorly argued before the tribunal; they should have the right to introduce new evidence and argument. Others went further and felt that refusal of permission to appeal of the first instance court should be the subject of a right of appeal to the Court of Appeal.

With all the above in mind and notwithstanding the understanding that the court already has the ability to control its own processes ([3.46-3.53 of the Second Consultation]), it is regarded as helpful that there will be a clear statement of how the court will approach any challenge but without giving deference to the tribunal. Some clarity as to the court's approach is regarded as desirable (and is also likely to encourage a party disputing jurisdiction to put its full case before the tribunal). It is hoped that this will strike the right balance, including encouraging any challenge to be heard at an earlier stage/avoiding a party deciding to wait until enforcement before raising challenges if a more cursory regime is adopted. It is acknowledged that where a party participates in the proceedings, section 67/70 of the Arbitration Act 1996 may limit the scope for any delay to challenge under section 67.

**3. We provisionally propose that the Arbitration Act 1996 be amended to confer the power to make rules of court to implement the proposals in CQ2 above. Do you agree?**

Yes. We can see the merit of the proposals, which largely take the form of procedural reforms, being contained within court rules, and welcome the proposal that they are piloted, with monitoring of any impact. It is agreed that clarity as to the precedence of the court rules (by amendment to the Act to give legislative authority to such rules) over existing case law is desirable.

**4. We provisionally propose that it should be deemed justified to require an arbitrator to have a nationality different from that of the arbitral parties. Do you agree?**

We acknowledge there is some merit in the Commission's proposal that it should be deemed justified to require an arbitrator to have a nationality different from that of the arbitral parties. A fundamental principle of arbitration is neutrality and particular care needs to be taken to avoid an award being challenged on the basis an arbitrator is not impartial.

The appointment of an arbitrator of a nationality different from that of the arbitral parties may be particularly relevant where there is an international arbitration involving two nations or parties based in different countries, to avoid any allegations that an arbitrator has a particular bias towards the country or their nationality. We note several arbitral institution rules state that an arbitrator should have a neutral nationality, and this is widely accepted practice.

We have considered whether there needs to be some safeguards in place with regard to a deemed justification. Under the Equality Act 2010, race is a protected characteristic. Race includes colour, nationality or ethnic or national origins. In an employment context, any direct discrimination on the grounds of race cannot be objectively justified and would be unlawful. Whilst we acknowledge that the "employment rules" do not currently apply to arbitrators, there are advantages to having some safeguards put in place if there is to be a permissible requirement (distinct from a more general prohibition in relation to discrimination and a formula for exceptions – see further below) to have an arbitrator of a nationality different from that of the arbitral parties. There is a distinction between prescribing selection requirements on the basis of the actual or perception of bias towards a particular nationality and objection to appointment of a person possessing a particular nationality on the basis of prejudices about their capabilities and characteristics because of their nationality. Although, in practice, this is likely to be difficult to spot.

On one view, the safeguards proposed in relation to a more general prohibition to discrimination could and should be applied equally to nationality i.e. there is a justification if discrimination is otherwise a proportionate means to achieving a legitimate aim (but without the presumption/deemed justification). An analogous protection was contemplated in *Jivaj v Hashwani* [2011] UKSC 40. Neutrality could equally be called into question if the arbitrator shares other characteristics with one party but not the other. It will often be the reality that an arbitrator with the same nationality as one of the parties will be no less impartial than an individual with a different nationality, who may even be residing or conducting their business

in the same jurisdiction as one or all of the parties. Protection is also offered by other measures in contemplation by the first consultation relating to duties to disclose circumstances giving rise to justifiable doubts as to an arbitrator's impartiality. However, respect for party autonomy should also be borne in mind.

On balance, we can see that there is a case for a clear position on this, as has been adopted by many of the arbitration rules to support a widespread practice in the arbitration community and, in reality, it is unlikely that parties will have provided expressly for this unless there is a real concern. Its adoption is likely to avoid satellite disputes arising from the adoption of such a formulation in arbitration agreements/rules. On this basis, it is likely to be impractical to prohibit it.

**5. Do you think that discrimination should be generally prohibited in the context of arbitration?**

The Law Commission is to be commended for promoting wider societal aims of improving equality, diversity and inclusion. It is an aim that is rightly moving up the agenda for many organisations, including the LSLA, which has identified that promotion of diversity amongst the profession should be a priority. However, we are concerned that more thought may need to be given to what issues exist in the context of arbitration, how they should be addressed and then make clear the challenges which should be available and the remedies.

*The original proposal (first consultation)*

Aside from the practice of prescribing from a nationality different to that of the parties (as discussed above), it is not understood to be widespread practice that arbitration agreements prescribe for choice of their arbitrator on the basis of protected characteristics.

In *Jivraj v Hashwani*, while it was accepted that arbitrators were not employed (they were independent providers of services who are not in a relationship of subordination with the person who receives such services), such that the provisions of the equality legislation which applied to protect employees against inequality and discrimination by virtue of their vulnerability to exploitation did not apply to them, as noted in the first consultation paper (paragraph 4.6), the court also held that being Ismaili would otherwise have been a genuine occupational requirement for the appointment, thereby being an admissible exception to the rule against discrimination.

The upshot of the analysis in *Jivraj v Hashwani* is that there is very limited protection of discriminatory practices in how arbitration agreements prescribe the characteristics of an arbitrator, but that if such practices are adopted, they could be justifiable in some circumstances.

Concerns in the arbitration community following the case arose as a result of the Court of Appeal decision (overturned by the Supreme Court) which suggested that the appointment of arbitrators were caught by the equality legislation which made it unlawful to discriminate on grounds of (amongst other things) religion when choosing persons offering personal services/employees. The major concern was understood to be that, by analogy, this would be applied to other characteristics, such as nationality, where it was widespread practice for the

parties to prescribe for the arbitrator to have a different nationality to the parties, as set out above.

In the circumstances, we support the proposal that a clause which directly discriminates on the basis of protected characteristics (as defined by the Equality Act 2010) should be unenforceable unless the requirement can be justified as a proportionate means of achieving a legitimate aim.

While we accept the proposal contemplated by the first consultation does not provide an additional basis to challenge an arbitrator, it does limit what would otherwise be an unrestricted right of challenge to an appointment inconsistent with the parties' original choice and will likely involve debate about aims and objectives where there is an appointment inconsistent with the arbitration agreement. However, we feel this is likely to strike a fair balance between promoting a society free of prejudice, respecting party autonomy and avoiding/curtailing parties' ability to disrupt the proper progression of arbitrations.

#### *Broader scope of protection against discrimination*

In addition to the above, it appears to be an aim of the Law Commission to promote greater diversity in relation to the appointment of arbitrators and more broadly prohibit discrimination. Although it is accepted that the message sent by the above will promote the priority of this agenda it is unlikely to assist with greater diversity in arbitrator appointments i.e. the selection by the parties of a more diverse arbitral tribunal. This appears to be a clear objective of the Law Commission following acknowledgment of the issue by the arbitration community. The attractiveness of a regime which favours diversity and inclusion is a key consideration.

It is understood that a competing concern in the arbitration community is the rising claims against arbitrators, and more generally the scope for challenges which are designed to derail the efficient running of the arbitration by a party dissatisfied by an award or determined to undermine the finality of the decision. It is worth considering here, key areas where potentially discriminatory practices arise in arbitration and in turn how far legislative change should go to address possible issues. It is worth bearing in mind that the body of law relating to discrimination arose in a different context, in order to protect an imbalance of power and the inherent vulnerability of employees. In an employment context, other than age, direct discrimination (treating someone less favourably because of their protected characteristics set out in section 4 of the Equality Act 2010) cannot be objectively justified save in limited circumstances, including the occupational requirement exception. Indirect discrimination, broadly speaking, is acts, decisions or policies which in practice have the effect of disadvantaging a group of people with particular protected characteristics, disadvantage an individual with those characteristics and cannot be objectively justified. Direct age discrimination is capable of objective justification, and there is a useful body of case law which is developing relating to what is required in order to prove there is an objective justification. Possible key areas of concern in the context of arbitration are:

- 1) Discriminatory appointment criteria for the arbitrator in the arbitration agreement (addressed specifically by the current proposals)

- 2) Discriminatory appointment criteria (where not prescribed in the arbitration agreement) or other discriminatory selection practices by parties or their solicitors, including borne out of lack of diversity in parties and their advisers involved in the arbitral process;
- 3) Discrimination in the broader selection of solicitors and counsel team (some protection already exists in the Equality Act 2010 in relation discrimination in connection with the instruction of a barrister (see section 47(6) of the Equality Act 2010);
- 4) Discrimination by the arbitrator in relation to:
  - a) The conduct of the arbitration relating to other arbitrators,
  - b) Decision making, including in relation to procedural requirements, in relation to the parties

It is believed that the Law Commission are contemplating legislative change in relation to 1) (discussed above in relation to the original proposal), 2) (but limited to direct discrimination only) and 4)a) and b) (again limited to direct discrimination only). In relation to 2) we can see the merit in something equivalent to section 47(6) being enacted in relation to the appointment of an arbitrator which we consider is likely to send the right signals to the arbitration community to examine their own practices and reasons in relation to appointments.

We wish to stress that our observations are not to suggest an objection against the extension of discrimination protection to arbitration, but that it would be helpful to understand clearly what is proposed should be protected, before considering the implication of any contravention and remedies, to ensure clarity.

As a more general point, it may be advisable to note here that, anecdotally, it has been suggested that work may need to be done to ensure that practitioners from other jurisdictions feel welcome and have access to participate in arbitration in London. The full extent of any barriers is not understood, but it has been suggested that there would be benefits from a greater collaboration between industry, government and the arbitration community to ensure that London is accessible to foreign lawyers for this purpose, to bolster the ability to champion London as the preferred seat for arbitration.

## **6. What do you think the remedies should be where discrimination occurs in the context of arbitration?**

At various points in relation to a discriminatory clause, including at [4.48] of the Second Consultation, the Law Commission suggest that the remedy of unenforceability of an award is not being proposed. However, it would be useful for the Law Commission to clarify the position in the event of a tribunal appointment inconsistent with the parties' choice of arbitrator in accordance with a discriminatory arbitration agreement, which a party later seeks (successfully) to objectively justify. While we recognise that such a scenario would be rare, not least due to other protections (such as under section 67 of the Arbitration Act 1996), it would be useful for there to be clarity in this regard. With this situation specifically in mind, there may be benefit in providing for time limits for challenges.

It is anticipated that, in relation to discriminatory conduct by an arbitrator e.g. against the parties or a tribunal member, it is agreed that the remedies already available are likely to be sufficient, such as the removal of the arbitrator under section 24 of the Arbitration Act 1996 and challenge to the award for serious irregularity (section 68 of the Arbitration Act 1996).

If the Employment Tribunal is to have jurisdiction to hear complaints by parties involved in arbitrations to determine if there has been any discriminatory conduct and for other remedies available in circumstances analogous to discrimination against an employee or barrister in relation to instruction, it would be advisable for the Law Commission to consider any implication of such proceedings in relation to any extant arbitration.

**Submission to the Law Commission of England and Wales**  
**Consultation Paper 258: Review of the Arbitration Act 1996**  
**Second Consultation Paper**

**The Law Applicable to Arbitration Agreements;  
The Role of the Courts in Reviewing  
Arbitral Tribunal Determinations on Substantive Jurisdiction**

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1. I am writing to provide a submission on certain issues raised by **Law Commission Consultation Paper 258: Review of the Arbitration Act 1996** ('Second Consultation Paper'), dated March 2023.
2. This submission addresses **Consultation Questions 1, 2 and 3**. It first addresses Consultation Question 1, relating to the law applicable to an arbitration agreement. It then addresses Consultation Questions 2 and 3 together, relating to the role of the courts in reviewing the determination by an arbitral tribunal of its own jurisdiction.

**Consultation Question 1 – Proper Law of the Arbitration Agreement**

3. The Second Consultation Paper raises an additional issue which was not examined in the First Consultation Paper, concerning the choice of law rules which determine the law applicable to an arbitration agreement. This issue was prominently and somewhat controversially addressed by the Supreme Court in *Enka v Chubb* [2020] UKSC 38. I agree that it would be helpful for the Law Commission to consider this issue, because of the importance of the issue and the policy considerations it presents, and because of some lack of clarity in the Supreme Court's judgment in *Enka v Chubb*. (Perhaps evidencing this lack of clarity, I am not entirely in agreement with the description of the Supreme Court's decision in the Second Consultation Paper, at 2.14, as explained further below.)
4. This issue is complex and reasonable arguments can certainly be made on both sides, as indeed is the case in the impressive Second Consultation Paper itself. I would, however, not concur with the proposal set out in **Consultation Question 1**, which is that "a new rule be included in the Arbitration Act 1996 to the effect that the law of the arbitration agreement is the law of the seat, unless the parties expressly agree otherwise in the arbitration agreement itself". In this submission I will set out what I understand to be the relevant principles, and explain how these broadly support the rule adopted by the Supreme Court in *Enka v Chubb* (and indeed the similar approaches adopted in other common law jurisdictions) although with a different codification than that presented in the Consultation Paper.

5. The question of what law governs an arbitration agreement is quite a fundamental one, and perspectives on this issue often reflect different theoretical understandings of arbitration itself. This submission does not engage with these deeper questions, but focuses on key accepted principles – if the theoretical issues are of further interest, you might wish to consult Chapter 6 of Mills, *Party Autonomy in Private International Law* (Cambridge University Press, 2018).

### ***Relevant principles***

6. A first and well-known key principle is that the law governing the arbitration agreement need not be the same as that governing the remainder of the contract, sometimes referred to as the ‘matrix contract’. This is because of the principle of separability, which allows for a distinct analysis of the arbitration clause’s applicable law, although one which may of course take into consideration its context as a clause in a larger contract.
7. A second key principle is party autonomy, which is the starting point for analysis of any contractual choice of law issue. This doctrine provides that an agreement as to the law which governs a contract or a clause of a contract must generally be given effect, absent considerations of public policy. This principle is codified in the Rome I Regulation, and also forms part of the common law rule (which as noted in the Consultation Paper remains applicable to arbitration agreements as they are excluded from the scope of Rome I). A choice of law may be express or implied – if the latter, the search is for factors which demonstrate a real (but undocumented) choice, not a choice which is imputed to the parties as one which they ought to have made.
8. In the absence of a real choice, it is necessary to consider not the intentions of the parties but the objective factors linking the contract to a particular system of law. This test is generally set out in Article 4 of the Rome I Regulation, but again, this does not apply to arbitration clauses. Arbitration clauses remain subject to the common law choice of law rule, under which the objective test is sometimes described as a search for the system of law with ‘the closest and most real connection’ to the contract or contractual clause.
9. In the law of arbitration, another principle is that of efficiency, but this principle is secondary to that of party autonomy. While the fact that efficiency is generally a goal for parties and for arbitration can assist in interpreting arbitration clauses, parties may choose to have their agreements resolved according to inefficient arbitral procedures should they so wish. The law should not interfere with their choices merely because they are thought unwise or undesirable.

### ***Choice of Law Rule***

10. On the basis of these clear principles, the law applicable to an arbitration agreement should be governed by the following rule, comprised of three parts in hierarchical order.

*Subject to considerations of public policy, an arbitration agreement is governed by:*

- (i) *The law expressly chosen to govern it;*
- (ii) *The law implicitly chosen to govern it;*
- (iii) *The law with which it has its closest and most real connection.*



This rule is simple, although its application may be complex in particular circumstances, as explained further below. The analysis below does not consider the application of public policy, but it is included in the rule and remains an important limitation.

***Part (i) – Express Choice***

11. An express choice of law for an arbitration agreement may arise in one of two ways.
12. First, the contract may contain a specific choice of law agreement for the arbitration clause. In this case, the application of this law to the arbitration clause is self-evidently based on the principles of party autonomy and separability, and is not controversial.
13. Second, the matrix contract may contain an express choice of law agreement which should, unless the contrary is agreed, be interpreted to extend to the arbitration clause. This follows from party autonomy, in combination with the common sense presumption that if parties have made an express choice of law for their entire contract, and have not specified a different applicable law for any particular clause of the contract, their choice extends to all of the terms of their contract – including any arbitration agreement. This presumption should, however, be rebuttable, if there are indications that the parties would not have wanted their express choice to cover the arbitration agreement. This might arise where there are other factors indicating an implied choice of a different law for the arbitration agreement, as discussed further below. It is important, however, to understand that this question is about the correct interpretation of the *scope* of a choice which *has been made* by the parties. The issue is whether there is evidence which might rebut the common sense presumption that their express choice of law should be understood to extend to all of the clauses of their contract.
14. The rule proposed in **Consultation Question 1** would, in effect, provide that the choice of a seat by the parties in their arbitration agreement *always* rebuts the presumption that their choice of law in the matrix contract extends to all of the terms of the contract. The justifications for this rule are primarily based on efficiency or other policy objectives – that it would be more efficient and also desirable for various policy reasons if arbitration agreements with their seat in England and Wales are governed by the law of England and Wales (see, for example, Second Consultation Paper, 2.52 *et seq*).
15. It is submitted, however, that this justification is not persuasive, as it elevates efficiency and other similar policy considerations above party autonomy. If the express choice of law in a matrix contract is of a different law from the law of the seat, a requirement to apply the law of the seat (as directed by **Consultation Question 1**) would in most cases not in fact be consistent with party autonomy. **Consultation Question 1** proposes a fixed rule (which cannot be rebutted) which applies as a matter of law, rather than an interpretive presumption as to what the parties (may) have chosen. As a result, it no longer requires but rather excludes an inquiry into what the parties have actually agreed. Indeed, the requirement that a choice *must* be “expressly agreed ... in the arbitration agreement itself” is in fact a constraint or limitation on party autonomy, which *repudiates* other forms of choice by the parties. Where parties have chosen a seat for their arbitration, but have (expressly or indeed implicitly) chosen a different governing law for their contract (including the arbitration clause), the fact that they have thereby chosen different laws for the law governing the arbitration process and the law governing the arbitration agreement may be considered undesirable, and it may be inefficient, but it is submitted that this is not a sufficient reason for the law to disrespect their choice, which is the very foundation of arbitration.

***Part (ii) – Implied Choice***

16. In the absence of an express choice (in the arbitration clause or in the matrix contract), an implied choice of law may arise in relation to the arbitration clause, again in one of two ways.
17. First, there may be an implied choice specific to the arbitration clause, for example where the parties have indicated an understanding that certain statutory provisions which are specific to a governing law will apply to the validity of the arbitration agreement. In this case, the application of the chosen law to the arbitration agreement once again follows straightforwardly as a matter of party autonomy and the principle of separability.
18. One important question in this context is whether a choice of arbitral seat should give rise to an implied choice of law for the arbitration clause. This would certainly be a factor indicating a possible choice of the law of the seat, but it is submitted that it should not be a decisive one on its own, as the inquiry is concerned with identifying a real choice made (but not documented) by the parties, and must be attentive to the terms of the contract and other relevant circumstances. Another factor which might point toward an implied choice of the law of the seat is the possibility that the arbitration agreement would otherwise (in the absence of an implied choice) be invalid, based on the presumption that parties intend to enter into valid arbitration agreements (the validation principle). This rule would thus in many cases lead to the same outcome as the proposed rule in **Consultation Question 1**, but would do so not because of a fixed rule of law but because of an implied agreement of the parties.
19. Second, in the absence of an implied choice specific to the arbitration agreement, it is necessary to consider whether there is an implied choice of law for the matrix contract, and if so whether that choice extends to the arbitration agreement. If such a choice exists, it should generally be understood to cover the arbitration agreement, for the reasons set out above – the common sense presumption that a choice of law (express or implied) should be understood to extend to all of the clauses of a contract. The determination of whether there is an implied choice of law for the matrix contract is again concerned with identifying a real choice made (but not documented) by the parties, taking into consideration “the terms of the contract” and “the circumstances of the case” (as directed by the Rome I Regulation, Article 3(1)).
20. It is notable that this determination may also take into account the existence of an arbitration agreement which specifies a seat for the arbitration (see, for example, *Egon Oldendorff v Liberia Corp* [1996] 1 Lloyd’s Rep 380, discussed in the Second Consultation Paper at 2.25). This is one factor which may indicate an implied choice of law (for the contract as a whole) in favour of the law of the seat, although it is not necessarily a decisive factor, given that many arbitrations are not conducted according to the law of the seat, and may be overcome by other considerations, such as those relating to the substantive obligations under the contract. Nevertheless, this is another way in which a choice of the seat might affect the law applicable to the arbitration agreement – as a factor indicating an implied choice of the law applicable to the matrix contract, which in turn would also once again apply to the arbitration agreement (on the basis that this law should be presumed to apply to all the terms of the contract). Again, this would follow not on the basis of a fixed rule of law (as set out in **Consultation Question 1**) but from party autonomy.
21. In other cases, despite or in the absence of a choice of the seat, “the terms of the contract” and “the circumstances of the case” may point to the implied choice of another system of law for the contract as a whole. For the reasons set out above, this implied choice should (at least ordinarily) be understood to extend also to the arbitration agreement. To provide that a choice of the seat *always* leads to the application of that law to the arbitration agreement is once

again in fact a *limitation* on party autonomy, because it means the applicable law is not being determined by reference to the real (albeit implicit) choices of the parties, but by a rule of law.

### ***Part (iii) – Closest and Most Real Connection***

22. In the absence of an express or implied choice of law affecting the arbitration agreement, the law applicable to the arbitration agreement must be determined based on objective connecting factors. In the common law this is traditionally expressed as the ‘closest and most real connection’ test. One of the important connecting factors is the place of performance of the contractual obligations.
23. The analysis of the applicable law of the arbitration agreement should once again begin with the clause itself, following the principle of separability. The question is then whether it is possible to identify a law with which the arbitration agreement has its closest and most real connection. In the majority of cases, the arbitration agreement will specify a seat for the arbitration. The law of the seat will then be assumed to be the law governing the arbitration agreement, either on the basis that the law of the seat governs the performance of the arbitration clause (as it provides the *lex arbitri*), or on the basis that the seat will also be assumed as the place of performance of the obligations relating to the arbitration clause (although it is not always strictly necessary that the arbitration physically take place in the territory of its ‘seat’). The law of the seat will therefore ordinarily govern the arbitration agreement in these circumstances – not as a matter of party autonomy, but as the law with which the arbitration agreement has its strongest objective connection.
24. Exceptionally, the parties may not have chosen a seat for their arbitration in their contract. In such a case, there may be other connecting factors which can be relied on to identify the applicable law – if, for example, the contract specifies an individual arbitrator who invariably works from a particular place, it would at least be arguable that the anticipated place of performance of the arbitration agreement would be at that location. There may, however, be no such connecting factors. In this case, there is no basis on which to determine the governing law for the arbitration agreement as a separate contract, and it should be governed by the law which governs the matrix contract. This will be generally determined (in these circumstances) through the application of Article 4 of the Rome I Regulation, and based on objective connecting factors relating to the contracting parties and the substantive obligations of the contract.

### ***Conclusions***

25. The Rule discussed above departs in some ways from the account of *Enka v Chubb* at 2.14 of the Second Consultation Paper, and departs in more significant ways from the proposed rule in **Consultation Question 1**. It is submitted, however, that the Rule discussed above is in fact very close if not identical to the rule adopted by the Supreme Court in *Enka v Chubb*, albeit expressed and structured in slightly different terms. It is also consistent with important long-standing principles concerning separability and party autonomy.
26. On this basis, it is respectfully submitted that it is not necessary or advisable to adopt the rule proposed in **Consultation Question 1**, and if a reformulated choice of law rule for arbitration agreements is to be adopted, it should be on the basis of the Rule discussed above, with some accompanying explanation as to its application, perhaps along the following lines.

*Subject to considerations of public policy, an arbitration agreement is governed by:*

*(i) The law expressly chosen to govern it;*

This choice may be specific to the arbitration agreement, in which case it must be given effect. If there is no such choice then an express choice in the contract containing the arbitration agreement will be presumed to also be a choice for the arbitration agreement, in the absence of indications to the contrary.

*(ii) The law implicitly chosen to govern it;*

This choice may be specific to the arbitration agreement, and a choice of the seat of the arbitration is one factor which might indicate such a choice, but would not be decisive on its own. If there is no such choice then an implied choice of law in the contract containing the arbitration agreement will be presumed to also be a choice for the arbitration agreement, in the absence of indications to the contrary.

*(iii) The law with which it has its closest and most real connection.*

If the arbitration agreement selects a seat, the law with the closest and most real connection to the arbitration agreement will be the law of the seat. If the arbitration agreement does not select a seat, and there is no other basis on which to determine the law with which it is most closely connected, the law governing the contract as a whole (as determined through objective connecting factors) should determine the law governing the arbitration agreement.

### **Consultation Questions 2 and 3 – Challenging Jurisdiction under Section 67**

27. Section 67 of the Arbitration Act 1996 is concerned with proceedings brought in court to challenge a tribunal award on the basis that the tribunal lacked substantive jurisdiction.
28. My submission to the First Consultation Paper (257) addressed the background to this issue in further detail, and I will not repeat that detail here. As noted (at 3.64) in the Second Consultation Paper, my submission was broadly supportive of the approach proposed by the Law Commission, on the basis that giving some degree of deference to the decision of a tribunal on its own jurisdiction would be in accordance with underlying principle, where the parties have participated in the arbitral proceedings. In particular, I supported the proposal as it would give a deferential (not merely temporal) effect to the principle of negative competence-competence, which is likely to increase efficiency in dispute resolution while still allowing for judicial oversight. I am glad to see these questions of principle further recognised and elaborated in the Second Consultation Paper, and I again broadly agree with the analysis set out by the Law Commission in its Second Consultation Paper.

#### ***The revised approach – four constraints***

29. The Second Consultation Paper, however, offers a revision of the approach which was proposed in the First Consultation Paper, which was that a section 67 challenge (by a party

who participated in the arbitration) should be by way of an appeal rather than a full rehearing. Under the Second Consultation Paper, it is proposed instead that the law be reformed to clarify the ‘practical constraints’ (3.103) under which such a challenge should function, without attaching the label of ‘appeal’ to that process. Four such constraints are identified.

30. The first constraint (3.104) is that the court should not generally allow new arguments, which is to say, arguments not raised before the tribunal, subject to limited exceptions. This is consistent with the application of the principle of *Henderson v Henderson* estoppel which was discussed in further detail in my submission on the First Consultation Paper, and I remain supportive of its recognition in this context.
31. The second and related constraint (3.105) is that the court should not generally allow the presentation of evidence which was not raised before the tribunal, again subject to limited exceptions. As the Second Consultation Paper notes, this is consistent with the approach adopted by the Court of Appeal when it is deciding an appeal from a lower court, as set out in *Ladd v Marshall* (1954) and in the Civil Procedure Rules at Rule 52.21(2)(b). Although the Second Consultation Paper no longer proposes adopting the language of ‘appeal’, which would directly suggest the application of this constraint, I would agree that it is nevertheless appropriate that this constraint be adopted. Indeed, in my response to the First Consultation Paper I highlighted the decision of *Ladd v Marshall* as an important authority which should influence the approach of the courts hearing a challenge under section 67, and for the reasons set out there I would remain supportive of the adoption of this constraint.
32. The third constraint (3.107) is that the court should not ordinarily allow for a rehearing of oral evidence. This is again consistent with the traditional approach in the Court of Appeal, as set out in the Civil Procedure Rules at Rule 52.21(2)(a). Once again, although the Second Consultation Paper no longer seeks to adopt the language of ‘appeal’ to describe a section 67 hearing, I would agree that it is appropriate that the constraints on evidence adopted in an appellate hearing be generally adopted, and so I am supportive of the recognition of this constraint.
33. The fourth constraint (3.108) is that the court should give deference to the decision of the tribunal – that it should be “accorded some legal and evidential value”. This comes back to the heart of the questions of underlying principle which are addressed in the Second Consultation Paper – that it is appropriate for the court to give deference to the decision of a tribunal on its own jurisdiction where the parties have participated in the tribunal proceedings. Once again, for the reasons raised in my submission on the First Consultation Paper, I am supportive of the recognition of this criteria, although as noted below it would be helpful if further guidance could be given as to precisely what is required of a court in conducting a section 67 review under this constraint.
34. In general, and by way of response to **Consultation Question 2**, I am supportive of the new approach proposed by the Law Commission to section 67 hearings. In particular, I agree that the new approach adopted in the Second Consultation Paper is an improvement on that adopted in the First Consultation Paper, as it moves beyond the label of ‘appeal’ to set out precisely what practical constraints should be operative in a section 67 hearing. This approach is likely to provide greater clarity to parties and to the courts. The revised approach remains, however, consistent with underlying principle as addressed in both Consultation Papers and in my submission to the First Consultation Paper.

### *Points of clarification*

35. In considering these proposals, I think it would be helpful for the Law Commission to clarify two points. The first is that, as noted above, it would be beneficial if additional guidance could be provided by the Law Commission as to what is required of a court when it is asked to accord “some legal and evidential value” to the decision of a tribunal. While it may be difficult to set out precisely what ‘deference’ actually requires in every case, and whatever guidance is adopted will require careful consideration and application in the context of the relevant facts, it would nevertheless be helpful if the principles to be applied could be explained further. This could build on the suggestion, at 3.108, that “the court should not be deciding the issue itself afresh” but “asking whether the tribunal’s ruling on jurisdiction was wrong”, considering for example how this might apply to determinations of fact or law.
36. The second point on which clarification would be welcome is the extent to which these constraints are considered to apply to proceedings under section 68 of the Arbitration Act 1996, and indeed how these two sections relate to one another.
37. In commenting on the second constraint, the Second Consultation Paper notes (at 3.105) that “Similar rules have been held to apply when new evidence is sought to be introduced in the context of a challenge under section 68.” This suggests an understanding that the constraints under sections 67 and 68 ought to be aligned, and it is not clear to me why this ought to be the case – indeed, I would suggest that a challenge under section 68 should generally be subject to fewer evidentiary constraints, and I am not persuaded that the authorities actually support the claim that similar constraints actually do apply in relation to section 68.
38. The case cited by the Second Consultation Paper in support of its analysis of section 68, *DDT Trucks of North America Ltd v DDT Holdings Ltd* [2007] EWHC 1542 (Comm), itself cites in support other authorities dealing with the question of when an English arbitral award can be later set aside by the courts for fraud. The leading case is *Westacre Investments Inc v Jugoimport-SDRP Holding Company Ltd* [1999] EWCA Civ 1401, which indeed suggests (albeit obiter) that under section 68, new evidence of fraud would only be admitted on condition of the “unavailability of the evidence produced as at the time of the arbitration, and that such evidence would have had an important influence on the result”. This decision was in part justified on the basis that it aligned the rules governing review of arbitral awards with those *at the time* governing applications to set aside an English judgment.
39. These authorities are, however, now out of date, as the Supreme Court held in *Takhar v Gracefield Developments* [2019] UKSC 13, at [54], that “where it can be shown that a judgment has been obtained by fraud, and where no allegation of fraud had been raised at the trial which led to that judgment, a requirement of reasonable diligence should not be imposed on the party seeking to set aside the judgment”. It would be difficult to see the justification for a different approach being adopted in relation to an application to challenge an arbitral award on the basis of fraud, as it is not clear why the finality of an English arbitral award is a stronger policy interest than the finality of an English judgment. Questions of fraud could equally, for example, affect the fourth constraint discussed above. Although the issues would require careful consideration and a degree of flexibility in the rules would be advisable, it would at least in some cases be clear that in proceedings brought under section 68 no deference whatsoever should be given any the decision of the tribunal itself on the matters raised. This might apply, for example, if it were alleged that an arbitral award was based on a manifestly unfair process, in which the tribunal determined that its own process was fair, or if a sole arbitrator accused of fraud or bias rejected those allegations in the award.

40. The broader point here is that where an award is challenged under section 68 (on the basis of “serious irregularity affecting the tribunal, the proceedings or the award”), there may be strong reasons to depart from the four constraints identified in relation to section 67 – there is an argument that the approaches under sections 67 and 68 indeed should not be aligned. (This may also arise because of an additional constraint under section 68(2) – the need to demonstrate ‘substantial injustice’ to the applicant.) The fact that there is some authority suggesting that similar constraints might also apply under section 68 is perhaps therefore unhelpful in analysing these issues in relation to section 67.
41. The issue is additionally significant for the present context because an argument affecting the jurisdiction of the tribunal could also in some cases arise under section 68. For example, if a tribunal reached a conclusion as to its own jurisdiction through procedures in which one party was not given equal opportunity to make its case and present its evidence, this could give rise to both a challenge to jurisdiction under section 67 and a challenge to the award under section 68(2)(a). This is because a challenge to the award under section 68 could include a challenge to that part of the award in which the tribunal determines its own jurisdiction: see, for example, *Maass v Musion Events Ltd* [2015] EWHC 1346 (Comm).
42. The better view is that the two sections may indeed have a significant overlap in such circumstances, but are (or ought to be) subject to different constraints. A challenge under section 67 might be subject to the four constraints, but a challenge under section 68 would not be – and a well-advised applicant would in this case ordinarily rely on section 68. The four constraints proposed to apply under section 67 could be justified in this context on the basis that, in circumstances where deference to the tribunal’s determinations would not be appropriate, the applicant has an alternative (and less constrained) basis on which to dispute the tribunal’s decision – section 68. I understand this to be the point made in footnote 116 of the Second Consultation Paper, but submit that the issue is worth addressing in further detail.

#### ***The manner in which reforms would be adopted***

43. The Second Consultation Paper also adopts a distinct approach in terms of the manner in which it recommends the adoption of its reforms. In the First Consultation Paper, the proposed reforms on section 67 hearings were (in my understanding) set out in the expectation that they would require legislative implementation. The Second Consultation Paper considers, rightly in my view, that no legislative change would be required for the courts to set out the terms on which a section 67 hearing should be conducted consistently with the constraints identified above. Instead, the Paper argues, the Arbitration Act 1996 should be amended to create a power to clarify these issues pursuant to rules of court.
44. By way of response to **Consultation Question 3**, I would agree that a power should be created to this effect. The question then arises as to how this power should be exercised. Although the approach set out by the Law Commission in its Second Consultation Paper should, I would submit, form the basis for the drafting of these rules of court, it is likely to be desirable that the rules of court be created (as usual) through the Civil Procedure Rule Committee, which may wish to consult further on the precise drafting of these provisions.

**Professor Alex Mills**

**22 May 2023**

## Response to the Law Commission's Second Consultation Paper on the review of the 1996 Arbitration Act

Dr Manuel Penades<sup>1</sup>

### This response only addresses Consultation Question 1.

“We provisionally propose that a new rule be included in the Arbitration Act 1996 to the effect that the law of the arbitration agreement is the law of the seat, unless the parties expressly agree otherwise in the arbitration agreement itself. Do you agree?”

#### I. Introduction

1. The Law Commission provisionally proposes that a new rule be introduced into the 1996 Arbitration Act ('AA') to the effect that the law of the arbitration agreement is the law of the seat, unless the parties expressly agree otherwise in the arbitration agreement itself.<sup>2</sup>
2. To date, the law governing an arbitration agreement is determined by the common law doctrine of the proper law of the contract. This doctrine requires, first, to look for a choice of law made by the parties to the arbitration agreement. Case law has traditionally accepted that such choice can be express as well as implied. This part of the test is concerned with ascertaining the parties' objective intentions. If neither of those forms of choice can be found, the arbitration agreement will be governed by the system of law with which it is most closely connected. In brief, the common law doctrine of the proper law for arbitration agreements can be summarised as follows:
  - First step: Express choice of law for the arbitration agreement.
  - Second step: Implied choice of law for the arbitration agreement.
  - Third step: Law with which the arbitration agreement has the closest and most real connection.
3. The proposed new rule introduces three significant amendments, impacting the three steps of the doctrine. First, it requires the express choice to be contained 'in the arbitration agreement itself'. Second, it eliminates the possibility to choose the governing law impliedly. Third, it replaces the last step of the doctrine by a hard-and-fast rule in favour of the law of the seat. In brief, the proposed new rule can be summarised as follows:
  - First step: Express choice of law for the arbitration agreement in the arbitration agreement itself.
  - Second step: Law of the seat.

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<sup>2</sup> Law Commission's Second Consultation Paper on the review of the 1996 Arbitration Act ('Second Consultation'), para. 2.76.



4. The following section addresses each of the changes introduced by the proposed new rule in the three steps of the common law doctrine of the proper law of the contract and identifies areas of refinement. Section III discusses two significant implications of the proposed new rule that are not mentioned in the Law Commission's Second Consultation.

## II. The proposed rule

### A. First step: Express choice of law in the arbitration agreement itself

5. The first step of the proposed new rule refines the existing rule by requiring that the choice of law must be contained 'in the arbitration agreement itself'. The rule is apparently simple and respects the fundamental principle of party autonomy, yet its application would not always be straightforward. Uncontroversial scenarios would include cases when parties include in the arbitration agreement itself an express choice of law specifically dedicated to the arbitration agreement. This is a very exceptional occurrence.
6. Two other scenarios could be a source of uncertainty. The first refers to arbitration agreements which provide that 'the arbitrators shall decide the dispute in accordance with the law of X', or cases in which the only choice of law in the whole contract is found in the arbitration agreement itself by way of a simple sentence (e.g., 'The applicable law shall be the law of X'). Neither of these examples includes a choice of law specifically dedicated to the arbitration agreement. Rather, they are the only reference to the governing law in the whole contract, but they are contained in the arbitration agreement.
7. Under the current rules, these cases would ultimately lead to the law of the matrix contract, either by way of express choice or implied choice. The elimination of implied choice of law from the common law doctrine under the new rule would be a source of uncertainty and would require that courts and arbitrators construe the agreement to decide whether the choice of law in the arbitration agreement is a choice that also applies to the arbitration agreement. Should an express choice of law for the arbitration agreement not be found, the law of the seat would apply. To the knowledge of the author, there is no decision under English law<sup>3</sup> that has decided definitely whether a general choice of law in the arbitration agreement applies to the matrix contract, to the arbitration agreement or to both. Probably this is due to the fact that under the existing rule, the use of express choice (step 1) or implied choice (step 2) does not produce any difference of outcome in scenarios like the ones mentioned in the previous paragraph. Even if these cases might require a case-by-base construction, uncertainty under the new rule would persist until case law settled whether, as a matter of principle, a generic choice of law in the arbitration agreement can be considered 'an express agreement in the arbitration agreement itself'.
8. The second scenario of uncertainty refers to the very ordinary cases in which the matrix contract contains a choice of law clause that refers to the 'Agreement'. When the arbitration agreement is contained in another clause of such 'Agreement', doubts may arise as to whether the choice of law clause also applies to the arbitration agreement. The UKSC ruled in *Kabab-Ji* that 'the effect of these clauses is absolutely clear'.<sup>4</sup> Even without any express definition of

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<sup>3</sup> References to English law should be understood as to the laws of England and Wales.

<sup>4</sup> *Kabab-Ji SAL v Kout Food Group* [2021] UKSC 48, [2022] 1 All ER (Comm) 773, [39].

the term “Agreement”, that choice of law is ordinarily and reasonably understood to denote all the clauses incorporated in the contractual document, including therefore the arbitration agreement. That is, these are not cases of implied choice of law for the arbitration agreement, but scenarios of express choice (step 1).

9. As with the previous example, this a situation where under the current rule the use of express choice (step 1) or implied choice (step 2) does not produce any difference of outcome, as both would lead to the law of the matrix contract. In contrast, under the new rule the finding that this is not ‘an express agreement in the arbitration agreement itself’ would result in the application of the law of the seat. It therefore becomes necessary to determine whether these are cases that satisfy step 1 of the new rule. The decision is not straightforward. The fact that the choice of law and the arbitration agreement are contained in separate clauses does not automatically mean that the choice of law is not part of ‘the arbitration agreement itself’. *Kabab-Ji* is a very clear example of this. In *Kabab Ji*, the UKSC did not hesitate to rely on the ‘no-oral modification clauses’ in the Agreement to prevent a change in the parties to the arbitration agreement itself.<sup>5</sup> That is, the arbitration agreement also included the ‘no-oral modification’ limitations which were contained in other clauses of the contract. It is very probable that in the vast majority of cases the same conclusion applies to clauses in the contract that identify the parties to the ‘Agreement’ or that provide for confidentiality obligations or impose assignment or entire agreement limitations. They are part of ‘the arbitration agreement itself’.
10. As with the first example, even if the decision in these cases might require a case-by-base construction, uncertainty under the new rule would persist until case law settled whether, as a matter of principle, an express choice of law in another clause in the contract can be considered ‘an express agreement in the arbitration agreement itself’.

## **B. The elimination of implied choice**

11. Under the existing rule, an implied choice of law is as effective as an express choice.<sup>6</sup> It is the application, not the concept, of implied choice of law that has been the source of uncertainty in the area of arbitration agreements and international contracts more generally.<sup>7</sup> The UKSC ruled in *Enka v Chubb* that if there is no express choice, and if the arbitration agreement forms part of a matrix contract, and if there is a choice of law, express or implied, for the matrix contract, then that chosen law will also govern the arbitration agreement by way of implied choice.<sup>8</sup> The UKSC also excluded the relevance of the choice of seat for the purposes of the finding of an implied choice of law for the arbitration agreement. It concluded that the choice of a different country as the seat of the arbitration is not, without more, sufficient to negate an inference that a choice of law to govern the contract was intended to apply to the

<sup>5</sup> *Kabab-Ji*, [55-69].

<sup>6</sup> *Enka v Chubb*, [35]: ‘It is also important to keep in mind that whether a choice is described as express or implied is not a distinction on which any legal consequence turns. An implied choice is still a choice which is just as effective as a choice made expressly’.

<sup>7</sup> See the study on the application of implied choice of law and escape clauses to international contracts by English courts in M. Penades Fons, ‘Commercial Choice of Law in Context: Looking Beyond Rome’ (2015) 78(2) *Modern Law Review* 241-295, available [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2573226](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2573226).

<sup>8</sup> *Enka v Chubb*, [170(iv)].

arbitration agreement.<sup>9</sup> It even stated that, in the absence of an express choice of law for the matrix contract, a clause providing for arbitration in a particular place will not by itself justify an inference that the contract or the arbitration agreement are intended to be governed by the law of that place.<sup>10</sup>

12. The prohibition of implied choice in the proposed new rule consolidates the irrelevance of the choice of seat for the purposes of the finding of implied choice. This is in line with *Enka v Chubb*. However, the general prohibition of implied choice in the proposed new rule is revolutionary. It means that, not only the seat, but also the law applicable to the matrix contract is irrelevant for the purposes of finding any choice of law. A choice of law for the matrix contract (either express or implied) does not carry any weight as regards the parties' objective intentions concerning the arbitration agreement.
13. The expulsion of implied choice from the system might come as a surprise. Notwithstanding the complexities caused by its application, the courts of England and Wales have never questioned the acceptance of implied choice. Implied choice is a manifestation of party autonomy and freedom of contract, principles which traditionally have been at the root of English contract law. Disregarding an implied choice of law demonstrated clearly by the terms of the contract or the circumstances of the case might seem a step backwards in the business-friendly environment cultivated by English law and courts for decades.
14. The proposed new rule also runs contrary to the vast majority of instruments governing choice of law in international business transactions. By way of example, implied choice is permitted by the 1980 Rome Convention (article 3.1), the retained Rome I Regulation (article 3.1), the retained Rome II Regulation (article 14.1) or the 2015 Hague Principles on Choice of Law in International Commercial Contracts (article 4).<sup>11</sup> The negotiation of some of these instruments also witnessed the appearance of some voices contrary to the acceptance of implied choice of law, although they were eventually unsuccessful.<sup>12</sup>
15. The existence of a clear trend in favour of accepting implied choices of law cannot per se justify its survival in the English choice of law regime for arbitration agreements. Disregarding implied choice of law for the purposes of the law governing arbitration agreements might be a positive innovation to reinforce English law's position at the forefront of arbitration law globally. Various reasons support this view.
16. Decades of experience have demonstrated that the finding of implied choice has been the source of significant uncertainty and expense for parties. This has been produced by the lack of clarity as regards the methodology applicable for the finding of implied choice as well as by the lack of predictability concerning the choice of law test applicable to arbitration

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<sup>9</sup> *Enka v Chubb*, [170(v)].

<sup>10</sup> *Enka v Chubb*, [170(vii)].

<sup>11</sup> It should be noted that all these instruments exclude arbitration agreements from their scope.

<sup>12</sup> P. Lagarde, 'Remarques sur la proposition de règlement de la Commission européenne sur la loi applicable aux obligations contractuelles (Rome I)' (2006) 95 *Revue Critique de DIP* 331, 335–339; S. Dutson, 'A misguided proposal' (2006) 122 *Law Quarterly Review* 374, 374–376; O. Lando and P. Nielsen, 'Rome I Regulation' (2008) 45 *Common Market Law Review* 1687, 1698 and 1707; U. Magnus, 'Article 4 Rome I Regulation' in S. Ferrari and S. Leible (eds), *Rome I Regulation: The Law Applicable to Contractual Obligations in Europe* (Munich: Sellier, 2009) 27, 30.

agreements more generally. English arbitration law should aspire to reduce uncertainty and increase efficiency in the resolution of disputes.

17. It is difficult to argue that the current rules are absolutely necessary to protect party autonomy even if in some cases the elimination of implied choice could disregard cases of genuine implied consent. This is because at times the practice of English courts around the finding of implied choice of law has been characterised by certain artificiality, partly motivated by the fact that the borderline between the tacit choice and the purely hypothetical choice is rather vague.<sup>13</sup> Indeed, the outcome of the analysis is sometimes more an imputed or hypothetical choice based on standards of business reasonableness than a genuine demonstration of the parties' objective intentions.<sup>14</sup> For instance, the current rule after *Enka v Chubb* that an implied choice of law for the matrix contract automatically amounts to an implied choice of law for the arbitration agreement, while apparently straightforward, might not always be reflective of a real intent of the parties. The proposed new rule would eliminate such risk for artificiality.
18. Keeping the current regime to protect the implied exercise of parties' consent in cases which, under the new rule would be referred to the law of the seat (step 2), appears to be a disproportionate measure. It would perpetuate a costly and uncertain regime, prone to strategic pleadings, to protect cases that parties themselves could correct by way of an express choice.
19. The risk of artificiality also turns into unpredictability as parties cannot easily anticipate the law applicable to their arbitration agreement in the absence of choice of law for the matrix contract and the arbitration agreement. The uncertainty produced to the parties in these scenarios is multiplied by the fact that the doubts around implied choice of law for the arbitration agreement need to be added to those existing around implied choice of law for the matrix contract. That is, in those scenarios it is necessary to overcome two sets of choice of law analyses for two different contracts and under two different choice of law regimes (e.g., in *Enka v Chubb* the Rome I Regulation and the common law doctrine of the proper law) to find out what law governs the arbitration agreement. There is little predictability in that system, even after the presumptions introduced by *Enka v Chubb*. The proposed new rule would eliminate that uncertainty of outcome.
20. Another reason to support the proposed new rule is the current lack of clarity regarding the test for implied choice of law applicable to arbitration agreements. The UKSC stated in *Enka v Chubb* that 'the terminology is useful in reflecting the fact that an agreement on a choice of law to govern a contract, like any contractual term, may be explicitly articulated or may be a matter of necessary implication or inference from other terms of the contract and the surrounding circumstances'.<sup>15</sup> The reference to 'necessary implication' by the UKSC might evoke the strict test for implication of terms under English law.<sup>16</sup> It is not the first time that

<sup>13</sup> The UKSC acknowledged in *Enka v Chubb* [256] that 'that one arrives at the same result at common law whether applying the implied choice or the default rule is unsurprising. It has long been recognised that there is a thin distinction between those two stages: they represent the distinction between implied and imputed intention'.

<sup>14</sup> *Timothy Joseph Lawlor v Sandvik Mining & ors* [2013] EWCA Civ 365, [2013] 2 Lloyd's Rep 98 at [30].

<sup>15</sup> *Enka v Chubb*, [35].

<sup>16</sup> Lord Neuberger usefully summarised this in *Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd & Anor (Rev 1)* [2015] UKSC 72 (2 December 2015): '16. There have, of course, been

English courts suggest a connection between the tests for implied choice of law and implication of terms.<sup>17</sup> However, the finding of implied choice of law is never a 'necessary' measure. The function of the default rule (e.g., step 3 in the current regime, or article 4 in the Rome I Regulation) is precisely to identify the applicable law in the absence of choice by the parties. The proposition that an implied choice of law for the matrix contract can automatically become the law governing the arbitration agreement contradicts the majority's 'necessary implication' test for identifying implied choices.<sup>18</sup> The proposed new rule would also eliminate that methodological uncertainty.

### C. Second step: Law of the seat

21. The UKSC ruled in *Enka v Chubb* that where the parties have chosen a seat of arbitration, the law with which the arbitration agreement is most closely connected 'will generally be the law of the seat, even if this differs from the law applicable to the parties' substantive contractual obligations'.<sup>19</sup>
22. The current proposal replaces step 3 of the existing regime with a clearer and more direct rule. In the absence of choice, the law of the arbitration agreement is the law of the seat. While, after *Enka v Chubb*, the outcome of the default rule in the existing as well as the proposed new regimes would be the same in most cases, the Law Commission's proposal is drafted in more absolute terms. It appears to be a hard-and-fast rule in favour of the law of the seat, without the gateway for exceptions inherent to the term 'generally' used by the UKSC in *Enka v Chubb*.
23. Hard-and-fast rules are alien to the common law doctrine of the proper law of the contract, where the reference to the closest and most real connection permits certain room manoeuvre

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many judicial observations as to the nature of the requirements which have to be satisfied before a term can be implied into a detailed commercial contract. They include three classic statements, which have been frequently quoted in law books and judgments. In *The Moorcock* (1889) 14 PD 64, 68, Bowen LJ observed that in all the cases where a term had been implied, "it will be found that ... the law is raising an implication from the presumed intention of the parties with the object of giving the transaction such efficacy as both parties must have intended that at all events it should have". In *Reigate v Union Manufacturing Co (Ramsbottom) Ltd* [1918] 1 KB 592, 605, Scrutton LJ said that "[a] term can only be implied if it is necessary in the business sense to give efficacy to the contract". He added that a term would only be implied if "it is such a term that it can confidently be said that if at the time the contract was being negotiated" the parties had been asked what would happen in a certain event, they would both have replied "'Of course, so and so will happen; we did not trouble to say that; it is too clear'". And in *Shirlaw v Southern Foundries (1926) Ltd* [1939] 2 KB 206, 227, MacKinnon LJ observed that, "[p]rima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying". Reflecting what Scrutton LJ had said 20 years earlier, MacKinnon LJ also famously added that a term would only be implied "if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common 'Oh, of course!'".

<sup>17</sup> See *Kabab-I SAL (Lebanon) v Kout Food Group (Kuwait)* [2020] EWCA Civ 6, [53]; *American Motorists Insurance Co v Cellstar Corp* [2003] EWCA Civ 206, [2003] Lloyd's Rep 295, [44]; and *Compagnie Tunisienne de Navigation S.A. v Compagnie d'Armement Maritime S.A.* [1970] 2 Lloyd's Rep. 99, 116; [1971] AC 572, 603. See also M. Phua, 'An Ameliorative Interpretation of Sulamérica', 2020(2) Lloyd's Maritime and Commercial Law Quarterly, 203-210, 207-208.

<sup>18</sup> Of the same view, M. Phua and M. Chan 'Persistent questions after *Enka v Chubb*' (2021) 137 Law Quarterly Review 216, 219.

<sup>19</sup> *Enka v Chubb*, [170(viii)].

in the determination of the applicable law. Other choice of law regimes that provide for hard-and-fast rules incorporate escape clauses that allow the disapplication of the identified law in exceptional circumstances (e.g., art. 4.3 Rome I Regulation).<sup>20</sup> In contrast, the proposed new rule lacks any reference to the possibility to escape from the law of the seat in any event. One possibility to do so would be in cases where the validation principle should apply in the regime designed by the UKSC in *Enka v Chubb*. This is one of the two outstanding questions explored in the next Section.

### III. Outstanding questions

24. The Law Commission's Second Consultation fails to address two very significant implications derived from the proposed new rule. One concerns the potential loss of the validation principle. The other relates to the discrepancy of choice of law tests between the common law doctrine of the proper law of the contract and the New York Convention ('NYC') (and the provisions of the 1996 Arbitration Act that implement it). The adoption of the proposed new rule requires full assessment of the reach of these two implications. It might be that their effect is so severe that the new rule should not be adopted, despite its original appeal.

#### A. The potential loss of the validation principle

25. The validation principle was examined by the UKSC at length in *Enka v Chubb*.<sup>21</sup> In *Kabab Ji*, the UKSC summarised it as 'the principle that contractual provisions, including any choice of law provision, should be interpreted so as to give effect to, and not defeat or undermine, the presumed intention that an arbitration agreement will be valid and effective [...]. Hence, where there is a serious risk that, if governed by the same law as the main contract, the arbitration agreement would be ineffective, it may be inferred that a choice of law to govern the contract does not extend to the arbitration agreement'.<sup>22</sup>
26. The validation principle operates beyond arbitration agreements, and the UKSC referred to it in *Enka v Chubb* as a general principle of choice of law, or even contract law. There are positive reasons to preserve it, and some legal systems such as Switzerland,<sup>23</sup> the Netherlands<sup>24</sup> or Spain<sup>25</sup> have used it as the guiding principle for the design of their choice of law regime for arbitration agreements.
27. The content of the proposed new rule might lead to the loss of the validation principle in the English regime for arbitration agreements. The reason for this is that the validation principle operates primarily in the context of implied choice, when a choice is not imputed if it renders the contract invalid. There is no imputation of choice or implied choice in the proposed new rule. That is, the validation principle rebuts a presumption, but there is no room for

<sup>20</sup> They are called 'gateways for judicial discretion' in M. Penades Fons, 'Commercial Choice of Law in Context: Looking Beyond Rome' (2015) 78(2) *Modern Law Review* 241-295, 243 and 244.

<sup>21</sup> *Enka v Chubb*, [95-109] for the majority; and also [198] (Lord Burrows) and [277] (Lord Sales).

<sup>22</sup> *Kabab-Ji*, [49].

<sup>23</sup> Swiss Federal Act on Private International Law, article 178(2).

<sup>24</sup> Dutch Civil Code, article 10:166.

<sup>25</sup> Spanish Arbitration Act, article 9(6).

presumption in the Law Commission's proposal. The question then arises whether the validation principle could rebut an express choice of law (step 1) and/or the application of the law of the seat (step 2). The answer should be negative in both cases.

28. The majority of the UKSC in *Enka v Chubb* referred to the validation principle as a 'well-established principle of contractual interpretation in English law' whereby 'an interpretation which upholds the validity of a transaction is to be preferred to one which would render it invalid or ineffective'.<sup>26</sup> The UKSC, however, has also stated in numerous cases that 'it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice', even ignoring the benefit of hindsight.<sup>27</sup> That is, role of courts is not to improve the contract or its malfunctioning. The validation principle allows the court to resort to the more favourable interpretation when the contract allows for various possible interpretations or, in the case of choice of law, various presumptions or inferences of choice.<sup>28</sup> When the choice is express, however, there is only one undisputable choice, even if it renders the arbitration agreement invalid or ineffective. In those cases, party autonomy (and the pathologies derived from its exercise) must prevail. Any deviation from the principle of party autonomy would need to be regulated to be acceptable and cannot be left to courts. In the view of this author, the current discussion of the validation principle in *Enka v Chubb* would be insufficient to support its operation in the context of express choices of law.
29. The validation should not apply either to displace the law of the seat. In the vast majority of cases where the proposed new rule would be applied, the seat of the arbitration would be England and Wales. Therefore, step 2 would lead to English law. Should an arbitration agreement become invalid or ineffective as a consequence of that law, the validation principle would allow the escape in favour of a foreign law to operate the arbitration agreement. Accepting the validation principle in this context would require the creation of a new choice of law rule to identify the applicable law after the displacement of the law of the seat. In addition, it would mean that English law would accept its own disapplication in scenarios where English law would not recognise the validity or effectiveness of the agreement to arbitrate. Unless otherwise regulated (like in the jurisdictions cited in para. 26 above), English law should not accept an escape from its own law in favour of a (yet undetermined) foreign law to circumvent sound policies of English law preventing arbitration in a given case.

## **B. The choice of law discrepancy between the common law doctrine and the New York Convention**

30. The proposed new rule eliminates implied choice of law from the common law doctrine of the proper law for arbitration agreements. The law applicable to arbitration agreements, however, is not always determined by English courts in accordance with the common law doctrine. In the context of the recognition and enforcement of foreign arbitral awards, section 103 AA replicates article V NYC. In line with article V(1)(a) NYC, section 103(2) AA provides that 'recognition or enforcement of the award may be refused if the person against whom it is invoked proves - (b) that the arbitration agreement was not valid under the law to which

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<sup>26</sup> *Enka v Chubb*, [95].

<sup>27</sup> *Arnold v Britton* [2015] UKSC 35, [2015] AC 1619.

<sup>28</sup> *Enka v Chubb*, [170(vi)].

the parties subjected it or, failing any indication thereon, under the law of the country where the award was made’.

31. The choice of law regime under article V(1)(a) NYC and section 103(2)(b) AA is divided into cases of choice of law and cases of absence of choice, in which case the law of the seat applies. The proposed new rule aligns the common law doctrine with the default rule in favour of the law of the seat in these provisions. What the AA and the NYC do not clarify is whether a choice of law for the purposes of their application can be express or implied. The UKSC addressed this issue in *Kabab Ji*. The default rule in article V(1)(a) NYC and section 103(2)(b) AA only applies ‘failing any indication’ of a choice of law. The UKSC reached the conclusion that ‘the word “indication” signifies that something less than an express and specific agreement will suffice’.<sup>29</sup> The court also endorsed the view in specialised commentary that ‘any form of agreement, express or tacit, would appear to be sufficient’.<sup>30</sup>
32. The proposed new rule for the common law doctrine of the proper law of the arbitration agreement departs from the NYC and from the choice of law rule applicable by English rules under section 103(2)(b) AA. In addition, the Law Commission’s proposal states that the new rule ‘would apply whether the arbitration was seated in England and Wales, or elsewhere’.<sup>31</sup> This means that, with the exception of section 103(2)(b) AA, foreign arbitration agreements would always be examined under the common law doctrine of the proper law of the contract (e.g., section 9 AA, regardless of the location of the seat), leaving section 103(2)(b) AA as a (very relevant) outlier in English law.
33. Nothing in the literal wording of section 103(2)(b) AA would prevent an interpretation that limited choices of law to cases of express choice. This internal alignment of English arbitration law would lead to an external dealignment; a departure from the generally accepted rule in the NYC. English courts have traditionally objected to these departures<sup>32</sup> and the UKSC acknowledged in *Kabab Ji* that ‘in keeping with that aim, it is desirable that the rules set out in article V(1)(a) for determining whether there is a valid arbitration agreement should not only be given a uniform meaning but should be applied by the courts of the contracting states in a uniform way’. Further, the UKSC cited with approval authoritative commentary of the NYC providing that ‘it has never been questioned that these conflict rules are to be interpreted as uniform rules which supersede the relevant conflict rules of the country in which the award is relied upon’.<sup>33</sup>

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<sup>29</sup> *Kabab-Ji*, [33].

<sup>30</sup> *Kabab-Ji*, [34], referring to *Summary Analysis of Record of the United Nations Conference May/June 1958* (51).

<sup>31</sup> Second Consultation, 2.77.

<sup>32</sup> *Kabab Ji*, [31]: ‘As a general principle, where a statute is passed in order to give effect to the United Kingdom’s obligations under an international convention, the statute should if possible be given a meaning that conforms to that of the convention: see eg *R (Adams) v Secretary of State for Justice* [2011] UKSC 18; [2012] 1 AC 48, para 14 (Lord Phillips); *Bennion, Bailey and Norbury on Statutory Interpretation*, 8th ed (2020), section 24.16. In the case of the New York Convention, that principle is reinforced by the Convention’s aim of establishing a single, uniform set of rules governing the recognition and enforcement of international arbitration agreements and awards’.

<sup>33</sup> Van den Berg, *The New York Arbitration Convention of 1958, Towards a Uniform Judicial Interpretation* (1981), 291. Similarly, *Fouchard Gaillard Goldman on International Commercial Arbitration* (1999), 985, states that the law governing the validity of the arbitration agreement ‘must be determined by applying a choice of law rule set forth in the Convention itself’.



34. It follows from this position that, even if the proposed new rule was adopted, section 103(2)(b) AA should retain the possibility to accept implied choices of law for arbitration agreements (presumably in accordance with the criteria laid down by the UKSC in *Enka v Chubb*, as the Court did in *Kabab Ji*). Therefore, the unavoidable consequence of the Law Commission's proposal would be an internal divide between the various regimes present in English law to determine the law applicable to arbitration agreements. This would be possible as a matter of law, since the UKSC stated in *Kabab Ji* that the common law rules on choice of law for arbitration agreements were not 'directly applicable' in the context of NYC enforcement actions.<sup>34</sup> However, it would be undesirable and could lead to serious inconsistencies. The same arbitration agreement could be subject to different laws at the pre-arbitration stage (e.g., an application to stay under section 9 AA) and at the post-arbitration stage (when the award resulting from that arbitration agreement was filed for recognition and enforcement before English courts under section 103 AA).
35. The desirability of this divide has been expressly rejected by the UKSC in *Enka v Chubb* as well as in *Kabab Ji*: 'Indeed, as we observed in *Enka*, at para 136, it would be illogical if the law governing the validity of the arbitration agreement were to differ depending on whether the question is raised before or after an award has been made. If there is to be consistency and coherence in the law, the same law should be applied - and therefore the principles for identifying the applicable law should be the same - in either case'<sup>35</sup>. Unless the Law Commission proposes a mechanism to overcome this divide, the proposed new rule should not be adopted.

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<sup>34</sup> *Kabab Ji*, [29].

<sup>35</sup> *Enka v Chubb*, [136] and *Kabab Ji*, [35].



**RESPONSE TO THE LAW COMMISSION'S CONSULTATION PAPER**

**REVIEW OF THE ARBITRATION ACT 1996 – SECOND CONSULTATION PAPER**

**INTRODUCTION**

- 1.1 Pinsent Masons is pleased to submit this Response to the Law Commission's Second Consultation Paper concerning its review of the Arbitration Act 1996 (the "Act") and welcomes the continued diligence with which the Commission is approaching its work.
- 1.2 We have set out our analysis and response to the issues raised in the Second Consultation Paper in this response. Given the comparatively brief nature of our response we do not summarise our views in this introduction or at the end of the document: instead, we begin our responses immediately below.

**THE LAW OF THE ARBITRATION AGREEMENT**

**Question 1 – We provisionally propose that a new rule be included in the Arbitration Act 1996 to the effect that the law of the arbitration agreement is the law of the seat, unless the parties expressly agree otherwise in the arbitration agreement itself. Do you agree?**

- 2.1 We have found this a difficult question but, on balance, we disagree with the Commission's proposal. We propose that the recent Supreme Court decisions in *Enka v Chubb*<sup>1</sup> and *Kabab-Ji SAL v Kout Food Group*<sup>2</sup> should remain as the English law authority on the law governing the arbitration agreement. We suggest that the Commission remains open to revisiting the issue as the effects of the decisions become clearer.
- 2.2 We think that the Supreme Court's decision in *Enka v Chubb* was consistent with the applicable principles of English law. However, the question before the Commission is not necessarily one of principle but of policy – the Commission is thus able to approach the default law of the arbitration agreement in an attempt to identify the most effective solution rather than being confined by existing rules of law. We approach the response to this question on that basis, and therefore do not address the reasoning in *Enka* or *Kabab-Ji*.

**A. Other Jurisdictions**

- 2.3 We assume that the calls for reform arise at least in part through the split decisions of the English and French courts in *Kabab-Ji*. In *Kabab-Ji*, the UK Supreme Court held that the law of the matrix contract applied (in this case, English law) while the French Cour de Cassation held that the law of the seat applies (in this case, French law).
- 2.4 A split in approach of two leading arbitral jurisdictions is unsatisfactory and may lead to forum shopping by litigants. However, English law adopting the same position as French law will not cure the lack of international harmony. The Commission notes at paragraph 2.38 of its paper that Singapore, Australia, and Hong Kong have endorsed the decision in *Enka* to some degree. The Supreme Court in *Enka* also notes international and national judicial support for its position.<sup>3</sup> We also

<sup>1</sup> *Enka Insaat Ve Sanayi A.S. v OOO Insurance Company Chubb* [2020] UKSC 38

<sup>2</sup> *Kabab-Ji SAL v Kout Food Group* [2021] UKSC 48

<sup>3</sup> At 55 – 58.



understand that the Courts of Türkiye have recently ruled that the law of the arbitration agreement is that of the matrix contract, following consideration of both the English and French positions.<sup>4</sup>

2.5 It would therefore be an error to adopt the law of the seat as the default choice in the expectation of the change bringing international harmony. While a change in approach in English law may have a persuasive effect in other jurisdictions, there will remain an element of discord at least for the short term.

**B. Our reasoning**

2.6 We think that the arguments for the default law of the arbitration agreement being the law of the seat are good ones. This would lead more arbitrations being governed by English law which will reduce the need to lead evidence on foreign law. England is a pro-arbitration jurisdiction its law has benefits to the efficient running and conduct of arbitrations which may not be available in foreign jurisdictions. As we are only concerned with a default choice then party autonomy is preserved to a large degree. Reform will not necessarily, but may, encourage international greater international harmony on an issue where there is currently a large degree of divergence.

2.7 However, the most compelling argument against the law of the seat being the default choice, and the one that tips the balance, is in privity of contract. Not all jurisdictions apply the strict form of privity of contract that English law does. It is possible to envisage a scenario where:

2.7.1 English law applies to the arbitration agreement as a result of the choice of seat. Therefore, the arbitration agreement only applies to the express contracting parties as a result of strict privity.

2.7.2 However, under the governing law of the matrix contract, there are a wider number of parties with claims or potential liabilities. Those parties will be required – or will be free – to litigate through the national courts.

This would create an unsatisfactory state of affairs which would increase costs for parties and create a risk of inconsistent decisions. We understand that this risk was alluded to by the Supreme Court at paragraph 53(ii) of *Enka*. In our view, this is a strong reason for not reforming this area of law.

**C. The Validation Principle**

2.8 The Commission's proposal is binary: where there is no express choice the law of the arbitration agreement is the law of the seat. We respectfully suggest that, if the Commission is not with us on not reforming this area of law then its proposal should be amended to provide for circumstances where the law of the seat will not apply.

2.9 In our view, the following circumstances require to be accounted for:

2.9.1 *There being no express choice of seat.* In such circumstances the rule as currently framed is unable to determine the governing law. While certain institutional rules provide for the institution to determine the seat in such circumstances<sup>5</sup> we submit that it is not appropriate for the choice of a third party to determine the governing law of parties' agreements. Such a mechanism would also be logically inconsistent with English law which holds such matters as decided at the outset of the agreement.

2.9.2 *The prospect of the law of the seat rendering the arbitration agreement invalid.* The validation principle is prevalent in the decision of *Enka* and it has sound logical basis: parties intend to enter valid agreements and thus if the application of one legal system

<sup>4</sup> Pelin Baysal, Bilge Kağan Çevik, Law Governing the Arbitration Agreement: Whose Side Are the Turkish Courts On? (Kluwer Arbitration Blog, 15 May 2023) (accessed on 17 May 2023 at <https://arbitrationblog.kluwerarbitration.com/2023/05/15/law-governing-the-arbitration-agreement-whose-side-are-the-turkish-courts-on/>).

<sup>5</sup> ICC Rules 2021, Article 18(1)



renders said agreement invalid then parties must not have intended it to apply. We acknowledge that there are limited, if any, circumstances in which an arbitration is capable of proceeding when the curial law would hold there to be no arbitration agreement. However, it seems wrong in principle to discount it in its entirety and the law as currently envisaged makes no allowance for doing so – it fetters the Courts' flexibility in dealing with novel circumstances and, we submit, does so unduly.

**D. Concluding remarks**

- 2.10 There has of course historically been a split of judicial opinion as to the default of the governing law of the arbitration agreement. That split is reflected in academic commentary on the issue. This is reflective of the good arguments on both sides of the debate, and these merits and demerits are why we have found this a difficult question. If the Commission decides to proceed with a default rule of the law of the seat then we do not think that this would cause great harm.
- 2.11 We do not consider there to be a need to codify the Supreme Court's decisions if the substantive law is not being changed.

**CHALLENGING JURISDICTION UNDER SECTION 67**

**Question 2 - We provisionally propose the following approach to a challenge under section 67 of the Arbitration Act 1996.**

**Where an objection has been made to the tribunal that it lacks jurisdiction, and the tribunal has ruled on its jurisdiction, then in any subsequent challenge under section 67 by a party who has participated in the arbitral proceedings:**

- (1) the court will not entertain any new grounds of objection, or any new evidence, unless even with reasonable diligence the grounds could not have been advanced or the evidence submitted before the tribunal;**
- (2) evidence will not be reheard, save exceptionally in the interests of justice;**
- (3) the court will allow the challenge where the decision of the tribunal on its jurisdiction was wrong.**

**Do you agree?**

- 3.1 We are grateful to the Commission for revisiting its proposals concerning the basis on which jurisdictional challenges under section 67 should be dealt with by the courts. In our view the original proposal to amend section 67 so that challenges would be take the form of an appeal instead of a rehearing presented a number of intellectual and practical difficulties in response to an issue which does not seem to have troubled the courts in any significant manner, or affected the status of London as a centre for arbitration.
- 3.2 However, despite the admirably well-presented commentary and arguments in Chapter 3 of the Second Consultation Paper, we remain unconvinced of the need for reform in respect of section 67. Moreover, whilst the amended proposals address certain concerns prompted by the approach to reform set out in the original Consultation Paper, in our view they give rise to other complications, the effect of which may well counterbalance any perceived benefit of restricting the basis of section 67 challenges.

**A. No Case for Reform**

- 3.3 In the first instance, and as we noted in our first response,<sup>6</sup> section 67 is rarely invoked. The figures cited by the Commission in its First Consultation Paper demonstrate that this provision does not

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<sup>6</sup> Paragraph 8.7.1.



result in routine challenges to awards, likely due (in part) to the strict criteria which a challenge must meet in order to be heard, and so section 67 is evidently not an obstacle to the rendering of enforceable arbitration awards in this jurisdiction.

- 3.4 Beyond referring to anecdotal evidence provided in response to its First Consultation Paper,<sup>7</sup> the Commission's Second Consultation Paper does not develop its reasoning as to the imperative for reform. It simply reiterates the point made previously that the duplication of jurisdictional objections between the arbitral and court processes leads to delay and cost. However, the Commission's Second Consultation Paper does not undertake any qualitative assessment between the advantages of section 67 and the perceived delay and cost which are said to be caused by this duplication. Indeed, we note that neither of the Commission's Consultation Papers give any significant consideration as to the advantages of a mechanism which allows for judicial oversight of decisions on jurisdiction, such as maintaining party confidence in the arbitral process by guarding against tribunal overreach and ensuring that only those disputes which the parties have agreed to arbitrate are determined by the tribunal.
- 3.5 Accordingly, in our view the Commission's amended proposals are a response to a case for reform which has not been made out. Reliance on issues of delay and cost which may arise – on the Commission's own evidence – in a "*tiny percentage of cases*"<sup>8</sup> to justify reform is insufficient, particularly in view of the fundamental issues of procedural propriety and party autonomy to which issues of jurisdiction relate, as set out in our response to the First Consultation Paper.<sup>9</sup> Cost and delay incurred in judicial processes – whilst undesirable – are to a certain extent the necessary consequences of engaging in an arbitral process which is subject to judicial controls intended to ensure the integrity of arbitration.

#### **B. The Commission's Amended Proposal**

- 3.6 The Commission's proposal set out in the Second Consultation Paper is for power to be conferred to make rules of court which implement an amended approach to the ability to challenge arbitral awards under section 67. In summary, the suggested approach would provide for certain limits on the nature of a section 67 challenge brought by a party who has participated in the underlying arbitral proceedings, including:
- 3.6.1 The exclusion of new grounds of objection, or new evidence, unless even with reasonable due diligence the new grounds or evidence could not have been advanced or submitted before the tribunal;
  - 3.6.2 The prohibition on the rehearing of evidence, unless exceptionally in the interests of justice; and
  - 3.6.3 A stipulation that the court will allow the challenge where the decision of the tribunal on jurisdiction was wrong.
- 3.7 In our view, this amended proposal results in the same outcome as the Commission's original proposal to provide that a section 67 challenge should be by way of appeal and not a rehearing. The proposed restrictions on section 67 challenges set out above are in effect a codification of the provisions of CPR 52.21 concerning the hearing of appeals, which provide that an appeal is limited to a review of the decision of the lower court unless, *inter alia*, the court "*considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a rehearing*". CPR 52.21 also prohibits the hearing of oral evidence or the introduction of new evidence unless the court orders otherwise, and will only allow an appeal where, *inter alia*, the decision of the lower court was wrong.

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<sup>7</sup> Paragraph 3.88.

<sup>8</sup> Commission's First Consultation Paper, paragraph 8.33.

<sup>9</sup> Paragraphs 8.2 – 8.6.



- 3.8 Therefore, the Commission's amended proposals would result in the courts being bound to treat section 67 challenges as if they are appeals limited to a review of the decision of the tribunal on its jurisdiction. Indeed, the Commission's amended proposal is more restrictive than the CPR provisions on the modalities of appeals. Whereas the latter gives the court the discretion to decide whether the interests of justice militate in favour of a rehearing and grants it a broad discretion as to issues of evidence, the Commission's proposal appears not to give the court any discretion as to whether to proceed with a review or a rehearing, and limits its discretion as to the circumstances in which new objections and / or evidence can be submitted.
- 3.9 Accordingly, we do not agree with the Commission's amended proposal. As set out above and in our first response, the issue of a tribunal's jurisdiction goes to the heart of the arbitral process, and so where there are justifiable doubts as to whether a tribunal has properly assumed jurisdiction, the consequences of jurisdiction having been wrongly accepted justify a full rehearing by the curial court. Moreover, as to the specifics of the Commission's amended proposals, we make the following comments:
- 3.9.1 First, we consider that the adoption of CPR-based provisions regarding appeals to section 67 challenges inapposite. Appeals from decisions of lower courts and challenges to decisions on jurisdiction from arbitral tribunals are qualitatively different actions. The latter are broadly concerned with judgments on the substantive issues in dispute and the lower court's determination of the legal issues. The former are concerned with the decisions issued by tribunals as to the antecedent – and fundamental – question of their ability to hear and determine the dispute that has been referred to them. In our view, the curial courts charged with supporting arbitration perform a different task when determining whether a tribunal has jurisdiction than an appellate court does when determining whether a lower court (whose jurisdiction to determine the dispute is usually never in doubt) has correctly applied the law to the issues in dispute.
- 3.9.2 Second, the proposed restrictions on the ability to adduce new arguments or evidence would prevent the court from being able to properly consider whether the tribunal's decision on jurisdiction was right or wrong. Questions of jurisdiction can be highly fact-sensitive, particularly issues regarding the extension of the arbitration agreement to third parties which can involve detailed consideration of a putative party's conduct. The prohibition on new arguments or evidence would mean that the court would be prevented from considering relevant facts, which could result in a tribunal's decision on jurisdiction being upheld in circumstances where evidence ruled inadmissible would result in a contrary finding. Given, as noted above, the fundamental importance of correctly establishing a tribunal's jurisdiction, the automatic exclusion of evidence risks the court rendering unjust rulings on section 67 challenges.
- 3.9.3 We do not consider that the parallels drawn by the Commission with the position of appeal courts on allowing new evidence and arguments are apt. Lower court proceedings from which appeals are made will have been conducted on the basis of common procedural rules as to both evidence and the opportunity for the parties to put their case. Moreover, the process by which the lower court interrogates the evidence and applies the law will be broadly common across every case. It is therefore appropriate for an appeal court to proceed from an assumption that each party has been given the same opportunity to put its evidence and its case, and that the lower court has reached its judgment having applied the law and procedure consistently as any other court would have done, and therefore accept the lower court's findings of fact without the need to undertake its own consideration of the evidence. However, given the significant discretion that each tribunal has to determine its own procedural rules (including as to evidence and the manner in which the parties present their case), there can arguably be no expectation of consistency from one tribunal's ruling on jurisdiction to another. The tribunal may be composed of arbitrators who are unfamiliar with the rules of evidence, or the procedural rules of evidence may be unclear or not followed consistently.



## Pinsent Masons

- 3.9.4 It is therefore unreasonable to assume that each section 67 challenge comes to the court with a decision on jurisdiction which has been reached following the same procedural and evidential rules such that the court can reasonably proceed to determine the challenge on the basis of the tribunal's findings of fact. Accordingly, the restrictions on the admission of new arguments and evidence – whilst appropriate in connection with proceedings from lower courts in which rules of procedure and evidence will have been consistently applied – are not in our view appropriate to the consideration of section 67 challenges.
- 3.9.5 Third, rather than preventing the incurrance of cost and delay, the Commission's proposals could well result in even more time and money being expended by parties. The first and second conditions which the Commission has proposed to attach to section 67 challenges would generate satellite arguments as to whether: (i) 'new' grounds of objection or evidence could have been advanced or submitted before the tribunal; and (ii) the interests of justice require that evidence is reheard by the court. A party challenging the tribunal's decision on jurisdiction will want to advance its strongest case, and so is likely to argue its entitlement to advance new arguments, adduce new evidence, and have existing evidence reheard, and so these satellite arguments will need to be disposed of by the court before it can then start considering the substance of the challenge.
- 3.10 In our view, the existing case management powers of the courts are adequate to address the principal concerns of delay and cost which appear to motivate the push for reform. We note the Commission's comments as to what it considers to be the difficulties in relying on case management powers in circumstances where a section 67 challenge is made by way of a rehearing and, as such, the parties "*should be free to introduce whatever evidence they wish*".<sup>10</sup> We disagree with this characterisation.
- 3.10.1 Parties are not generally unfettered in the nature and scope of the evidence that they are entitled to submit, and the court's ability to exclude evidence (which, as the Commission notes, is available in all hearings) is more than sufficient to prevent a party from gratuitously adducing irrelevant and / or untimely evidence.
- 3.10.2 Moreover, it seems to us that the risk of parties relying on the ability to challenge jurisdiction a second time and therefore another opportunity to "*more industriously*" locate evidence is overstated. In our experience, a well-advised party will always put forward its best case and evidence when seeking to challenge jurisdiction before the tribunal, as successfully challenging jurisdiction at an early stage will avoid the continued expenditure of costs in having the merits of the dispute determined by the tribunal.
- 3.10.3 We therefore see no contradiction in a challenge taking the form of a rehearing in circumstances where the court may exercise its case management powers in order to limit evidence where it deems it appropriate. Not only does the court have the inherent discretion to do so in other types of cases (including appeals, see CPR 52.21), but this scenario reflects the unique aspects of a section 67 challenge, including the fact that it is a challenge from a decision of a tribunal which has *prima facie* competence to determine its own jurisdiction.
- 3.10.4 We also see no issue with the fact that the prior hearing of the evidence on jurisdiction resulted in an award of no "*legal or evidential value*". However, we do agree with the Commission's proposal that the tribunal's decision on jurisdiction should be afforded some weight, given that it will have been rendered following a hearing of the evidence and – as noted above – by a tribunal which was entitled to rule on its own jurisdiction. We would propose that the decision on jurisdiction which is the subject of a section 67 challenge should be awarded some evidential weight, perhaps by the court treating the tribunal's findings of fact as rebuttable presumptions which the party bringing the section 67 proceedings would have to disprove in order to make out its challenge.

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<sup>10</sup> Paragraph 3.51.



**Question 3 - We provisionally propose that the Arbitration Act 1996 be amended to confer the power to make rules of court to implement the proposals in CQ2 above. Do you agree?**

3.11 For the reasons set out above, we do not agree.

**DISCRIMINATION**

**Question 4 – We provisionally propose that it should be deemed justified to require an arbitrator to have a nationality different from that of the arbitral parties. Do you agree?**

4.1 We strongly endorse the Commission's proposal that it should be deemed justified (i.e. non-discriminatory) to require that an arbitrator has a different nationality from the parties. Given the sense in this proposal we shall only state the reasons for our endorsement briefly: a purpose of international arbitration is to provide a neutral forum, part of ensuring neutrality is to be seen to be neutral, and requiring an arbitrator be of a different nationality to the parties is a legitimate aim in being seen to be neutral as it guards against parochialism (a major factor in the decision to avoid national courts).

4.2 However, we do think it sensible if the Commission was to define what an arbitral party is in this context to include direct and indirect parent companies. By way of example, it is not uncommon for one party to an arbitration to be a wholly owned special purpose vehicle of a foreign domiciled entity. The justifications for having the arbitrator be a different nationality that the parent – who is often in effect the controlling mind – apply with equal strength.

4.3 We have considered:

4.3.1 Whether arbitral parties requires to be defined as both parties to the arbitration and the arbitration agreement. We have in mind the circumstances where Party A and Party B are parties to the arbitration agreement and that agreement specifies that Nationalities A and B are prohibited (rather than a generally worded prohibition on the arbitrator being of the same nationality as the parties). Party A is then replaced with Party C however due to an oversight in the drafting Nationality A remains prohibited. We think that rendering the prohibition on Nationality A voidable in such circumstances is acceptable as there is likely to be little, if any, continuing objection to using Nationality A as an arbitrator. We therefore conclude that this is not necessary.

4.3.2 Whether provision requires to be made for prohibiting an arbitrator from the place of the performance of the contract, assuming that is significant (e.g. the project is a significant local employer or nationally significant infrastructure). We consider that any such provision would be difficult to word in the circumstances and uncertain in its application. We therefore conclude that this is not advisable.

**Question 5 – Do you think that discrimination should be generally prohibited in the context of arbitration?**

4.4 We agree that discrimination should be prohibited across the entirety of the arbitral process.

4.5 At paragraph 4.1 of our first submission we explain that the principles of exclusivity and diversity are fundamental principles that must be observed by all individuals as a matter of public policy. The statutory prohibition on discrimination by the Commission furthers this aim. We do not, however, consider that the Commission is taking a radical step; we agree that an arbitrator who engages in discrimination would likely be liable to be removed pursuant to s.24 of the Act as there would be justifiable doubts to their impartiality and the award could be liable to challenge on the basis of serious irregularity under s.68 of the Act.





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### **Question 6 – What do you think the remedies should be where discrimination occurs in the context of arbitration?**

- 4.6 As noted above, our view is that the Act already contains remedies for discrimination: an arbitrator who acts in a discriminatory manner is at risk of being removed pursuant to s.24 or their award being overturned on the basis of a serious irregularity pursuant to s.68.
- 4.7 Those remedies are, however, insufficient. The victim of discrimination may not be appointed as arbitrator, may be the successful party, or may be an independent expert who will experience little personal restitution if the award is overturned. Therefore, we think it necessary for the Act to provide for a remedy of compensation and declaration of discrimination also.

**Pinsent Masons LLP**

**26 June 23**

Submitted to Law Commission second consultation on the Arbitration Act 1996  
Submitted on 2023-05-19 13:33:15

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## Proper law

### Consultation Question 1

Yes

Please give your reasons::

We agree that this would be a very welcome addition and clarification of English arbitration law, and would reduce the scope for disputes in the future.

We note that in the last few years there have been a number of high profile, but somewhat inconsistent decisions, made by national courts addressing the governing law of the arbitration agreement.

Setting out a clear answer to this issue under English law will avoid unnecessary and avoidable disputes about what is a largely academic issue. Further, the proposal preserves party autonomy, as the parties remain free to agree a different governing law of the arbitration agreement.

There is also some concern about the *Enka v Chubb* solution, which arguably has several flaws, including the relative uncertainty of its conflicts of law approach.

With this being said, it is worth considering whether the proposal directly to provide for the law of the seat to govern the arbitration agreement (unless the parties expressly agree otherwise in the arbitration agreement itself) will necessarily achieve the best outcome.

One aspect, which is not clear in the proposed reform, is how the new proposed rules would apply in the event of enforcement in England of an arbitral award issued by a foreign-seated tribunal. A number of problems with *Enka v Chubb* are identified in the 2nd Consultation Paper, however No mention is made of the important question as to who is party to the arbitration agreement in question. English law tends to take a restrictive approach to this question, whereas some jurisdictions, like France, take a wider view.

We query whether, with the new rule in place, an English court would be bound to recognise the decision and jurisdiction of, for example, a French seated tribunal that has found certain non-signatories to be party to the arbitration agreement, applying the law of the seat to that question in the absence of

express choice of another law, and having issued its award accordingly? Logically, the new rule should lead to recognition of such an award if the tribunal has correctly applied French law, and irrespective of what the law applicable to the matrix agreement may have to say on the matter. So, recognition should follow even if the matrix agreement is governed by English law, and even though English law might have led to a different outcome as to who were parties to the arbitration agreement. If one is to adopt a new rule, not only is such recognition the logical outcome, but it is also the desirable outcome. Subject to public policy considerations, one would presumably not wish *Enka v Chubb* to apply by the back door to enforcement proceedings to disturb an award which is valid under the law of its seat. The new rule is intended to prioritise English law for English seated arbitrations over the law applicable to the matrix agreement, reversing *Enka v Chubb*. The new rule should apply equally to enforcement of awards issued by foreign seated tribunals. If it does then, logically, the Supreme Court decision in *Kabab-Ji* would, like *Enka v Chubb*, be reversed by the proposed new rule.

No legislative provision can avoid the risk, experienced by the protagonists in *Dallah v Pakistan*, where the English courts came to findings on French law applicable to the arbitration agreement that were different to the findings on French law made by the French courts themselves. But the new rule should, one would think, apply to enforcement of foreign awards as much as to England seated arbitrations, to maintain a level playing field under English arbitral process. It would also be consistent with Article V of the New York Convention. It may be that some cross-referencing to Section 103 of the Arbitration Act is necessary to ensure a level playing field here.

If the proposal is adopted in the reform, will English courts also apply the exceptions determined in *Enka Chubb*, in particular, "where there is a serious risk that the chosen law might render the arbitration agreement invalid, or not binding on one party (according to the majority) of reduced scope – this is known as the 'validation principle'" (see §2.14)?

It is worth noting that under French arbitration law, the "validation principle" constitutes the core of the regime of the arbitration agreement, and French case law has developed a substantive rule (*règles matérielle*) of the validity of the arbitration agreement.

Finally, the proposed wording of the expression of party autonomy should be praised as it explicitly requires that the parties' choice of law be "in the arbitration agreement itself." This removes any discussion about where the parties' choice must be found and whether a choice of law in the matrix contract could be seen as a choice of law of the arbitration agreement (see *Kabab-Ji* decision).

## Section 67

### Consultation Question 2

Other

Please give your reasons::

Ultimately, we believe this point is finely poised and are therefore unable to firmly support or oppose the proposal as a whole. 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.

#### VIEWS SUPPORTING PROPOSED APPROACH

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

While the arbitral tribunal's decision on jurisdiction must be subject to an a posteriori control from state courts, this control should not be too broad. In particular allowing the judge to hear completely new evidence, other than for exceptional cases, constitutes an excessive constraint on arbitrators and the arbitral process, and is arguably inconsistent with the principle of finality in international arbitration.

Further, the data show that section 67 challenges, which are presently considered de novo by the court, overwhelmingly fail. Conducting such challenges on de novo basis involves considerable expense for parties, who have to re-argue issues that have already been argued before and determined by a tribunal. A cost-benefit analysis of the current state of play suggests that the costs and time taken by de novo reviews of challenges under section 67 may be disproportionate to the objectives of section 67.

From a comparative law perspective, we note that French law has taken for many years the "full control" (or de novo rehearing) route and Swiss law has adopted a more balanced approach where the judge will focus on the tribunal's decision only. We consider this latter position as being more supportive of arbitration.

However, those supporting the proposed in principle also raised a concern as to the language of the proposed paragraph (1), which seems to pre-empt the challenging party proving a negative and where the language could possibly be clearer. The following amendment was suggested: "the court will not entertain any new ground of objection, or any new evidence, unless the challenging party can establish that the new ground of objection or new evidence was not advanced or submitted before the tribunal despite it having exercised reasonable diligence."

#### VIEWS OPPOSING THE PROPOSED APPROACH

On the other hand, others believe that it is a crucial safeguard to the ultimate fairness of the overall process to ensure that the state courts have unfettered jurisdiction over any decision of the tribunal as to its own jurisdiction, which requires them to be able to approach the issue by way of a de novo review / rehearing.

### Consultation Question 3

No

Please give your reasons::

As explained in our answer to Question 2 above, we were unable firmly to support or oppose the proposed reform in the first place, as we believe this point is finely poised.

However, to the extent the reform is adopted, the prevailing view is that the reform should be implemented directly in the Arbitration Act 1996. This is dictated by two concerns:

1) The proposed reform would mark a significant development, putting the English Arbitration Act at the forefront of modern arbitration laws, however the impact of the reform – or at least the perception of its impact – could potentially be lessened by embedding it in the rules of court instead of the Act itself.

2) Perhaps more importantly, it is concerning that the relevant rules of court could then change over time (as suggested in the 2nd Consultation paper - §3.126). Arbitration stakeholders need certainty and implementing such reform with a potentially “variable geometry” is not desirable.

## Discrimination

### Consultation Question 4

No

Please give your reasons::

We do not think that the parties should be prevented from requiring an arbitrator to have a nationality different from that of the arbitral parties.

Put another way, we think the parties to the arbitral agreement should be at liberty to agree that an arbitrator should have a nationality different from that of the arbitral parties.

Arbitration is a product of the parties' consent. It is unanimously recognised that one of the advantages users seek when choosing arbitration as a dispute settlement mechanism is flexibility. Imposing a criterion of nationality in the arbitration law itself does not seem to be the best way to strengthen one of the most important features of arbitration.

If the parties wish to avoid the possibility of having arbitrators of the same nationality as the parties, they should be allowed to provide for this restriction in the arbitration agreement (directly or by reference to arbitration rules providing for such possibility).

That said, we accept that the proposed rule would be more justified in relation to sole or presiding arbitrators. Arbitration is often selected by parties because neither party wishes to have disputes determined by the national courts of the other party. Reflecting this, it is common (and best) practice in international arbitrations that a sole or presiding arbitrator does not have the same nationality as one of the parties, unless the party that is not of the same nationality as the arbitrator and the other party agrees. This avoids the perception that one party has obtained a ‘home field’ advantage. It is likely that very few international arbitrators would be partial to a party based solely on a shared nationality. Nevertheless, the rules and the practice set out above serve an importance purpose, by avoiding the appearance of bias or potential bias (much like choosing referees or umpires of neutral nationality in certain international sports fixtures / competitions).

This is also reflected in many of the arbitration rules of leading arbitration institutes (such as the LCIA), which rules provide that a presiding or sole arbitrator may not have the same nationality as one of the parties, unless the party that is not of the same nationality as the arbitrator and the other party agrees. If the Arbitration Act prohibited such nationality restrictions, there would be conflict between the Act and the arbitration rules of leading arbitration institutes. This would likely be disruptive, and might potentially (at least in theory) be used by dissatisfied award debtors to seek to challenge awards.

The nationality restriction in institutional arbitration rules can be waived by the party whom they are to protect. Indeed, we often encounter parties who are prepared to waive nationality requirements, usually in respect of a presiding arbitrator, where a party wishes to nominate jointly a particularly individual as presiding arbitrator notwithstanding that the individual holds the same nationality as the other party.

The considerations set out above do not apply to the same degree with respect to co-arbitrators. There is less risk of the appearance of bias with co-arbitrators, as they are not the sole or most influential decision-maker on the tribunal, and the nationality restrictions that apply to presiding arbitrators serve as a counterbalance where parties nominate a co-arbitrator of the same nationality as the party, and we would note that the arbitration rules of several leading arbitration institutes reflects that distinction.

We therefore think that it is particularly important that (if there is a change to the current position) then it should not apply to party-appointed arbitrators as it is frequent in practice (and legitimate) that parties appoint co-arbitrators of their own nationality. However, even for sole arbitrators and presidents of an arbitral tribunal, as indicated above, there seems to be no compelling reason to impose a new and unique rule going to the arbitral tribunal's constitution.

### Consultation Question 5

Other

Please give your reasons::

As a firm we are strongly opposed to discrimination of any kind and firmly advocate that discrimination should be denounced and discouraged in any context, including arbitration.

However, whether a new formal prohibition should be enacted is a different question, which relates to the existing available remedies and how such a prohibition would be enforced in practice.

As indicated in the 2nd Consultation Paper, there are already arbitration-related remedies such as removal of the arbitrator under section 24 of the Arbitration Act 1996, and challenge to an award for serious irregularity under section 68 (see §4.22) including because of breach of section 33. We believe that these well-established existing remedies are the simplest and best way to deal with discrimination in the context of arbitration.

We note in this context that it would be difficult to enforce any novel anti-discrimination measures in practice in international arbitrations. Most arbitrations are private and confidential. It is therefore unclear how one would effectively police anti-discrimination measures without breaching that privacy and/or confidentiality, unless there was a specific carve-out allowed to confidentiality / privacy to permit victims of discrimination to pursue claims for discrimination. That would then potentially raise the question of whether other matters should also come within the scope of a similar carve-out.

A further concern is whether a dissatisfied award debtor may be encouraged by changes in statute baselessly to contend that an award is tainted because of discrimination. In that context, we have previously observed parties to an arbitration making (groundless) complaints to an arbitral institution after an arbitration was over, asserting that the respective tribunals had discriminated against them on the basis of their nationality, ethnicity and/or religion.

Given the above, we do not think it is beneficial to create new specific remedies to address discrimination in the context of arbitration (beyond the existing arbitration-related remedies, as listed in the 2nd Consultation Paper).

#### Consultation Question 6

Please give your answer::

Where discrimination occurs in the context of arbitration we think that the remedies should be the removal of an arbitrator under section 24 of the Arbitration Act 1996 or by use of the existing mechanism to challenge an award for serious irregularity under section 68 of the Act.

Submitted to Law Commission second consultation on the Arbitration Act 1996  
Submitted on 2023-05-19 10:01:58

## 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?

[REDACTED]  
[REDACTED]

What is your telephone number?

[REDACTED]  
[REDACTED]

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Tell us why you regard the information as confidential:

## Proper law

Consultation Question 1

Yes

Please give your reasons::

We agree with the proposal. Given the apparent complex solution established by the Supreme Court in *Enka v. Chubb* [2020] UKSC 38, the approach proposed by the Law Commission is practical, it enables certainty, and it would underpin the principle of party autonomy.

## Section 67

Consultation Question 2

Yes

Please give your reasons::

RICS believes that the success of arbitration in the built environment has often been because arbitrators have been able to quickly and decisively rule on jurisdictional challenges. We believe the proposed reforms can work to deter jurisdictional challenges which are spurious or ill-informed and provide effective review where there is need to ensure the interests of justice are served and/or arbitrators have clearly erred in their decisions on jurisdiction.

Consultation Question 3

Yes

Please give your reasons::

We agree with the Law Commission's approach in principle, i.e. to reform court rules. We are nevertheless aware that there is likely to be mixed views expressed by those who respond to this proposal, and we would thus suggest that consideration is given to a mechanism by which this proposal could be trialled and modified if necessary.

## Discrimination

### Consultation Question 4

Yes

Please give your reasons::

RICS appoints several thousand arbitrators each year to resolve disputes in the built environment. Almost all of our appointments are in the context of domestic matters, i.e. where both parties are located in the same jurisdiction. It follows that we are not normally faced with appointing arbitrators where the parties are from different nations.

We appreciate that in the context of international arbitration, the nationality of the tribunal is often a requisite for ensuring the perception of neutrality, and the practice of requiring a different nationality is common practice. In the light of this, we agree that it would be deemed justified to require an arbitrator to have a different nationality to the parties, when the arbitration has an international context and the parties are from different nations.

### Consultation Question 5

Yes

Please give your reasons::

RICS is committed to the promotion of diversity, and this extends to boosting equality in the field of arbitration. We believe that fighting against discrimination should not merely focus on numbers and/or prohibitive policies, and that it should be part of a hearts and minds cultural movement across the industry.

We believe that parties should not be able to challenge the appointment of an arbitrator on the basis of the arbitrator's race or other protected characteristic unless the arbitration legitimately requires an arbitrator to possess a protected characteristic, for one example, a native of a country where both parties are located and require someone who fluently speaks a language or regional argot.

### Consultation Question 6

Please give your answer::

We submit that there are already remedies in place under the Arbitration Act that can be drawn on to address instances of discrimination, e.g. the right to challenge on the basis of procedural irregularity.

Where discrimination demonstrably occurs, challenges should lead to the removal of arbitrators and prevent enforcement of their awards on the grounds that enforcement would be contrary to public policy.

Submitted to Law Commission second consultation on the Arbitration Act 1996  
Submitted on 2023-03-28 18:05:28

## 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?

[REDACTED]  
[REDACTED]

What is your telephone number?

[REDACTED]  
[REDACTED]

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Tell us why you regard the information as confidential:

## Proper law

Consultation Question 1

Yes

Please give your reasons::

I should say at once that my experience is only with small domestic arbitrations in the construction industry - I am a chartered architect. Where I am involved there has never been any question that the law of the agreement and the seat are the same. All I can say is that if it were any different I can only see that it would lead to unnecessary complication, so I agree with this proposal.

## Section 67

Consultation Question 2

Yes

Please give your reasons::

I have ruled on many challenges to my jurisdiction, the outcome usually confirming that I have it. I have always given my reasons and none of my decisions has ever been challenged. Therefore I have no experience of an s.67 challenge. Nevertheless I agree with your 3 proposals, for they will strengthen the initial decision without closing off a fair and justified escape.

One circumstance that I have come across on several occasions is that after making a positive ruling on jurisdiction, the respondent withdraws and then applies the common law right to take no further part in the arbitration. I am curious to know whether making representations for the purposes of s.30 (only) would preclude an appeal under s.72. (NB. Notice the words "first step" in s.31(1)). The conceptual issue is whether a respondent will, as a result of you 1st proposal, be forced to take part in the arbitration willy-nilly, with the attendant cost of doing so.

Consultation Question 3



Other

Please give your reasons::

Not sure, bearing in mind my answer to CQ2.

## Discrimination

### Consultation Question 4

Other

Please give your reasons::

No view on this, but clearly it should only apply where the parties are of differing nationalities.

### Consultation Question 5

Yes

Please give your reasons::

In construction arbitrations, a site visit is frequently necessary. A construction arbitrator should be capable of climbing a ladder. I make no comment on other forms of discrimination (gender, sexual orientation, etc.) except to say that the provisions of the Equalities Act should generally apply to all UK legislation unless for good reason, and there is none here.

### Consultation Question 6

Please give your answer::

Tis is a really tricky one, but I think that such a remedy could not be imposed by the arbitrator. It should be the court or, if the court is reluctant to entertain such a duty, then the arbitral appointing authority.

Submitted to Law Commission second consultation on the Arbitration Act 1996  
Submitted on 2023-03-27 21:49:49

## 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?

[REDACTED]  
[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.

Tell us why you regard the information as confidential:

## Proper law

### Consultation Question 1

Yes

Please give your reasons::

Yes, absolutely. The presumed alignment between the law of the seat and the law governing the arbitration agreement should always have been part of English law which seems to have gone astray in Enka and Kabab-Ji.

Parties think that when they agree to arbitrate in a particular location, it is that country's arbitration law that will govern what happens and that must extend to questions of the interpretation of the arbitration agreement. Even where no choice is made, the parties lay themselves at the mercy of the institution selected or tribunal itself to select the seat and create the applicable law for them.

Only where parties decide consciously to select another law to govern the arbitration agreement, should this rule be displaced.

## Section 67

### Consultation Question 2

No

Please give your reasons::

No. A tribunal without jurisdiction cannot give itself jurisdiction (and the power to earn remuneration from this fact) by making errors of either fact or law. It is a matter for any court to determine the type of evidence that it considers will assist in reaching the correct result. An arbitral tribunal whose jurisdiction is being questioned has no status sufficient to influence a court and its findings should have no such effect. There is no evidence that the law in England requires changing. The Arbitration Act is complex enough without acquiring further wrinkles of this type.

### Consultation Question 3

No

Please give your reasons::

See my answer to the previous question

### Discrimination

#### Consultation Question 4

Yes

Please give your reasons::

This may be politically necessary at this time considering the requirements of arbitration organizations to base appointments on nationality.

#### Consultation Question 5

Yes

Please give your reasons::

Discrimination on grounds of race, religion, colour, creed, disability, sex and sexual orientation should always be generally prohibited unless strong justification to the contrary is shown.

One can just about tolerate discrimination where parties have actively selected a religious tribunal which practices such generally unacceptable behaviour. That, though, is the limit. Even then, one should be concerned about the risks of coercion being applied to the weaker party to submit to such an unacceptable jurisdiction.

#### Consultation Question 6

Please give your answer::

As suggested, excision of the offending feature of the clause is the obvious solution and the one correctly found by the Court of Appeal in *Jivraj v Hashwani*.

**From:** [Scherer, Maxi](#)  
**To:** [Tamblyn, Nathan](#)  
**Subject:** Comment on Second Consultation paper  
**Date:** 22 May 2023 18:28:51  
**Attachments:** [Scherer and Jensen - 2022 - Of Implied Choices and Close Connections Two Perv.pdf](#)  
[Scherer and Jensen - 2021 - The Law Governing the Arbitration Agreement A Com.pdf](#)  
[Scherer and Jensen - 2021 - Towards a Harmonized Theory of the Law Governing t.pdf](#)

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Dear Nathan,

Many thanks for your email and the follow-up on the second consultation paper.

I am glad (and somewhat relieved) that the Commission now intends to include an express provision on the law governing the arbitration agreement in the Act. In my view, this is a welcome development to avoid the unnecessary complications of Enka etc. (see my previous articles, attached) and to make the UK a more attractive arbitration place.

I wonder though whether the suggested formulation of the new rule (“the law of the arbitration agreement is the law of the seat, **unless the parties expressly agree otherwise in the arbitration agreement itself**) is sufficient to do away with any remaining uncertainties. Governing law clauses (regarding substantive matters) are often included in the arbitration agreement. See eg LCIA recommended clauses [https://www.lcia.org/dispute\\_resolution\\_services/lcia\\_recommended\\_clauses.aspx](https://www.lcia.org/dispute_resolution_services/lcia_recommended_clauses.aspx) Therefore there could be a risk that some “hard-liners” in favour of a contractual approach would read the new rule as allowing that an express choice of the law **regarding the contract in the arbitration agreement** be read as an express choice of law regarding the arbitration agreement.

Maybe another formulation such as “**unless the parties expressly choose a law governing the arbitration agreement**” would ensure more clarity.

Congratulations again on conducting this exercise so expertly !

With best wishes

Maxi

**Professor Dr Maxi Scherer, LL.M.**  
**Wilmer Cutler Pickering Hale and Dorr LLP**  
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**From:** Tamblyn, Nathan [REDACTED]  
**Sent:** 15 March 2023 10:33  
**To:** Scherer, Maxi [REDACTED]  
**Subject:** Law Com / Arbitration

**EXTERNAL SENDER**

We write with an update on our project reviewing the Arbitration Act 1996.

We received many responses to our consultation paper, and we have read them all with interest. We are grateful to consultees for sharing their views with us. In light of those responses, we have decided that it would be profitable to publish a second consultation paper discussing the proper law of an arbitration agreement. We seek to publish this second consultation paper as soon as possible within the coming weeks. We will write again announcing its publication.

Best wishes,

Nathan

**Nathan Tamblyn** | [Law Commission](#)  
Lawyer | Commercial and Common Law Team

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**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”<sup>1</sup>*

**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*

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<sup>1</sup> 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.*”<sup>2</sup>

Spotlight on Corruption<sup>3</sup> (“**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 arbitrations<sup>4</sup>. 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 force<sup>5</sup>.

English common law has accepted<sup>6</sup> 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”<sup>7</sup>. 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**

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<sup>2</sup> *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

<sup>3</sup> Spotlight on Corruption is registered as a charitable company. Charity Number (England and Wales) 1185872. Company number 1212348.

<sup>4</sup> *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*”

<sup>5</sup> 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

<sup>6</sup> E.g. *Ali Shipping Corporation v Shipyard Trogir* [1998] 2 All ER 136; [1999] 1 WLR 314 [326]

<sup>7</sup> 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.<sup>8</sup>

### **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*”<sup>9</sup> that a higher degree of transparency will drive users away to other jurisdictions. As also discussed in the Consultation paper, the examples of other

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<sup>8</sup> The Economic Crime (Transparency and Enforcement) Act 2022

<sup>9</sup> *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.<sup>10</sup>

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 grounds<sup>11</sup> or where a court deals with a challenge to an award for serious irregularity.<sup>12</sup>

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 law<sup>13</sup> 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.<sup>14</sup> It is inherently unsatisfactory for the courts to have to interpret legislative intentions where the legislature itself has declined to set out

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<sup>10</sup> *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

<sup>11</sup> *Westacre Investments Inc v Jugoimport-SDRP Holding Co Ltd* [1999] EWCA Civ 1401; [2000] QB 288

<sup>12</sup> *Lesotho Highlands Development Authority v Impregilo SpA and Others* [2002] EWHC 2435 (Comm); [2003] 1 All ER (Comm) 22 [2005] UKHL 43

<sup>13</sup> *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)

<sup>14</sup> 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.”<sup>15</sup>

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.<sup>16</sup> 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 corruption<sup>17</sup> 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**

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<sup>15</sup> *Burke v Central Independent Television Plc* [1994] EWCA Civ J0209-2

<sup>16</sup> 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.

<sup>17</sup> 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.<sup>18</sup> 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 concerns<sup>19</sup> and would incentivise them to comply with their overriding duty to issue an enforceable award.<sup>20</sup> 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.*"<sup>21</sup>

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.

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<sup>18</sup> Todd Tucker, 'Inside the Black Box: Collegial Patterns on Investment Tribunals' (2016) 19 Journal of International Dispute Settlement 190.

<sup>19</sup> Especially on a *sua sponte* basis where they have not been raised by the parties

<sup>20</sup> Under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958

<sup>21</sup> Consultation Paper, para 2.2



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22 May 2023

### By email

Law Commission

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### Comments on the Law Commission's Review of the Arbitration Act 1996

As international practitioners with significant experience in arbitrations seated in many jurisdictions including England and Wales and under various institutional and *ad hoc* arbitration rules, we welcome the Law Commission's review of the Arbitration Act 1996. We also commend the Law Commission for the diligent and thoughtful way in which the review and consultation process has been conducted so far. Having had the opportunity to review the Law Commission's proposals, we set out below our comments and suggestions concerning the questions posed in the Law Commission's Second Consultation Paper.

The comments and suggestions below represent the authors' views and should not be taken to reflect the views of the firm as a whole or any of its clients.

**Question 1: We provisionally propose that a new rule be included in the Arbitration Act 1996 to the effect that the law of the arbitration agreement is the law of the seat, unless the parties expressly agree otherwise in the arbitration agreement itself. Do you agree?**

We agree with the Law Commission's provisional proposal and make four observations.

*First*, the Law Commission identified several reasons in favour of reform at paragraphs 1.19-1.25 and 2.48-2.61 of its Second Consultation Paper. Of these, we consider the most compelling reason to be that the conflicts-of-law approach in *Enka v Chubb* remains open to interpretation, and results in unnecessary complexity and uncertainty for arbitration users, thereby exacerbating disputes. The simplicity of the Law Commission's proposed default rule is to be welcomed.

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**Second**, the reason for reform given in paragraphs 2.57-2.58 of the Second Consultation Paper presupposes that arbitrability is determined by the law of the arbitration agreement. We consider the legal position on this issue to be unsettled under English law. Arguments can be made that arbitrability should be governed by various laws, including the law of the seat, the governing law of arbitration agreement, the law of the jurisdiction where enforcement will be sought, or some combination of them. The only case that we are aware of that has addressed this point directly is the recent Singaporean case of *Anupam Mittal v Westbridge Ventures II Investment Holdings* [2023] SGCA 1, in which the Singapore Court of Appeals considered that the dispute must be arbitrable under the law of the seat *and* the law governing the arbitration agreement in order to proceed to arbitration in Singapore.<sup>1</sup> We do not express an opinion on the correctness of this approach, or whether the legal position in England and Wales is the same. Rather, we merely observe that it should not necessarily be assumed that the Law Commission’s provisional proposal would avoid the application of a foreign law’s restrictive approach to arbitrability, as appears to be suggested at paragraphs 2.57-2.58. Equally, it should not necessarily be assumed that the argument against reform at paragraph 2.69 is sound.<sup>2</sup>

**Third**, there seems to be an assumption made in paragraphs 2.54-2.56 of the Second Consultation paper that section 7 on separability might be disapplied by operation of section 4(5) where a foreign law is chosen for the matrix contract that does not respect the principle of severability, thus invalidating the agreement to arbitrate. This assumption is arguably in tension with the majority position in *Enka v. Chubb* on separability and its practical implications. The majority noted that in such circumstances, the validation principle would operate to shift the presumption of the law governing the arbitration agreement to the jurisdiction with the closest connection thereto (i.e., in almost any conceivable scenario, the seat of arbitration).<sup>3</sup> The court in *Enka v Chubb* did not purport to displace this principle, and so the Law Commission’s proposal would not change this state of affairs with regard to separability.

**Fourth**, while there is no uniformity of approach across jurisdictions, the Law Commission should take comfort that its provisional proposal is consistent with the approach taken in Article

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<sup>1</sup> *Anupam Mittal v Westbridge Ventures II Investment Holdings* [2023] SGCA 1, paras 48, 52.

<sup>2</sup> Law Commission’s Second Consultation Paper, paragraph 2.69 (“A further argument against reform might be put as follows. As noted above, the law of England and Wales is generous when it comes to questions of arbitrability and scope. Foreign law might be more restrictive. However, there could be sound public policy reasons why that foreign law is more restrictive. We would not want our arbitration law to be viewed as something analogous to money laundering, as a means of circumventing foreign public law duties.”)

<sup>3</sup> *Enka v. Chubb*, paras 101-105. The court cited to *Sulamerica*, in which the parties had expressly included a Brazilian choice of law clause, and an exclusive Brazilian-court jurisdiction clause in the matrix contract. Regardless of those clauses, the court held the arbitration agreement was governed by the law of the seat (English law) because Brazilian arbitration law would have negated the binding nature of the arbitration agreement and, considering this risk, the parties could not have intended for it to govern the arbitration agreement.

V(1)(a) of the New York Convention, as well as (we understand<sup>4</sup>) the approach taken in several jurisdictions, including for example Sweden, Hong Kong,<sup>5</sup> China,<sup>6</sup> and Germany.

**Question 2: We provisionally propose the following approach to a challenge under section 67 of the Arbitration Act 1996. Where an objection has been made to the tribunal that it lacks jurisdiction, and the tribunal has ruled on its jurisdiction, then in any subsequent challenge under section 67 by a party who has participated in the arbitral proceedings: (1) the court will not entertain any new grounds of objection, or any new evidence, unless even with reasonable diligence the grounds could not have been advanced or the evidence submitted before the tribunal; (2) evidence will not be reheard, save exceptionally in the interests of justice; (3) the court will allow the challenge where the decision of the tribunal on its jurisdiction was wrong. Do you agree?**

We agree that this reform is sensible and, in our experience, consistent with the expectations of most users of international arbitration. This is particularly so given that, even in those jurisdictions where national courts adopt a *de novo* review of jurisdictional awards, that review is often far more circumscribed in terms of length and scope than currently occurs in English courts under section 67.

At paragraphs 1.46-1.47 of its Second Consultation Paper, the Law Commission rightly acknowledges the importance of the internationally recognised principle of competence-competence. We would merely reiterate that, whatever reform the Law Commission may eventually recommend (whether or not aligned with the provisional proposal in Question 2), it is essential that the principle of competence-competence is not eroded or seen to be eroded.

**Question 3: We provisionally propose that the Arbitration Act 1996 be amended to confer the power to make rules of court to implement the proposals in CQ2 above. Do you agree?**

We agree with this provisional proposal.

**Question 4: We provisionally propose that it should be deemed justified to require an arbitrator to have a nationality different from that of the arbitral parties. Do you agree?**

We note that this proposal is premised on the Law Commission adopting the provisional proposal in its First Consultation Paper that “a term be unenforceable which requires an arbitrator to be appointed by reference to a protected characteristic, unless that requirement can

<sup>4</sup> Florian Quintard, *A global view of the law applicable to an arbitration agreement*, Outlaw Analysis (11 February 2021), available at <https://www.pinsentmasons.com/out-law/analysis/a-global-view-law-applicable-arbitration-agreement>.

<sup>5</sup> On the basis of the article cited in footnote 4, we understand that, while there is room for doubt, Hong Kong conflict of laws rules would apply, and under those rules the law governing the arbitration agreement would be the law of the seat absent contrary agreement, even where the matrix contract referred to a different governing law.

<sup>6</sup> See Law of the People's Republic of China on Choice of Law for Foreign-related Civil Relationships, article 13.

be justified as a proportionate means of achieving a legitimate aim”.<sup>7</sup> Since we did not previously set out our views on this first-consultation proposal, we do so now before responding to Question 4.

#### First-consultation proposal

There is no question that discrimination is unacceptable, and that lack of diversity in arbitrator appointments is a significant issue. While we applaud the Law Commission’s desire to redress this issue, we have reservations about whether unilateral legislative reform is the correct approach.

From our vantage point, the first-consultation proposal is a solution in search of a problem. In our collective experience of international arbitrations based on contracts and investment treaties, we have never encountered any arbitration agreement that has discriminated by reference to a protected characteristic other than nationality. (We set out our views on nationality-based discrimination below.)

We do not ignore the fact that agreements containing discriminatory arbitrator qualifications may exist. The arbitration agreement in *Hashwani v Jivraj* is, of course, one such example. And we are aware that some older forms of arbitration agreements in England required arbitrators to be “commercial men”. However, to the extent that discriminatory qualifications in arbitration agreements do exist and are not susceptible to an expansive interpretation, we believe they are increasingly the exception rather than the norm. Moreover, even for contracts that expressly refer to discriminatory qualifications (which we believe to be exceptional), the first-consultation proposal would only apply if one party seeks to escape that prior agreement and the other party was attempting to enforce it. If parties wish their dispute to be resolved by individuals with religious authority (be it Ismaili, as in *Jivraj*, or the law of the Beth Din), which is a practice that amongst some communities goes back centuries, then it isn’t clear that there should be a legislative intervention to prohibit it.

Given this, while the first-consultation proposal is well-intentioned, we do not expect it to make a material improvement to the diversity statistics cited at paragraph 4.4 of the Law Commission’s First Consultation Paper or to further the goal of “end[ing] discrimination against people on the grounds of their protected characteristics”.<sup>8</sup> In our view, the principal source of the diversity problem lies not in discriminatory arbitration agreements, but in non-diverse appointments.<sup>9</sup> Our views on that issue are set out in response to the next consultation question.

Conversely, in the exceptionally rare circumstances that the first-consultation proposal is invoked, it could give rise to several uncertainties and unintended consequences in the

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<sup>7</sup> Law Commission’s Second Consultation Paper, ¶ 4.1.

<sup>8</sup> Law Commission’s Second Consultation Paper, ¶ 4.35.

<sup>9</sup> Law Commission’s Second Consultation Paper, ¶ 4.19.

arbitration process that, instead of protecting the persons discriminated against, would benefit parties that seek to disrupt and delay the arbitration process. We offer two examples.

**First**, an obstructive party could exploit the opportunity created by the first-consultation proposal in order to argue about the impropriety of the opposing side's and/or arbitral institution's appointment of an arbitrator in disregard of the expressly agreed qualifications, and this argument could be repackaged and deployed at multiple stages of the arbitration process:

1. Prior to an appointment: The issue might arise in the parties' submissions when an arbitral institution and/or the English court is called upon to appoint an arbitrator.<sup>10</sup> In both circumstances, the decision-maker will likely invite submissions from the parties on which qualifications should be taken into consideration. This is the first stage at which the issue might arise.
2. In an institutional challenge of the appointment: Under some institutional rules, the institution can be petitioned to remove an arbitrator who does not possess the contractually agreed qualifications.<sup>11</sup>
3. In a judicial challenge of the appointment: After having exhausted any challenge mechanism under the applicable institutional rules, the English court can be petitioned to remove the "unqualified" arbitrator.<sup>12</sup>
4. In an arbitral challenge to the tribunal's jurisdiction: Exercising its authority under section 30 of the Arbitration Act 1996, the tribunal may be invited to reject substantive jurisdiction on the basis that it was improperly constituted.
5. In a judicial challenge to the tribunal's jurisdiction: An award addressing the tribunal's jurisdiction can be challenged at least on the basis that tribunal lacks substantive jurisdiction due to its allegedly improper constitution.<sup>13</sup>
6. In resisting enforcement: Under the New York Convention, the enforcement of the award can be resisted on the grounds that the tribunal was not constituted in accordance with the parties' agreement (Article V.1(d)) and/or that enforcement would be contrary to public policy of the enforcing state which places party autonomy in priority to the non-discrimination ideals of the first-consultation proposal (Article V.2(b)).

The Law Commission's First Consultation Paper states that its reform proposals would mean that "a discriminatory requirement would be ignored" under the Arbitration Act 1996 in stages

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<sup>10</sup> Many arbitration rules empower the arbitral institution to appoint an arbitrator (see for example, Article 5 of the 2020 LCIA Rules, Article 13 of the 2021 ICC Rules). Likewise, the English court also has an appointment power under sections 18 and 19 of the Arbitration Act 1996.

<sup>11</sup> *See for example*: Article 14(1) of the 2021 ICC Arbitration Rules.

<sup>12</sup> Section 24 of the Arbitration Act 1996.

<sup>13</sup> Section 67 of the Arbitration Act 1996.



1, 3, and 4 above.<sup>14</sup> However, in practice, it may not be so straightforward. One can easily imagine legitimate debate around: (a) whether an agreed arbitrator qualification refers to a protected characteristic in a sufficiently direct manner to fall foul of the first-consultation proposal; and (b) if so, whether that qualification is justified as a proportionate means of achieving a legitimate aim. Since it is rarely evident whether a party feels genuinely aggrieved or is being deliberately obstructive, the decision-maker invariably gives due consideration to those submissions.

The risks of an injured party having to overcome many more hurdles to obtain an enforceable award cannot be ignored in our view. And while we do not wish to overstate these risks, on balance, we consider that they outweigh the seemingly immaterial practical benefits that would be derived from the first-consultation proposal.

*Second*, we note that the Law Commission’s opinion that the risk of a party successfully resisting enforcement of an award based on the improper constitution of the tribunal under Article V.1(d) of the New York Convention is “more theoretical than practical”. We do not entirely agree with this assessment or the reasoning underlying it.

At paragraph 4.26 of the First Consultation Paper, the Law Commission reasons: “[T]he Arbitration Act 1996 already has provisions which can lead to a change in the agreed composition of the arbitral tribunal. For example, an arbitrator can be removed by the court under section 24. And despite an arbitration agreement providing for three arbitrators, section 17 allows the claimant’s arbitrator to be appointed as sole arbitrator.” However, the provisions that the Law Commission cites are not comparable to its proposal. An arbitrator removed by the court under section 24 would be replaced pursuant to section 27 unless the parties agree otherwise, and thus the use of section 24 does not render an award unenforceable under Article V.1(d) of the New York Convention. And section 17 only operates where the respondent seeks to frustrate the arbitration process by repeatedly refusing to appoint an arbitrator; this is unlikely to raise concerns under Article V.1(d) of the New York Convention, since the enforcing court would likely proceed with enforcement based on the respondent’s waiver or estoppel (as the Law Commission recognises at paragraph 4.27).

At paragraphs 4.27-4.33 of the First Consultation Paper, the Law Commission reasons that, notwithstanding the risk of an enforcement challenge under Article V.1(d) arising from its proposal, “the court still retains a discretion whether to enforce anyway” and (as we understand the reasoning) that “reasonable foreign courts” would do so after having considered the social objective of the proposed law. Respectfully, we consider this too hopeful for a few reasons.

First, as the Law Commission rightly recognises, “the discretion is rather narrow” and arguably “concerned with allowing enforcement whether the grounds for objection are subject to waiver or estoppel”.<sup>15</sup> Thus, even a pro-arbitration jurisdiction such as the United States has refused to enforce a London-seated arbitration award where the English courts facilitated a minor

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<sup>14</sup> Law Commission’s First Consultation Paper, ¶ 4.23.

<sup>15</sup> Law Commission’s First Consultation Paper, ¶ 4.27.

deviation from the parties' agreement on tribunal constitution by prematurely appointing a presiding arbitrator before the co-arbitrators had a full opportunity to do so.<sup>16</sup>

Second, it is not appropriate to assume that all foreign courts are supportive of the arbitral process. Unfortunately, in practice, it is not uncommon for difficulties to arise in seeking enforcement, particularly in jurisdictions where local courts are unfamiliar with or suspicious of international arbitration, or where local power structures have some influence over the courts. There is a risk that such a court may deny enforcement on the superficial basis that the tribunal is improperly constituted, rather than grapple with the intricacies of a mandatory foreign law that disappplied the discriminatory aspects of the parties' agreement.

Finally, we note that the Law Commission did not address the risk of non-enforcement based on varying concepts of discrimination around the world and Article V.2(b), which for example may arise where the enforcing court considers that its jurisdiction's public policy requires party autonomy to be prioritised over English non-discrimination standards in the field of international arbitration (irrespective of how much it may sympathise with those ideals).

***In conclusion***, we consider that there are more effective ways of advancing diversity and equality than unilateral legislative reform, and with less collateral negative effects.

One way is through the progressive development and deployment of practice rules, guidelines, and standards. There has been significant activity in the arbitration community in recent years to encourage diversity when proposing arbitrators, including voluntary schemes (such as the ERA Pledge and REAL) and institutional guidelines (such as the 2022 ICC Note to National Committees and Groups on the Proposal of Arbitrators, the 2021 ICCA Guidelines on Standards of Practice in International Arbitration, etc.). These activities are making a positive (albeit slow) impact on the diversity statistics, as recognised at paragraph 4.4 of the First Consultation Paper.

Another way is through encouraging the development of the professional rules that are applied to foreign lawyers. In 2022, the IBA surveyed the rules promulgated by 188 individual Bars, law societies and professional bodies worldwide.<sup>17</sup> Of those, the IBA found that 41% have some form of express anti-discrimination provisions within their codes, rules, or regulations.<sup>18</sup> In this regard, we note that the UK is already a leader in developing standards for anti-discrimination in legal practice. All the regulatory bodies within the UK and Ireland have *express* wording in their rules providing for measures to combat discrimination in legal practice.<sup>19</sup> However, given the international nature of arbitration as well as the legal teams and

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<sup>16</sup> See *Encyclopaedia Universalis SA v Encyclopaedia Britannica Inc.*, 403 F.3d 85, 90 (2d Cir. 2005).

<sup>17</sup> IBA Global Directory of Anti-Discrimination Rules (2022), available [here](#).

<sup>18</sup> *Ibid.* p 8.

<sup>19</sup> For example, the Bar Standards Board of England and Wales and the Law Society of Scotland both use similar language in their texts. The Bar Standards Board's Handbook Core Duty 8 reads: 'You must not discriminate unlawfully against any person' which is then supplemented by rC12: 'You must not discriminate unlawfully against, victimise or harass any other person on the grounds of race, colour, ethnic or national origin, nationality, citizenship, sex, gender re-assignment, sexual orientation, marital or civil

parties involved, encouraging foreign Bars, law societies and professional bodies on the benefits of regulating for diversity would likely progress the diversity of arbitrator appointments.

While we welcome the Law Commission’s aspiration to establish “a world-leading initiative [that would] send an important signal about diversity and equality”, we have reservations about whether the legislative reform proposal will be effective in achieving its aim (see our earlier point), and whether this goal can and should be pursued unilaterally by England and Wales through legislation. In our opinion, if the Law Commission’s proposal were to be implemented, it would be better to incorporate it into the rules of leading arbitral institutions, rather than the Arbitration Act 1996. This would achieve the same result (at least where those rules applied) while putting the matter on a contractual footing, and thereby avoiding many of the concerns expressed above. There are many examples of institutional arbitration rules overriding the express terms of the parties’ arbitration agreement.

Even if legislation were an appropriate vehicle for introducing this initiative, there may be more effective and collaborative ways of pursuing this: for example, the United Kingdom could advocate for reform in the appropriate UNCITRAL Working Group in order to have it incorporated into the next iteration of the UNCITRAL Model Law on International Commercial Arbitration, and thereby disseminate it into the national laws of multiple jurisdictions. This multi-lateral governmental approach could also be implemented in a way that mitigates against the enforcement risk previously described.

#### Second-consultation proposal

If the first-consultation proposal were implemented as a reform to the Arbitration Act 1996, then we consider it essential to adopt the proposal set out in Question 4 of the Second Consultation Paper, i.e. that nationality-based discrimination be deemed justified.

In our view, the presumed acceptance of a nationality-based qualification restriction is critical if London is to retain its status as a trusted forum for international arbitrations, where it is common practice—particularly in arbitrations involving States, their instrumentalities, or major national companies—for the parties to appoint arbitrators who do not share the same nationality so as to avoid even the appearance of bias. Indeed, the LCIA Arbitration Rules requires that if the parties are of different nationalities, the sole or presiding arbitrator shall not have the same nationality as any party.<sup>20</sup> Similarly, the ICC Arbitration Rules provide that the ICC Court will take into account the arbitrator’s nationality in confirming or appointing him/her<sup>21</sup> and

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partnership status, disability, age, pregnancy, and maternity, religion or belief.’ The SRA in England and Wales and the Faculty of Advocates in Scotland also require their members to actively promote equality and diversity.

<sup>20</sup> Article 6.1 of the 2020 LCIA Arbitration Rules.

<sup>21</sup> Article 13.1 of the 2021 ICC Arbitration Rules.

generally (or in the case of the 2021 ICC Rules where the appointment is made by the ICC Court) the sole or presiding arbitrator “shall be of a nationality other than those of the parties”.<sup>22</sup>

**Question 5: Do you think that discrimination should be generally prohibited in the context of arbitration?**

We do not believe that discrimination should be generally prohibited in the context of arbitration.

We understand that the provisional proposal in Question 5 is aimed at tackling the problem of the lack of diversity in arbitrations seated in England & Wales, particularly with regard to arbitral appointments. However, for the reasons already given in response to Question 4, we consider that the better way of addressing non-diverse appointments is through industry initiatives, rather than unilateral legislative reform. We are particularly concerned by the significant lack of clarity about how the general prohibition proposed in Question 5 would operate in practice.

*First*, it is unclear who would enforce such a prohibition, and in what circumstances it would do so:

- A party that has selected an arbitrator using a discriminatory process would not enforce the prohibition against itself.
- A party would not be aware if the other party had adopted a discriminatory process so as to enforce the general prohibition; and even if the first party did become aware, it is not apparent that it has ‘lost’ anything that requires a remedy.
- Even the selected arbitrators are unlikely to know if they have been selected as a result of a discriminatory process.
- The only persons who directly suffer from a discriminatory selection process are the arbitrator candidates who were not selected. However, given the confidential nature of arbitration, it is highly unlikely those candidates would ever know that discrimination had taken place. And even if they did somehow learn of the discrimination, it is highly unlikely that they would ever seek to enforce the general prohibition for reputational reasons.

*Second*, we consider that the uncertainty that would result from a general discrimination prohibition extending to all aspects of the arbitration process, including procedural measures, tribunal deliberations, and party representation, would be immensely unhelpful. The uncertainty would be ripe for exploitation by recalcitrant parties and would significantly increase the risk of parties challenging unfavourable London-seated awards (ostensibly on the

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<sup>22</sup> Article 13.5 of the 2012, 2017 and 2021 ICC Arbitration Rules.

basis that some aspect of the arbitral process was discriminatory), which in turn may discourage arbitration users from choosing London as the seat of their arbitration.

*Third*, in our experience, it is uncommon that parties would make decisions related to the arbitral process without taking the advice of legal counsel. On that basis, we believe that efforts to combat discrimination in arbitration are best targeted at arbitration practitioners, not the parties, in the manner described in response to our response to Question 4.

<b>Question 6: What do you think the remedies should be where discrimination occurs in the context of arbitration?</b>
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The absence of practical remedies adds to the reasons that we do not believe that discrimination should be generally prohibited in the context of arbitration.

However, for the sake of argument, we proceed to consider what remedies could theoretically be awarded to a rejected arbitrator candidate who learned that a discriminatory selection process had been applied, and was willing to commit the time, effort and resources into pursuing a complaint notwithstanding the reputational consequences:

- A remedy that replaces one of the selected arbitrators with the rejected candidate is not workable, among other reasons, because: (a) the total number of rejected candidates could exceed the number of tribunal members; (b) it would be challenging to prove which of the rejected candidates might have been selected absent the discriminatory process; (c) it may not be apparent which of the selected arbitrators should be replaced; and (d) it is antithetical to the consensual process of arbitration to have arbitrators foisted upon the parties against their will.
- A remedy that involves some type of publicity of the discrimination is also unworkable, because publication of any details of the arbitration or the parties involved could breach the confidentiality of the arbitration process.
- A remedy that requires the payment of financial compensation for lost earnings and/or injury to feelings, which we understand is the main remedy in the context of discriminatory employment recruitment, is unlikely to be workable. In an arbitration context, even assuming that a rejected candidate would bring a claim for financial compensation (which seems highly far-fetched, given the risk of reputational harm): (a) it is unlikely that the rejected candidate will have suffered any meaningful loss, since they are likely highly qualified and in demand; and (b) it would be challenging to prove that the rejected candidate might have been selected absent the discriminatory process so as to have lost earnings;
- A remedy that requires the payment of a fine or penalty to the rejected candidate or an authority (even assuming it were appropriate) is unlikely to be impactful or constitute a meaningful sanction unless it is significant relative to (i) the amounts at stake in the dispute and/or (ii) the parties' financial strength. However, those two characteristics can vary immensely from one arbitration to another.

The challenges of awarding any of these hypothetical remedies reinforce our view that it would be inappropriate to impose any kind of general prohibition on discrimination in an arbitration context.

**Constantine Partasides KC**

**Leilah Bruton**

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## Response ID ANON-44ZW-8XFH-Q

Submitted to Law Commission second consultation on the Arbitration Act 1996  
Submitted on 2023-05-22 08:04:11

### About you

What is your name?

Name:  
Pierre-Yves Tschanz

What is the name of your organisation?

Enter the name of your organisation:  
Tschanz Arbitration

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]  
[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.

Tell us why you regard the information as confidential:

### Proper law

Consultation Question 1

No

Please give your reasons::

To deal with an international arbitration agreement is to deal with an agreement that has two subjects.

One subject is the setting up and functioning of a one-off tribunal that will hear the dispute.

The other subject is a party's consent to submit disputes to the competence of such a tribunal.

The national law of the seat of arbitration can directly provide the rules governing the setting up and functioning of the arbitral tribunal.

However, the law of the seat would be ill-advised to designate one national law, whether of the seat or another law – as the so-called “law of the arbitration agreement” – to resolve the issue of consent to arbitral competence.

Conceptually, it would amount to treating an arbitration agreement as if it were an ordinary substantive contract, whereas the parties' consent to submit disputes to an arbitral tribunal is not a substantive contract.

Furthermore, from the viewpoint of promoting a place of arbitration, there is an incentive for the parties to seat their arbitration in a country where the arbitration law maximizes the chances that consent to arbitral competence will be recognized and enforced, both at the seat and abroad. This would be the case if under English arbitration law the parties are more likely than under other arbitration laws to be found to have consented to the competence of a tribunal set up under English arbitration law.

One solution achieves this desirable result. It is a solution which at the same time is –

- the most generous in finding consent to arbitral competence,
- respectful of the requirement that a consent to arbitral competence must exist,
- conceptually consistent with the nature of a consent to arbitral competence (which is not a substantive contract),
- most in tune with the transnational nature of international arbitration, and
- taking into account the reality that international arbitration is the most generally used jurisdiction in international commerce.

The solution fulfilling these prerequisites is for the arbitration law to provide that consent to arbitral competence exists if it exists by applying either one of three national laws, which are the national laws that are most closely connected to the alleged consent to arbitral competence.

The three laws having potential legitimacy (but individually not exclusive legitimacy) are the law of the seat, the law governing the main contract, and the law chosen by the parties, if any, to govern their arbitration agreement. The rule of validity (recognised in English law), which prescribes to disregard the latter choice if no consent to arbitral jurisdiction exists under the chosen law, is a step in this direction, albeit conceptually incomplete.

If it is not possible to find consent to arbitral competence under any one of the three laws that have a potential legitimacy to govern consent to arbitral competence, then it is justified to find that no consent exists.

The combination of national laws provides more certainty and predictability than an arbitration law providing for a conflict rule, which entails a degree of uncertainty as to which law will ultimately be determined to be the only "law of the arbitration agreement" (as if it were a substantive contract). Insisting on a single national law to determine consent is needlessly and unduly restricting the possibility of finding that consent to arbitral competence exists in the transnational context of international arbitration.

The solution of applying the most favourable of the three laws (as opposed to only one of them) to the issue of consent to arbitral competence was adopted by Art 178(2) of the Swiss PIL Act (1987). Pursuant to this test, an arbitral tribunal is most likely to find consent to arbitral competence to exist, and the courts are most likely to agree – whether those at the seat called upon to stay legal proceedings at the seat or to set aside the award there on the ground of lack of arbitral competence, or courts abroad called upon to stay legal proceedings there or to enforce the award.

Unfortunately for Swiss lawyers, it is not enough to have come up with a commercially and conceptually good solution. They are rarely those drafting major international contracts and therefore are rarely in a position to advise as to the advantages of a seat of arbitration. Major London law firms, however, are most likely to be able to make the argument to their clients. Why not give them the advantage of the best argument in favour of an English seat when it comes to consent to arbitral competence?

## Section 67

### Consultation Question 2

Not Answered

Please give your reasons::

### Consultation Question 3

Not Answered

Please give your reasons::

## Discrimination

### Consultation Question 4

Not Answered

Please give your reasons::

### Consultation Question 5

Not Answered

Please give your reasons::

### Consultation Question 6

Please give your answer::



**Response to the Law Commission of England and Wales Second Consultation on the  
Review of the English Arbitration Act 1996  
University of Aberdeen, Scotland  
May 2023**

## **1. Introduction**

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 consists of Dr Patricia Živković, Dr Nevena Jevremović, Ilias Kazeem, Baffour Yiadom-Boakye, Aysu Baser, Konstantina Kalaitoglou, and Tung Xuan Le with comments from Professor Justin Borg-Barthet and Dr Burcu Yüksel Ripley.<sup>1</sup>

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 also responded to the first consultation on the Review of the Arbitration Act 1996.<sup>2</sup> 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 IN Scotland 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.

## **2. Response**

### **Chapter 2: Proper law of the arbitration agreement**

#### ***Question 1.***

***We provisionally propose that a new rule be included in the Arbitration Act 1996 to the effect that the law of the arbitration agreement is the law of the seat, unless the parties expressly agree otherwise in the arbitration agreement itself. Do you agree?***

Yes, we agree. The proposed rule should be included in the Arbitration Act 1996. In our view, the rule is necessary to promote clarity and legal certainty. Although certain principles have been set out in *Enka v Chubb* to provide clarity on the matter, they are still too complex and difficult to apply in practice because they require courts to assess a range of factual connections, the appreciation of the relative relevance of which will vary on a case-by-case basis. We are of the view that the proposed rule would simplify the matter and make the law more predictable and user-friendly. In addition, the reform would minimise the possibility of conflicting decisions by courts on the proper law of the arbitration agreement, as well as addressing the limitation of the 'validation' principle as seen in the *Kebab-Ji* case.

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<sup>1</sup> The Dispute Resolution expertise at the University of Aberdeen, School of law can be found here: <https://www.abdn.ac.uk/law/research/dispute-resolution-professional-network-1221.php>.

<sup>2</sup> University of Aberdeen, School of Law, Response to EAA Consultation, December 2022, available at <https://www.abdn.ac.uk/law/research/centre-for-commercial-law/public-policy-stakeholder-engagement-1109.php#panel1519>).

Moreover, the proposed rule is likely to result in more arbitration agreements governed by the law of England and Wales because London is a popular choice for seat. Thus, the rule will allow parties to take advantage of English law and its pro-arbitration stance, even when the parties have omitted to choose English law in an arbitration seated in England. The proposed rule would have no negative consequences for party autonomy as it would apply only where the parties have not designated the proper law of the arbitration agreement expressly in the arbitration agreement itself.

The requirement that the designation of an alternative governing law must be expressly stated in the arbitration agreement itself provides further clarity. It eliminates the possibility of the complexity associated with the identification of an implied choice, thereby guiding the parties on the need to make a clear choice or have the default rule apply.

In sum, we believe that this default rule will not only simplify the law on this point, but it will also increase the opportunity for parties to benefit from the pro-arbitration stance of English law in appropriate cases.

### **Chapter 3: Challenging jurisdiction under section 67**

#### ***Question 2.***

***We provisionally propose the following approach to a challenge under section 67 of the Arbitration Act 1996. Where an objection has been made to the tribunal that it lacks jurisdiction, and the tribunal has ruled on its jurisdiction, then in any subsequent challenge under section 67 by a party who has participated in the arbitral proceedings:***

***(1) the court will not entertain any new grounds of objection, or any new evidence, unless even with reasonable diligence the grounds could not have been advanced or the evidence submitted before the tribunal;***

***(2) evidence will not be reheard, save exceptionally in the interests of justice;***

***(3) the court will allow the challenge where the decision of the tribunal on its jurisdiction was wrong. Do you agree?***

Yes, we agree. The proposal for reform strikes an appropriate balance between relevant concerns. The fact that practice has shown that full rehearing under Section 67 is rare shows that the position to limit it to exceptional cases is meritorious. The proposal for reform aligns with the development in practice, with the added advantage that it clarifies the applicable procedure for challenging the decisions of arbitral tribunals under Section 67. As we noted in our response to the first consultation, a full re-hearing of challenge under Section 67 impedes procedural fairness, efficiency, and competence-competence. However, we appreciate how the proposal for reform has developed regarding the slippery slope on the effect of terminologies of “appeal”, and “re-hearing”. We also understand the contention that regardless of our view of the negative implications of rehearing, it is necessary in certain cases. It is thus sensible for a reform to allow exceptions in exceptional cases, as the proposal seeks to do.

The proposed approach provides sufficient grounds to identify the exceptional cases where rehearing will be necessary. It stipulates that the court shall not consider new grounds of objection or evidence that were available to the parties during the arbitral proceedings unless it can be established that such grounds or evidence could not have been advanced with reasonable diligence. This requirement aligns with the principle of finality in arbitration, which emphasises the need for parties to present all relevant issues before the tribunal in a timely manner. Also, it provides that the court shall not revisit the evidence that was presented before the tribunal, except in limited and exceptional circumstances that serve the interests of justice. This further underscores the importance of finality and efficiency in the arbitral process.

Lastly, the approach acknowledges that the court may allow a challenge where the tribunal's determination of its own jurisdiction was wrong. This aspect of the approach is consistent with the contention that a tribunal's decision on its own jurisdiction should not be final as that is a fundamental question in the arbitral process. However, it also strikes an appropriate balance with the principle of competence-competence because this standard will ensure that weight will be attached to the tribunal's decision unless it is found to be wrong. At the same time, we do encourage further guidance on the meaning of the word "wrong" in the context of the new provision to ensure the predictability and efficiency of the process. Specifically, further guidance is necessary to outline if the "wrong decisions on jurisdiction" include a misapplication of the law (which would make the ground too broad) or a defect in the arbitral procedure.

In sum, the proposed approach strikes an appropriate balance between the interests of finality and competence-competence in arbitration, while ensuring that parties have a meaningful opportunity to challenge the tribunal's jurisdiction in suitable cases.

***Question 3.***

***We provisionally propose that the Arbitration Act 1996 be amended to confer the power to make rules of court to implement the proposals in CQ2 above. Do you agree?***

We agree. We consider the matter to be procedural in nature and thus agree that the Arbitration Act 1996 should confer the power to the court to implement the proposal in Q2. We are aware of considerations around the scope of the intervention of the court in the proceedings, and accessibility of the rules to foreign parties. However, we do not consider that these concerns represent an impediment to the solution that the Consultation paper offers. We do note that the powers and the orders alike should be well-defined, narrow, and exhaustive to promote predictability and efficiency of the arbitral process.

## **Chapter 4: Discrimination**

### ***Question 4.***

***We provisionally propose that it should be deemed justified to require an arbitrator to have a nationality different from that of the arbitral parties. Do you agree?***

We agree that it should be deemed justified to require an arbitrator to have a nationality different from the nationality of the parties. This is in accordance with *Hashwani v Jivraj*<sup>3</sup> and the proposed position in the first consultation paper on discrimination. The requirement for an arbitrator to have a nationality different from the nationality of the parties may be legitimate and justified to present a sense of impartiality on the part of an arbitrator and to avoid perceptions of bias. This is especially so in the context of small and microstates (in which people tend to be known to one another) but also more generally in the example in paragraph 4.28 of the second consultation paper with England and Germany. This justification is also in accordance with party autonomy and recognised by institutional rules. Article 6.1. of the LCIA Rules states that “[w]here 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.” In the same manner, the 2021 ICC Arbitration Rules provides in Article 13(5) that “[w]here the Court is to appoint the sole arbitrator or the president of the arbitral tribunal, such sole arbitrator or president of the arbitral tribunal shall be of a nationality other than those of the parties. The requirement for an arbitrator with different nationality from the nationality of parties reflects the consensual and flexible nature of arbitration.

### ***Question 5.***

***Do you think that discrimination should be generally prohibited in the context of arbitration?***

We firmly support the general prohibition of discrimination in the context of arbitration. This includes opposing any form of parties’ discriminatory appointments or behaviour by arbitrators. We believe in upholding the principles of fairness, equality, and non-discrimination in all aspects of arbitration proceedings. We note that discrimination is indirectly prohibited in arbitration particularly on the part of arbitrators in the conduct of proceedings through the requirement for an impartial tribunal under Section 1(a) of the Arbitration Act 1996. This places an obligation on arbitrators to conduct arbitral proceedings in a neutral manner and not favour one party to the detriment of another.

Additionally, we recognise the importance of addressing potentially discriminatory appointments by national courts under Section 18(3)(d). Such appointments should be subject to scrutiny and rectification if found to be discriminatory. It is crucial to ensure that the composition of arbitral tribunals is free from bias and discrimination, preserving the integrity and impartiality of the arbitration process. By condemning all forms of discrimination and promoting diversity and inclusivity, we aim to create an environment where arbitration can truly serve as a fair and effective means of dispute resolution for all parties involved.

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<sup>3</sup> [2011] UKSC 40, [2011] 1 WLR 1872.

### **Question 6.**

#### ***What do you think the remedies should be where discrimination occurs in the context of arbitration?***

While we welcome the general prohibition of discrimination in arbitration, we anticipate certain challenges in terms of enforcement of such a prohibition and provide potential solutions below. The challenges would arise due to the arbitration's confidential nature. Namely, confidentiality is one of the cornerstones of international arbitration and as such it restricts who has access to information pertaining to individual arbitration cases, including nominations and appointments of arbitrators.

Still, we believe that a statutory provision explicitly prohibiting discrimination would significantly impact behaviour of all arbitration stakeholders (parties, arbitrators, arbitral institutions, national courts) in this regard. Moreover, the general prohibition of discrimination in arbitration would have direct horizontal effects that would cover discriminatory actions of private stakeholders, and it would impose State obligations to combat such discrimination in the context of arbitration.

In addressing discriminatory behaviour by arbitrators, we propose the inclusion of an additional ground in Section 68, complementing the existing remedies of removal under Section 24 and the current grounds for claiming serious irregularity under Section 68. This new ground would directly address discriminatory conduct on the part of arbitrators, providing an avenue for redress.

We also invite drafters to consider potential remedies for addressing discriminatory appointments by institutions and courts. In the case of institutional appointments, we suggest allowing claims to be brought by either party or by an aggrieved person who acts as an arbitrator for the relevant institution. In order to strengthen and emphasise accountability in this field, we suggest that a reporting mechanism (either mandatory or voluntary) can be established for arbitral institutions seated in the jurisdiction of England and Wales on the statistics of institutional appointment in relation to protected and non-protected characteristics (i.e. those that are not governed by the Equality Act, but the institutions decide to report on), in order to empower interested parties to raise relevant claims. Additionally, the Arbitration Act 1996 could require internal consultations and the reasoning underpinning institutional appointments to be recorded and included in such annual reports. While acknowledging the complexities involved, we believe that exploring these avenues for remedying discrimination in arbitration is crucial to ensure a fair and equitable process for all parties involved.