Law Commission
Reforming the law

Review of the Arbitration Act 1996

A consultation paper

Consultation Paper 257

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September 2022

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Topic of this consultation: Proposals to reform the Arbitration Act 1996.

Geographical Scope: This consultation applies to the law of England and Wales.

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

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

Alternatively, comments may be sent:

By email to arbitration@lawcommission.gov.uk

OR

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

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

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After the consultation: We will analyse the responses received and undertake further stakeholder engagement as appropriate. We will publish a report of our final recommendations for law reform. It will be for the Ministry of Justice, along with other interested departments, to decide whether to implement any recommendations.

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Contents

The Law Commission – how we consult iii

List of abbreviations vii

CHAPTER 1: INTRODUCTION 1

This project 1

What is arbitration? 2

This consultation 6

Project team 8

CHAPTER 2: CONFIDENTIALITY 9

Background 9

The current law 10

Foreign jurisdictions, and arbitral rules 14

Discussion 16

CHAPTER 3: ARBITRATOR INDEPENDENCE AND DISCLOSURE 19

Independence 19

Impartiality 20

Disclosure 21

Foreign legislation, and arbitral rules 24

Discussion 25

CHAPTER 4: DISCRIMINATION 29

Introduction 29

Discussion 30

Proposal 32

Gendered language 36

CHAPTER 5: ARBITRATOR IMMUNITY 39

Introduction 39

Resignation 40

Removal 43

CHAPTER 6: SUMMARY DISPOSAL **47**
Discussion 47
Provisional proposals 50

CHAPTER 7: SECTION 44 (COURT POWERS EXERCISABLE IN SUPPORT OF ARBITRAL PROCEEDINGS) **55**
Understanding section 44 55
Section 44 and third parties 57
Emergency arbitrators 62

CHAPTER 8: CHALLENGING JURISDICTION UNDER SECTION 67 **73**
Current law on challenging jurisdiction 73
Appeal or rehearing? 76
Remedies under section 67 83
Costs 84

CHAPTER 9: APPEAL ON A POINT OF LAW **87**
Historical development of section 69 87
Current law: section 69 of the Arbitration Act 1996 90
Foreign legislation 90
Evaluation of section 69 92

CHAPTER 10: MINOR REFORMS **97**
Section 7 (separability of arbitration agreement) 97
Appeals from section 9 (stay of legal proceedings) 99
Sections 32 and 45 (court determination of preliminary matters) 100
Modern technology 103
Section 39 (power to make provisional awards) 105
Section 70 (challenge or appeal: supplementary provisions) 107
Sections 85 to 88 (domestic arbitration agreements) 110

CHAPTER 11: OTHER STAKEHOLDER SUGGESTIONS NOT SHORT-LISTED FOR REVIEW **111**

CHAPTER 12: CONSULTATION QUESTIONS **135**

APPENDIX 1: TERMS OF REFERENCE **145**

APPENDIX 2: ACKNOWLEDGEMENTS **147**

List of abbreviations

Abbreviation	Meaning
AAA	American Arbitration Association
ACICA	Australian Centre for International Commercial Arbitration
AMINZ	Arbitrators' and Mediators' Institute of New Zealand
CIArb	Chartered Institute of Arbitrators
CIETAC	China International Economic and Trade Arbitration Commission
CIMAR	Construction Industry Model Arbitration Rules
CPR	Civil Procedure Rules
DAC	Departmental Advisory Committee on Arbitration Law
DIAC	Dubai International Arbitration Centre
GAFTA	Grain and Feed Trade Association
HKIAC	Hong Kong International Arbitration Centre
ICC	International Chamber of Commerce
ICCA	International Council for Commercial Arbitration
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington, 1965)
IFLA	Institute of Family Law Arbitrators
LCIA	London Court of International Arbitration
LMAA	London Maritime Arbitrators Association

LME	London Metal Exchange
LSAC	Lloyd’s Salvage Arbitration Clauses
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)
RICS	Royal Institution of Chartered Surveyors
RSC	Rules of the Supreme Court
SCC	Stockholm Chamber of Commerce
SIAC	Singapore International Arbitration Centre
UKJT	United Kingdom Jurisdiction Taskforce, appointed by Lawtech Delivery Panel (a UK government-backed initiative)
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration 1985, with 2006 Amendments

Chapter 1: Introduction

1.1 Arbitration is a major area of activity. For example, the Chartered Institute of Arbitrators, headquartered in London, has more than 17,000 members across 149 countries.[1] Industry estimates suggest that international arbitration has grown by about 26% between 2016 and 2020, with London the most popular seat.[2] Domestic arbitration continues to grow, for example in areas like family law.

1.2 Some arbitral institutions report their caseload figures.[3] Others do not, but have provided us with rough figures on a confidential basis. Overall, we estimate that there are at least 5000 domestic and international arbitrations in England and Wales every year, potentially worth at least £2.5 billion to the economy.[4] The actual figures may be much higher.

1.3 In England and Wales, arbitration is regulated by the Arbitration Act 1996. January 2022 saw the 25th anniversary of the Act coming into force. This presents a good opportunity to revisit the Act, particularly as other jurisdictions have enacted more recent reforms. Our review seeks to ensure that the Act remains state of the art, both for domestic arbitrations, and in support of London as the world's first choice for international commercial arbitration.

1.4 In preparing this consultation paper, we have spoken with a wide range of stakeholders, and we have conducted our own research into the provisions of the Act. We conclude that the Act still works very well and there is no need for extensive reform. In certain specific areas, we provisionally propose amendments to the Act which would further modernise it. Throughout, we ask consultees for their views.

THIS PROJECT

1.5 In 2016, stakeholders suggested to the Law Commission that the Arbitration Act 1996 should be reviewed to ensure it remained "best in class". In our 13th programme of law reform, published in 2017,[5] we noted that stakeholders had identified the introduction of an express summary judgment procedure as one possible area of reform. Some stakeholders had suggested a broader review. However, given the cross-government nature of the work, it was not possible to secure government agreement to its inclusion in the 13th programme.

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1 https://www.ciarb.org/about-us/.

2 Lexis Nexis, *Arbitration Statistics 2020*: https://www.lexisnexis.co.uk/blog/research-legal-analysis/arbitration-statistics-2020-from-sole-arbitrators-to-no-arbitrators.

3 Including the International Chamber of Commerce, the London Court of International Arbitration, and the London Maritime Arbitrators Association.

4 From the caseload figures provided to us, we have divided arbitration between domestic and international, and between those conducted in proceedings where arbitrator fees are capped and uncapped, to estimate likely arbitrator and legal fees.

5 13th Programme of Law Reform (2017) from para 4.52, available at https://www.lawcom.gov.uk/project/13th-programme-of-law-reform/.

1.6 In our consultation on our 14th programme of law reform, published in 2021,[6] we asked specifically about review of the Arbitration Act 1996. Responses suggested that stakeholders remained in favour of a Law Commission project in this area, and that support for a more general review had increased. Given this support, in 2021 the Ministry of Justice asked us to undertake a review of the Arbitration Act 1996. We started work in January 2022.

1.7 Our terms of reference are set out at Appendix 1.

1.8 Separately, responses to previous programme consultations have argued for the introduction of trust law arbitration, which is not possible under the current law. The Law Commission intends during the course of the 14th programme to consider the scope for introducing trust law arbitration, alongside wider work on modernising trust law.

Territorial extent

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

1.10 However, the Arbitration Act 1996 extends to England, Wales and Northern Ireland.[7] We hope that the Government will consider implementing our proposed reforms in Northern Ireland too, after appropriate engagement and consultation.

1.11 We would be interested to hear from stakeholders if there are any particular factors that could affect our proposals in their application to Northern Ireland.

WHAT IS ARBITRATION?

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

1.13 Arbitration tends to happen only when all parties agree to it.[8] It is possible to agree to arbitration after a dispute has arisen. More usually, when parties enter into a contract, and wish to resolve any disputes by arbitration rather than litigation, that contract will include an arbitration clause. In broad terms, an arbitration clause provides that any dispute arising out of the contract will be settled by arbitration. Although that clause appears in the contract, it is usually viewed as a separable agreement.[9]

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[6] https://www.lawcom.gov.uk/14th-programme/.

[7] Scotland has its own separate arbitration legislation – the Arbitration (Scotland) Act 2010.

[8] Sometimes statute requires a particular dispute to be referred to arbitration, eg Agricultural Tenancies Act 1995, s 28. Provision is made for statutory arbitration in the Arbitration Act 1996, ss 94 to 98.

[9] Arbitration Act 1996, s 7.

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

1.15 For our purposes, a domestic arbitration means that the seat of the arbitration is in England and Wales, and all parties are resident or incorporated in the United Kingdom. An international arbitration will involve one or more parties who are resident or incorporated abroad, although the seat of the arbitration may still be in England and Wales.

1.16 The seat of an arbitration is its juridical seat.[10] In other words, it is where, as a matter of law, the arbitration is deemed to be based. This matters because it will determine which law governs the arbitral proceedings. If an arbitration is seated in England and Wales (or Northern Ireland), it will be governed by the Arbitration Act 1996. During the arbitration, hearings can occur at any venue, whether or not in the same place as the seat.

1.17 The Arbitration Act 1996 provides a framework for arbitration. For example, it upholds arbitration agreements, preventing one party from unilaterally ignoring their promise to arbitrate rather than litigate in court. It can help get an arbitration under way, for example if the parties cannot agree on a choice of arbitrator. It can assist during an arbitration, for example by enabling the courts to make supportive orders for the preservation of evidence or assets. And it provides ways in which an arbitral award (that is, the ruling of the arbitrator) can be enforced or challenged.

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

1.19 Some arbitrations are administered by an arbitral institution, like the London Court of International Arbitration. Some arbitrations are run solely by the arbitrators themselves, in consultation with the parties. Some arbitration clauses state that the arbitration will be governed by a particular set of procedural rules. Arbitral institutions, and arbitrator associations, like the London Maritime Arbitrators Association, often promulgate their own procedural rules, adapted for their members or for a particular area of activity. When parties agree to use such rules, that is the usual way in which the parties agree procedures different from the non-mandatory sections of the Act.[11]

1.20 A party to arbitration proceedings may wish to apply to the court, for example to remove or appoint an arbitrator, or to challenge an award. Applications to court will usually require an arbitration claim form.[12] Usually the arbitration claim will be made in the Commercial Court, although it can also be made in the Technology and Construction Court, or the Chancery Division of the High Court.[13] The Commercial Court Guide allows for arbitration claims to be transferred from the Commercial Court

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[10] Arbitration Act 1996, s 3.

[11] Arbitration Act 1996, s 4(3).

[12] Civil Procedure Rules (“CPR”) r 62.3.

[13] CPR PD 62 para 2.3.

to the Technology and Construction Court or the Chancery Division in appropriate cases.[14]

Historical background

1.21 Arbitration has a long history in England and Wales.[15] It was a common way of settling disputes in Anglo-Saxon times. It was then largely a public affair, with enforcement through community pressure. By Norman times, parties could choose their arbitrators, who were often considered friends to both sides, familiar with the dispute, and therefore well placed to facilitate a reconciliation. Arbitrators gave their services out of goodwill. Arbitration often occurred under the auspices of various local bodies, like guilds.

1.22 By the fourteenth century, the mayor and aldermen of London had set up in effect an arbitration centre in London. This resolved domestic and international disputes, including between foreign parties whose dispute had no other connection to England.

1.23 In Elizabethan times, there was a growth in arbitration clauses, and private arbitration, with an expectation that arbitrators would be honest and impartial. By the mid-eighteenth century, professional arbitrators began to emerge, charging fees for their services. Arbitration clauses had become routine, and private arbitration was now part of ordinary business life.

1.24 The first legislation appeared in 1698. It was commissioned by the Board of Trade, and drafted by John Locke.[16] It was styled An Act for Determining Differences by Arbitration,[17] whose purposes were "promoting trade and rendering the award of arbitrators the more effectual". It had only two sections. One provided a mechanism by which arbitration agreements and arbitral awards could be enforced by proceedings for contempt of court. The other allowed arbitral awards to be set aside if obtained by corruption or undue means.

1.25 There were various legislative additions,[18] until the law was consolidated in the Arbitration Act 1889. This in turn was added to,[19] until the next consolidating statute,

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[14] *Commercial Court Guide* (11th ed 2022) para O 12.1. See too: *Chancery Guide* (updated 2022) ch 31 paras 3.3, 3.4, and 3.11; *TCC Guide* (updated July 2019) paras 10.1.2 to 10.1.3. There is no express provision for transfers to the Family Court or the Family Division of the High Court. This might merit revisiting, given the rise of family law arbitrations.

[15] We have drawn heavily on the work of Derek Roebuck for the few brief paragraphs which follow. We found the following useful in particular: D Roebuck, "Sources for the History of Arbitration: A Bibliographical Introduction" (1998) 14(3) *Arbitration International* 237; D Roebuck, *Early English Arbitration* (2008); D Roebuck, *Mediation and Arbitration in the Middle Ages* (2013); D Roebuck, *The Golden Age of Arbitration* (2015) (which discusses arbitration during the reign of Elizabeth I); D Roebuck, F C Boorman, R Markless, *English Arbitration and Mediation in the Long Eighteenth Century* (2019).

[16] H Horwitz and J Oldham, "John Locke, Lord Mansfield, and Arbitration During the Eighteenth Century" (1993) 36(1) *The Historical Journal* 137.

[17] 9 & 10 Will 3 c 15.

[18] An Act for the further Amendment of the Law, and the better Advancement of Justice (1833) (3 & 4 Will 4 c 42), ss 39 to 41; Common Law Procedure Act 1854, ss 3 to 17; Supreme Court of Judicature Act 1873, s 56; Supreme Court of Judicature Act 1884, ss 9 to 11.

[19] Administration of Justice Act 1920, s 16; Arbitration Clauses (Protocol) Act 1924; Arbitration (Foreign Awards) Act 1930; Arbitration Act 1934.

the Arbitration Act 1950. This was also supplemented by the Arbitration Act 1975, which enacted the New York Convention (see below), and the Arbitration Act 1979, which concerned how to appeal an arbitral award to the court on a question of law.

1.26 Meanwhile, two major international developments must be mentioned. First, there is the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), more commonly called the New York Convention. It provides for signatory states to recognise and uphold arbitration agreements. It also requires states to recognise and enforce arbitral awards made in a foreign state. It has proven very popular, with 168 state signatories including the UK,[20] and effective, with enforcement of foreign awards in at least 73% of cases.[21]

1.27 Second, in 1985, the United Nations Commission on International Trade Law (UNCITRAL) produced its Model Law on international commercial arbitration. It was updated in 2006. As its name suggests, it provides a model arbitration law for states to adopt into their own domestic legislation. It has also proven successful, with legislation based on the UNCITRAL Model Law adopted in around 118 jurisdictions.[22]

1.28 The UK delegation to UNCITRAL to formulate its Model Law included Lord Justice Mustill. He chaired the Departmental Advisory Committee ("DAC") on arbitration law which, in its 1989 report,[23] advised against adopting the UNCITRAL Model Law in England and Wales (legislation in Scotland was a separate consideration).

1.29 The DAC report of 1989 conceded that some parts of the UNCITRAL Model Law might be an improvement over the law which then governed in England and Wales, but concluded that other parts were not. The report also said that the UNCITRAL Model Law had gaps, was untested, and its implementation might also cause an undesirable bifurcation of regimes, one for international arbitration, another for domestic arbitration. The UNCITRAL Model Law was praised as a project of negotiated compromise in the spirit of international harmonisation, but the DAC concluded that England and Wales, with its long and well-developed history of arbitration law, should retain the benefit of that experience and learning.

1.30 The DAC report of 1989 did recommend legislative reform of arbitration law in England and Wales on the basis that the existing legislation was too widely dispersed and fragmentary. The DAC recommended that new legislation should bring into one place the more important and uncontroversial principles of arbitration law, whether they originated in statute or the common law. Preferably, they said, it should apply to domestic and international arbitration alike. And while it should not be limited to the

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20 https://www.newyorkconvention.org/countries.

21 R Alford and others, "Empirical Analysis of National Courts Vacatur and Enforcement of International Commercial Arbitration Awards" (2022) 39(3) *Journal of International Arbitration* 299. For an estimate suggesting even higher enforcement rates, see *Redfern and Hunter: Law and Practice of International Arbitration* (6th ed 2015) para 11.62 n 73.

22 https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status.

23 *A New Arbitration Act for the United Kingdom? The Response of the Departmental Advisory Committee to the UNCITRAL Model Law* (1989). It is available at: (1990) 6(1) *Arbitration International* 3.

subject-matter of the UNCITRAL Model Law, it should align with the UNCITRAL Model Law as far as possible.

1.31 The DAC issued another report in February 1996.[24] By then it was chaired by Lord Justice Saville. It acknowledged the previous approach of the DAC, and the need for new legislation to be a (non-exhaustive) restatement of the law, rather than merely an act of consolidation. The DAC set out a draft Bill with detailed commentary. Changes were made to the Bill during its passage through Parliament, and commentary on those changes was provided by the DAC in a supplementary report in January 1997.[25]

1.32 The end result was the Arbitration Act 1996, an act “to restate and improve the law relating to arbitration”.[26] Twenty-five years after it came into force, it is now the subject of our review.

THIS CONSULTATION

1.33 We have been guided in our work by our stakeholders. Users of the Arbitration Act 1996 have told us, by written submissions and in meetings, what works well, and what might benefit from review. We have had a high level of engagement so far, both in terms of the volume of discussions and the level of detail. We are very grateful to all those who have given us their time.

1.34 Appendix 2 contains a list of all those with whom we have communicated in the development of this consultation paper. As these were introductory and preliminary discussions, when we refer to the views of stakeholders in this consultation paper, we do not attribute those views. In particular, we have spoken with various arbitral institutions and associations whose members have often presented us with a diversity of views. It may be that, in response to this paper, consultees are able to communicate their definitive position. However, where there remains a plurality of views, for example within an arbitral institution, we would be equally pleased to hear of that plurality.

1.35 Our research has looked at the legislation and its history, the case law, and the related academic and professional commentary. We have considered the legislative approach of a number of comparable foreign jurisdictions, and the practical approach of various arbitral institutions and associations. We have been able to test and revisit some of our preliminary views in our discussions with stakeholders.

1.36 We have heard repeatedly that the Arbitration Act 1996 works well; root and branch reform is not needed or wanted. We are mindful also of the practical benefits to the arbitration community of completing this project within a shorter timeframe.

1.37 That said, we received many suggestions for review of discrete topics within the Act, and we have considered them all. We have chosen to focus this consultation paper on

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[24] *Report on the Arbitration Bill* (1996). It is available at: (1997) 13(3) *Arbitration International* 275.

[25] *Supplementary Report on the Arbitration Act 1996* (1997). It is available at: (1997) 13(3) *Arbitration International* 317. Both the 1996 and 1997 DAC reports are also available in *Merkin and Flannery on the Arbitration Act 1996* (6th ed 2020) app 1.

[26] Recital to the Arbitration Act 1996.

a shortlist of topics. The shortlist reflects a large measure of agreement among stakeholders that these are the topics which would benefit most from review, even if we were to reach a provisional conclusion that no reform is necessary.

1.38 Of the other suggestions which did not make our shortlist, the principal ones are set out in Chapter 11, along with an indication, in abbreviated form, of the main reasons why these topics did not make our shortlist. The consultation paper is written for a general audience, but Chapter 11, because it seeks to cover much ground concisely, presumes a level of expert knowledge. Nevertheless, it makes for important reading. No final decision has been made about the issues raised in Chapter 11. In responding to this paper, consultees are welcome to provide reasons why an issue in Chapter 11 needs revisiting in full.

Structure of this paper

1.39 This paper comprises 11 further chapters and two appendices.

(1) In Chapter 2, we discuss whether the Arbitration Act 1996 should provide that arbitrations are private and confidential.

(2) In Chapter 3, we discuss whether the Act should impose on arbitrators express duties of independence and disclosure.

(3) In Chapter 4, we discuss whether the Act should prohibit the enforcement of discriminatory criteria in the appointment of arbitrators.

(4) In Chapter 5, we discuss whether the Act should strengthen the immunity of arbitrators from legal liability.

(5) In Chapter 6, we discuss whether the Act should provide arbitrators with an express power to adopt a summary procedure to deal with issues raised which obviously lack merit.

(6) In Chapter 7, we discuss how court powers exercisable in support of arbitral proceedings, under section 44 of the Act, might be understood and clarified, and how that section interacts with emergency arbitrator provisions.

(7) In Chapter 8, we discuss whether a challenge to the arbitral tribunal's jurisdiction, made before the court under section 67 of the Act, should be by way of a rehearing or an appeal.

(8) In Chapter 9, we discuss whether there should be any reform to section 69 and appeals on a point of law.

(9) Chapter 10 provisionally proposes some minor amendments to various provisions of the Act. The matters addressed are: section 7 (separability of arbitration agreement); section 9 (stay of legal proceedings); section 32 (determination of preliminary point of jurisdiction) and section 45 (determination of preliminary point of law); the compatibility of the Act with modern technology; section 39 (power to make provisional awards); when time runs under section 70 (challenge or appeal: supplementary provisions); and sections 85 to 88 (domestic arbitration agreements).

(10) As noted above, Chapter 11 sets out the main other issues which were raised with us, and explains in brief why we decided not to shortlist those issues for further inquiry. To repeat, consultees are welcome to provide reasons why an issue in Chapter 11 needs revisiting in full.

(11) Chapter 12 contains a full list of all the consultation questions in this paper.

1.40 Appendix 1 sets out our terms of reference, also noted above. Appendix 2 lists those individuals and organisations we have spoken or communicated with in the development of this consultation paper.

Next steps

1.41 We seek views on our proposals and replies to our questions by 15 December 2022. Our aim is to publish final recommendations by mid-2023. It will thereafter be for Government to decide whether to implement our recommendations.

PROJECT TEAM

1.42 The following members of the Commercial and Common Law team have contributed to this report: Laura Burgoyne (team manager); Nathan Tamblyn (lawyer); Daniel Hodgkinson (research assistant); and Matthew Freeman (research assistant). Maryan Hassan joined us for a short period as an intern.

Chapter 2: Confidentiality

2.1 In this chapter, we consider whether the Arbitration Act 1996 should address the confidentiality of arbitrations explicitly.

2.2 Our provisional conclusion is that the Act should not include provisions dealing with confidentiality. We are not persuaded that all types of arbitration should be confidential by default; the Act would need to provide exceptions. We think that the exceptions would be at such a high level of generality as to provide little concrete guidance. Overall, we think that the stronger approach is to leave the law of confidentiality to be developed by the courts.

BACKGROUND

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

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

2.5 The Arbitration Act 1996 does not explicitly address confidentiality. The DAC noted that arbitrations seated in England and Wales were governed by general principles of confidentiality and privacy, but that the exceptions were manifestly legion and unsettled. They concluded that attempting a statutory code would create more problems than it would solve, and that any issues which arose could be resolved by the courts on a pragmatic case-by-case basis.[1]

2.6 In a major 2018 survey on international arbitration, 87% of respondents attached some degree of importance to confidentiality.[2] 40% thought it "very important". Overall, confidentiality was rated the fifth most valuable characteristic of international arbitration: enforceability of awards was the most highly rated characteristic (by 64% of respondents), then avoiding specific national courts (60%), flexibility (40%), ability to select arbitrators (39%), and confidentiality (35%).[3] This order and share of the vote confirmed the results of a 2015 survey.[4]

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

2 White & Case, Queen Mary University of London, *2018 International Arbitration Survey*, pp 27 to 28.

3 White & Case, Queen Mary University of London, *2018 International Arbitration Survey*, p 7.

4 White & Case, Queen Mary University of London, *2015 International Arbitration Survey*, p 6.

THE CURRENT LAW

2.7 Arbitrations seated in England and Wales are, by default, private and confidential.[5] This is clearly confirmed in the case law. For example, in *Dept of Economics, Policy and Development of the City of Moscow v Bankers Trust Co*, Lord Justice Mance said:[6]

> Among features long assumed to be implicit in parties' choice to arbitrate in England are privacy and confidentiality. The 1996 Act's silence does not detract from this.

That position was recently confirmed by the Supreme Court in *Halliburton Co v Chubb Bermuda Insurance Ltd*.[7]

2.8 As for privacy, this tends to mean that arbitral proceedings are not open to public viewing. They are "invitation only". Arbitral parties are free to agree otherwise, and indeed, many arbitral rules do contain provisions for widening the number of participants, through joinder of parties, or consolidation of proceedings, or concurrent hearings.[8]

2.9 Privacy is extended to "arbitration claims", that is, any application about arbitration which is brought before the court.[9] Applications under section 45 (preliminary point of law) and section 69 (appeal on a point of law) tend to be held in public, presumably because the law potentially affects the wider public and not just the arbitrating parties. Other arbitration claims in court are by default heard in private.[10]

2.10 In *Halliburton v Chubb*,[11] Lord Hodge said that a duty of confidentiality might be an implied obligation "arising out of the nature of arbitration";[12] or it might arise from the fact that the agreement to arbitrate is a contract "to which the court attributes particular characteristics";[13] or it might be "a rule of substantive law masquerading as

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5 On confidentiality in arbitrations generally, see: *Toulson & Phipps on Confidentiality* (4th ed 2020) ch 22; *Russell on Arbitration* (24th ed 2015) paras 5-214 to 5-224; *Redfern & Hunter: Law and Practice of International Commercial Arbitration* (6th ed 2015) paras 2-161 to 2-196; *Merkin and Flannery on the Arbitration Act 1996* (6th ed 2020) pp 29 to 32.

6 [2004] EWCA Civ 314, [2004] 4 All ER 746 at [2].

7 [2020] UKSC 48, [2020] 3 WLR 1474 at [83] by Lord Hodge DPSC, and at [173] by Lady Arden JSC.

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

9 The definition of "arbitration claims" is found in Civil Procedure Rules, r 62.2.

10 Civil Procedure Rules, r 62.10(3).

11 [2020] UKSC 48, [2020] 3 WLR 1474 at [83].

12 This phrase originally comes from *Dolling-Baker v Merrett* [1991] 2 All ER 890, 899 by Parker LJ.

13 This phrase originally comes from *Ali Shipping Corp v Shipyard Trogir* [1998] 2 All ER 136, 147 by Potter LJ.

an implied term".[14] He said that arbitrators were also bound to uphold confidentiality, either as a result of contract, or in performance of an equitable duty.[15]

2.11 Thus, a duty of confidentiality might arise in one of the following ways.

(1) Confidentiality can be an express term of the arbitration agreement, and of the agreement appointing the arbitrator. For example, some arbitral rules explicitly provide for confidentiality (see below).

(2) Confidentiality can be an implied term.[16] Previously, the basis of implication for this term was to reflect the obvious but unexpressed intentions of the parties or because it was necessary for business efficacy,[17] or perhaps also to reflect custom.[18] Now, the better view is that confidentiality is simply a term implied by law.[19]

(3) A duty of confidentiality might arise in equity.

2.12 There are two requirements for an equitable duty of confidentiality.[20] First, the information must have the quality of confidentiality. Not all information is potentially confidential. For example, the fact that a person was seen shopping in a supermarket is probably not confidential. But their bank account details are confidential. Second, the information must have been received in circumstances importing an obligation of confidence. This could be, for example, where a stranger finds a government laptop left behind on a train, and is aware that the information is confidential and not meant for public sharing.[21] More usually, an obligation of confidentiality arises in well-settled circumstances like when consulting with a barrister or solicitor or doctor, or between banker and customer.[22] So too it might attach in an arbitration.

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14 This phrase originally comes from *Emmott v Michael Wilson & Partners Ltd* [2008] EWCA Civ 184, [2008] 2 All ER (Comm) 193 at [84] by Lawrence Collins LJ.

15 The reference to an equitable duty was repeated: [2020] UKSC 48, [2020] 3 WLR 1474 at [102].

16 This was the basis identified by Lady Arden in *Halliburton v Chubb*: [2020] UKSC 48, [2021] AC 1083 at [173].

17 This was the approach of Atkin LJ in *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461, 483. But that case was decided before the courts recognised that terms could be 'implied by law'. It was rejected as the basis of implication by Lawrence Collins LJ in *Emmott v Michael Wilson & Partners Ltd* [2008] EWCA Civ 184, [2008] 2 All ER (Comm) 193 at [81].

18 *Hassneh Insurance Co of Isreal v Steuart J Mew* [1993] 2 Lloyd's Rep 243, 246 by Colman J. In *Halliburton v Chubb*, Lord Hodge said that custom might qualify a duty of confidentiality, giving the example of how LOF arbitration awards are often shared in other LOF proceedings to ensure consistency: [2020] UKSC 48, [2021] AC 1083 at [89].

19 This was the preference of Potter LJ in *Ali Shipping Corp v Shipyard Trogir* [1998] 2 All ER 136, 146, and Lawrence Collins LJ in *Emmott v Michael Wilson & Partners Ltd* [2008] EWCA Civ 184, [2008] 2 All ER (Comm) 193 at [81]. 'Implied by law' refers to that type of implication recognised in *Liverpool City Council v Irwin* [1977] AC 239 (HL).

20 *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41, 47 by Megarry J.

21 *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 281 by Lord Goff.

22 This was the analogy given by Parker LJ in *Dolling-Baker v Merrett* [1991] 2 All ER 890, 899.

2.13 It is worth noting that the equitable duty of confidentiality gave rise to the tort of misuse of private information,[23] which evolved again to adopt the language of invasion of privacy.[24] For example, while the fact that a person was seen shopping in a supermarket is probably not confidential, taking a photo of them and publishing it in a magazine could be an invasion of their privacy.[25] It is appropriate to invoke this tort when seeking to defend one's right to respect for private or family life.[26] This could be relevant, for example, in family law arbitrations. And yet in the context of arbitration, privacy tends to mean, much more narrowly, excluding others from the hearing. Thus the language of privacy might have two different meanings in arbitration.

2.14 It may well be that part of the complexity of confidentiality in arbitration is the very fact that confidentiality can arise simultaneously on a number of bases.[27]

Exceptions to confidentiality

2.15 Confidentiality cannot be absolute. For example, a person who has behaved unlawfully cannot invoke their desire for confidentiality to deny all inquiry into their wrongdoing.[28] So what are the limits of confidentiality in arbitration?

2.16 The starting point is *Tournier v National Provincial and Union Bank of England*.[29] This was a decision about the relationship between banker and customer. The court held that confidentiality was an implied term of their contract. As to the exceptions, Lord Justice Bankes noted that there was no authority on the question.[30] So too did Lord Justice Scrutton,[31] who said that the exceptions were difficult to state.[32] Lord Justice Atkin also said that it was difficult to hit upon a formula which defined the precise limits of the duty of confidentiality.[33] Nevertheless each judge recounted a list of exceptions which were similar but not identical to each other.

2.17 The judgments in *Tournier* were the basis for the decision in *Emmott v Michael Wilson & Partners Ltd*.[34] The latter was a case about confidentiality in arbitration, and is now

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

24 For example: *PJS v News Group Newspapers Ltd* [2016] UKSC 26, [2016] AC 1081; *Richard v BBC* [2018] EWHC 1837 (Ch), [2019] 2 All ER 105.

25 *Von Hannover v Germany* (2004) 16 BHRC 545, (2005) 40 EHRR 1 (ECtHR). But see also: *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457; *Murray v Express Newspapers plc* [2008] EWCA Civ 446, [2009] Ch 481.

26 Art 8, European Convention on Human Rights, enacted into English law through the Human Rights Act 1998.

27 A yet further basis worth noting is that the arbitrator might give directions on confidentiality, which are then binding on the parties. Some arbitral rules encourage the tribunal to consider such directions (see below).

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

29 [1924] 1 KB 461 (CA).

30 [1924] 1 KB 461, 473.

31 [1924] 1 KB 461, 479.

32 [1924] 1 KB 461, 481.

33 [1924] 1 KB 461, 486.

34 [2008] EWCA Civ 184, [2008] 2 All ER (Comm) 193.

the leading case on the exceptions to confidentiality (in arbitration and generally). It was endorsed recently by the Supreme Court in *Halliburton v Chubb*.[35]

2.18 In *Emmott*, Lord Justice Lawrence Collins set out the following list of exceptions:[36]

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

2.19 Lord Justice Lawrence Collins expressed caution in formulating this list. He noted that *Tournier* had not been the subject of much discussion.[37] He said that the exceptions were still in the process of development,[38] and represented (only) the "principal cases" in which disclosure may be permissible.[39]

2.20 He also acknowledged[40] that his list of exceptions must be read in light of the reservation of Lord Hobhouse in *Associated Electric and Gas Insurance Services*.[41] In that case, Lord Hobhouse said that he doubted the desirability or merit of characterising the duty of confidentiality solely on the basis of it being an implied term of arbitration, and then formulating exceptions to it. Different types of confidentiality might arise, he said, and privacy was a further (separate) concern. Also, he said, different rules might apply when it comes to the arbitral award itself.

2.21 As for the general exceptions listed in *Emmott*, there are a large variety of ways in which they might manifest in the particulars of any given case. For example, disclosure may be legitimate to enable an arbitrating party to found a cause of action against a third party, or defend a claim brought by a third party.[42] Or to question the honesty of witness evidence in one proceedings by comparing it to their evidence in previous arbitral proceedings.[43] Or to prove that an issue in current arbitral proceedings was resolved in previous arbitral proceedings and so cannot be relitigated.[44] Further, while arbitration claims in court might be heard in private, the default position is for court judgments to be published, at least where this can be done

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35 [2020] UKSC 48, [2020] 3 WLR 1474 at [85].

36 [2008] EWCA Civ 184, [2008] 2 All ER (Comm) 193 at [107].

37 [2008] EWCA Civ 184, [2008] 2 All ER (Comm) 193 at [89].

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

39 [2008] EWCA Civ 184, [2008] 2 All ER (Comm) 193 at [107].

40 [2008] EWCA Civ 184, [2008] 2 All ER (Comm) 193 at [91] to [93].

41 [2003] UKPC 11, [2003] 1 All ER (Comm) 253 at [20].

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

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

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

without disclosing significant confidential information (for example, by redacting or anonymising).[45]

2.22 These examples are drawn from the leading cases already cited in the footnotes to this chapter. A full account of the extensive case law might run to well over 30 pages.[46]

2.23 The DAC gave the following further examples of when disclosure might be appropriate and to whom:[47]

> The award may become public in [domestic] legal proceedings … or abroad under the 1958 New York Convention; the conduct of the arbitration may also become public if subjected to judicial scrutiny within or without England; and most importantly, several non-parties have legitimate interests in being informed as to the content of a pending arbitration, even short of an award: eg parent company, insurer, P & I Club,[48] guarantor, partner, beneficiary, licensor and licensee, debenture-holder, creditors' committee etc, and of course even the arbitral institution itself (such as the ICC Court members approving the draft award) … . Further, any provisions as to privacy and confidentiality would have to deal with the duty of a company to make disclosure of eg arbitration proceedings and actual or potential awards which have an effect on the company's financial position.

2.24 As noted in *Emmott*, confidentiality can be overridden where the parties consent. Some arbitral rules create exceptions to confidentiality (see below). Parties consent to those exceptions to the extent that they agree that the arbitral rules will govern their arbitration.

FOREIGN JURISDICTIONS, AND ARBITRAL RULES

2.25 Internationally, there is a great diversity of legislative approaches to confidentiality.[49] Some foreign statutes do include provisions on confidentiality.[50] These tend to take the form of a general rule of confidentiality, followed by a list of exceptions. Some rules are mandatory, some are opt-out, and some are opt-in. Some of their provisions, for example as to whether court proceedings are held in public or private, find

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

46 For example, see: *Toulson & Phipps on Confidentiality* (4th ed 2020) paras 5-050 to 5-180 (pp 107 to 139).

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

48 Protection and Indemnity Club, a mutual insurance association in the shipping industry.

49 For a wide-ranging survey of 93 jurisdictions, see: Hong-Lin Yu, "Duty of confidentiality: myth and reality" (2012) 31(1) *Civil Justice Quarterly* 68.

50 For present purposes, pertinent examples include: Arbitration Act 1996 (New Zealand), ss 14 to 14I, which are opt-out provisions; International Arbitration Act 1974 (Cth) (Australia), ss 23C to 23G, which are opt-in provisions; Arbitration Ordinance (Cap. 609) (Hong Kong), ss 16 to 17, which are mandatory, and s 18, which is opt-out; Arbitration (Scotland) Act 2010, sch 1, r 26, an opt-out provision, which also says that disclosure is otherwise actionable as a breach of an obligation of confidence. For criticism of the Scottish approach to confidentiality, see: F Davidson, "The Arbitration (Scotland) Act 2010: the way forward or a few missteps?" [2011] *Journal of Business Law* 43, 53 to 60.

comparable rules in England, not in the Arbitration Act 1996, but in the Civil Procedure Rules. The following four points are worth noting.

2.26 First, one suggestion is that confidentiality should be opt-in, because dispute resolution should not be secret.[51] But if secrecy is a problem, it is only overcome by prohibiting confidentiality. Secrecy is otherwise maintained if parties opt-in. And parties are likely to opt-in, given the appetite for confidentiality revealed by arbitral rules and industry surveys.

2.27 Second, those foreign statutes which do address confidentiality often have a large measure of overlap, but their respective provisions are not identical, either to each other, or to the principles discussed in *Emmott*.

2.28 Third, foreign statutory provisions about confidentiality tend to be one-size-fits-all. And yet, perhaps one size does not fit all. Different approaches to confidentiality may be appropriate for different types of arbitration. For example, investor-state arbitrations tend to start from a default position of transparency rather than confidentiality.[52] More transparency might also be appropriate in areas which affect the general public, like public procurement contracts,[53] or sport;[54] and family law arbitrations concerning children might have more extensive duties of disclosure, for example to report child welfare concerns.[55]

2.29 Fourth, to the extent that the foreign statutory rules are not mandatory, they represent an optional scheme of confidentiality which the parties can adopt. No doubt that scheme is based on the law, but it is not a codification of the law, that is, it is not a statutory expression of the living law. There is a difference between the following. On the one hand, a law of confidentiality, which always governs, even if it is part of that law to uphold (often) the agreement of the parties. On the other hand, rules of confidentiality which are contingent, which only apply because the parties choose them.

2.30 Parties already have a choice of arbitral rules with provisions on confidentiality. Some foreign arbitral institutions have provisions on confidentiality even though their own domestic statutes also contain rules on confidentiality.[56] As for the rules of other

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[51] C Partasides and S Maynard, "Raising the Curtain on English Arbitration" (2017) 33 *Arbitration International* 197.

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

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

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

[55] This is explicitly acknowledged in the IFLA Children Scheme Rules 2021.

[56] HKIAC Administered Arbitration Rules 2018, arts 45.1 to 45.5; AMINZ Arbitration Rules 2022, rr 17.11 to 17.13; ACICA Arbitration Rules 2021, rr 26.1 to 26.6.

arbitral institutions, some provide that hearings are private,[57] and some provide for confidentiality with a (varying) list of exceptions.[58] Some encourage the tribunal to discuss confidentiality with the parties,[59] and some empower the tribunal to make orders to protect confidentiality.[60] At least one even provides for potential anonymity, so that the parties do not know each other's identities (but the arbitrator will know).[61] Some confirm the confidentiality of awards,[62] others provide that awards might be disseminated (or when appropriately anonymised),[63] or published.[64] Some even prescribe publicity for those parties who fail to abide by an arbitral award.[65]

DISCUSSION

2.31 The existing default position – that arbitrations seated in England and Wales are, by default, private and confidential – is strongly supported by many users of arbitration. An obligation of confidentiality might be an express term of the arbitration agreement, or a term implied by law, or it might arise in equity, and "privacy" can also be protected in tort. But confidentiality cannot be an absolute obligation. It must be subject to exceptions. For example, an arbitral party seeking to enforce an award must be able to disclose it. The difficulty lies not in stating the default rule, but in articulating the exceptions.

Codification

2.32 We have considered whether it would be desirable to codify the existing law to provide certainty and clarity. One option might be to include in the Arbitration Act 1996 a provision stating explicitly that arbitrations are private and confidential, unless an exception applies. The provision could then set out a non-exhaustive list of exceptions, to include the principal exceptions to confidentiality which have already been identified in case law:

(1) where there is consent;

(2) where the court so orders;

(3) where reasonably necessary for the protection of the legitimate interests, or the fulfilment of the legal duties, of an arbitral party;

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

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

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

60 ICC Arbitration Rules 2021, art 22.3.

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

62 LCIA Arbitration Rules 2020, art 30.3.

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

64 LSAC 2020, cl 13.

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

(4) where required by the interests of justice; and

(5) where required by the public interest.

2.33 To the definition in *Emmott*, in subparagraph (3) above, we have added a reference to the fulfilment of legal duties. This is to include various circumstances noted by the DAC (quoted above), such as a company having to report its financial exposure in arbitral proceedings.

2.34 We consider that any statutory list should include a public interest exception, despite the hesitancy in *Emmott*. This is because we believe that this best captures possible debates about, for example, transparency in arbitrations involving public money, or the need to report child welfare concerns in family arbitrations.

2.35 Including such a provision in the Arbitration Act 1996 would have the merit of stating the default rule, and providing at least some guidance to users of the Act on the principal exceptions to confidentiality. It should provide sufficient room for the courts to develop the law as necessary, both in terms of broad principle, and in terms of the specific details in any given case.

2.36 This would be a mandatory provision. There seems little added value in the Arbitration Act 1996 offering an optional scheme of confidentiality when arbitral rules do that already. Any added value would instead be in the form of a codification of the law. And of course, the law is mandatory. Any optional scheme would be subject to the mandatory law anyway. This can be explained further, as follows.

2.37 If the parties agree that their arbitration will be confidential, the law recognises that their agreement carries some weight. But the parties' mere agreement cannot preclude all scrutiny in all cases. For example, if the interests of justice require the public scrutiny of matters arising in the arbitration, that trumps the parties' agreement. Similarly, the parties might agree that their arbitration be public, but there might be times when the law of confidentiality overrides that agreement, for example with state secrets under the Official Secrets Act 1989.

2.38 In other words, the parties' agreement that their arbitration be confidential is an important starting point which the courts are disposed to uphold. But the parties' agreement cannot exclude the mandatory law of confidentiality and its limits, which will override the parties' agreement in certain circumstances. Thus, any codification of the law of confidentiality in the Arbitration Act 1996 would also have to be mandatory.

Our preference

2.39 However, we have provisionally concluded not to propose codification of the law of confidentiality, for the following reasons.

2.40 We are not persuaded that confidentiality should be the presumption in all types of arbitration. As noted above, in some types of arbitration, the default already favours transparency, for example investor-state arbitrations. Elsewhere, there is a trend towards transparency, at least in some respects, such as the publication of awards. And there is further debate to be had in other contexts, for example with some public procurement contracts, about the extent to which hearings should be open to public scrutiny.

2.41 Alternatively, if confidentiality is to be the default rule, the list of exceptions must be robust. The decisions in *Tournier* and *Emmott* have identified a list of exceptions, but with the following caveats: the list is not exhaustive; the law is still developing; different approaches might be needed given that confidentiality can arise from a variety of sources (in contract, equity, and tort). These caveats are not trivial.

2.42 Those exceptions which do appear on the list are expressed in broad terms and at a higher level of generality. We are not persuaded that they provide especially useful guidance to users in terms of how they would apply in any particular case. They leave work still to be done by the courts, both in terms of building up a detailed application of the general rules, and potentially extending the general rules. Any provision in the Arbitration Act 1996 would provide little guidance to the courts in that regard.

2.43 Foreign statutes, and arbitral rules, show a wide variety of differing approaches to confidentiality. This might indicate a lack of consensus in identifying with precision the limits of confidentiality. It might also reflect the fact that the proper balance between confidentiality and transparency is still a matter of debate. Further, the dividing line between confidentiality and transparency will likely be drawn in different places depending on the context. This militates against a one-size-fits-all approach.

2.44 Therefore, we do not think it possible to provide a detailed statutory codification of the law relating to confidentiality in arbitration in a way which would be comprehensive, let alone future-proof. Although confidentiality is important to arbitration, the law of confidentiality is far broader than arbitration; an attempt to codify the law of confidentiality within an arbitration statute seems misplaced.

2.45 The law of confidentiality is complex, fact-sensitive, and in the context of arbitration, a matter of ongoing debate. In such circumstances, there is a significant practical advantage in relying on the courts' ability to develop the law on a case-by-case basis. Far from being a weakness, we consider it one of the strengths of arbitration law in England and Wales that confidentiality is not codified.

2.46 In the meantime, those parties seeking greater specificity can choose arbitral rules which provide a scheme of confidentiality, or the matter can be addressed in a tribunal order at an early stage of arbitral proceedings. Or parties might simply agree to refer their disputes to "private and confidential arbitration", knowing that all these approaches are supported by a law which still retains the ability to respond flexibly as circumstances change.

Consultation Question 1.

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

Chapter 3: Arbitrator independence and disclosure

3.1 In broad terms, impartiality is the idea that arbitrators are neutral as between the arbitrating parties, and independence is the idea that arbitrators have no connection to the arbitrating parties. Disclosure is the idea that arbitrators should reveal what connections they might have.

3.2 In this chapter, we discuss whether the Arbitration Act 1996 should impose express duties of independence and disclosure on arbitrators. There is already an express statutory duty of impartiality.

3.3 We provisionally conclude that there should be no new express duty of independence. It is not practicable in many areas of arbitration. We think that what matters instead is that arbitrators are impartial. We propose codifying the common law, which requires an arbitrator to disclose circumstances which might reasonably give rise to justifiable doubts as to their impartiality.

INDEPENDENCE

3.4 To repeat, independence is the idea that arbitrators have no connection to the arbitrating parties.

3.5 The Arbitration Act 1996 does not require arbitrators to be independent. This was deliberate. The DAC said:[1]

> It seems to us that lack of independence, unless it gives rise to justifiable doubts about the impartiality of the arbitrator, is of no significance. … We do not follow what is meant to be covered by a lack of independence which does not lead to the appearance of partiality. Furthermore, the inclusion of independence would give rise to endless arguments, as it has, for example, in Sweden and the United States where almost any connection (however remote) has been put forward to challenge the "independence" of an arbitrator. For example, it is often the case that one member of a barristers' chambers appears as counsel before an arbitrator who comes from the same chambers. Is that to be regarded, without more, as a lack of independence justifying the removal of the arbitrator? We are quite certain that this would not be the case in English law.

3.6 There seem to be two points here. First, that impartiality is what really matters, not independence. Second, that it is not practically possible to ensure complete independence.

3.7 There is also a third point which the DAC did not refer to. That third point is disclosure.

3.8 For example, it may well be that, in an arbitration, counsel and arbitrator are colleagues. Some colleagues are professionally acquainted but might otherwise have no further relationship. Other colleagues might be close friends, with an attendant risk

[1] *Report on the Arbitration Bill* (1996) paras 101 to 102.

of at least unconscious bias. This goes to the fairness of the arbitration. The parties themselves should be able to debate whether their arbitrator can be impartial despite a lack of complete independence. This debate is only possible if the arbitrator discloses the connection.

3.9 In support of their argument, the DAC cited an article by Kendall.[2] However, that author concludes that an arbitrator should disclose that they are from the same chambers as counsel.[3] So too does the International Bar Association,[4] whose *Guidelines on Conflicts of Interest in International Arbitration* describe good arbitral practice which is internationally recognised. Similarly, in court proceedings it might be appropriate for a recorder to decline to sit in cases where the barrister is from the same chambers, for example if the barrister's fee is dependent on the outcome and contributes to chambers' expenses.[5]

3.10 In this way, we see that independence is tied up with impartiality and disclosure. We discuss those topics in turn.

IMPARTIALITY

3.11 Impartiality is the idea that arbitrators are neutral as between the arbitrating parties.

3.12 The Arbitration Act 1996 imposes an express duty of impartiality on arbitrators, as follows.

3.13 Section 1 provides:

> The provisions of this Part are founded on the following principles, and shall be construed accordingly –
>
> (a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense … .

3.14 Section 33 provides:

> (1) The tribunal shall –
>
> (a) 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 … .

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2 J Kendall, "Barristers' Independence and Disclosure" (1992) 8(3) *Arbitration International* 287.

3 (1992) 8(3) *Arbitration International* 287, 299.

4 International Bar Association, *Guidelines on Conflicts of Interest in International Arbitration* (2014) Pt 2 § 3.3.2. The Guidelines operate a traffic light system. The Red List contains circumstances which objectively give rise to justifiable doubts. The Orange List contains circumstances which may give rise in the eyes of the parties to justifiable doubts. There is no duty of disclosure for circumstances on the Green List. Where the arbitrator and counsel are from the same barristers' chambers, that connection appears on the Orange List.

5 *Smith v Kvaerner Cementation* [2006] EWCA Civ 242, [2007] 1 WLR 370 at [17].

3.15 An arbitral award can be challenged under section 68 for serious irregularity if the arbitrator fails to abide by their duties under section 33.[6] Also, an arbitrator who is not impartial can be removed by the court. Section 24(1)(a) states:

> A party to arbitral proceedings may … apply to the court to remove an arbitrator on any of the following grounds – that circumstances exist that give rise to justifiable doubts as to [the arbitrator's] impartiality … .

3.16 The law of England and Wales responds, not just to actual bias, but also to apparent bias. Partly this is pragmatic, given the difficulties of proving actual bias.[7] Partly it reflects the adage that justice must be done and be seen to be done. This is also why section 24 talks in terms of "justifiable doubt" as to impartiality (rather than limiting itself to actual impartiality).

3.17 In *Halliburton Co v Chubb Bermuda Insurance Ltd*,[8] the Supreme Court confirmed that the test for justifiable doubt as to impartiality is the same as for apparent bias.[9] That test is: whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.[10]

3.18 Some arbitral rules state that an arbitrator shall not represent either party or advise them.[11] It is clear as a matter of the law of England and Wales that an arbitrator must be impartial whether appointed by one party, or by all parties jointly, or as chair by the other arbitrators.[12] Once appointed, they must act neutrally.

3.19 We have not heard of any need to reform the law on impartiality.

DISCLOSURE

3.20 Disclosure is the idea that arbitrators should reveal to the parties any circumstances which might go to the question of impartiality or independence.

3.21 The Arbitration Act 1996 has no express duty of disclosure. However, in *Halliburton v Chubb*, the Supreme Court held that there was a duty of disclosure.

3.22 The facts were as follows. An arbitrator was appointed in a first arbitration between parties A and B. The same arbitrator was then appointed in a second arbitration between parties A and C. The second arbitration arose out of the same facts as the first arbitration, and addressed some overlapping issues. The second appointment was not disclosed to party B. When party B discovered this, their complaint was that party A might get an advantage: depending on timing, party A would potentially get to

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6 *Halliburton Co v Chubb Bermuda Insurance Ltd* [2020] UKSC 48, [2021] AC 1083 at [51] by Lord Hodge.

7 *Jackson v Thompsons Solicitors* [2015] EWHC 218 (QB), [2015] All ER (D) 121 (Feb) at [16] to [17] by Simon J.

8 [2020] UKSC 48, [2021] AC 1083.

9 [2020] UKSC 48, [2021] AC 1083 at [55] by Lord Hodge.

10 [2020] UKSC 48, [2021] AC 1083 at [52] by Lord Hodge.

11 CIETAC Arbitration Rules 2015, art 24; LCIA Arbitration Rules 2020, r 5.3; LME Arbitration Regulations 2022, r 3.10.

12 *Halliburton Co v Chubb Bermuda Insurance Ltd* [2020] UKSC 48, [2021] AC 1083 at [63] by Lord Hodge.

find out how the arbitrator reacted to the evidence and arguments in the second arbitration, and could use that to improve their evidence and arguments in the first arbitration. Party C might equally have complained for the same reason.

3.23 Party B complained that the arbitrator had breached their duty of disclosure, and should be removed for apparent bias. The court agreed that the arbitrator had breached their duty of disclosure.[13] But the court said that apparent bias was to be judged at the time when the complaint was heard by the court.[14] In this case, said the court, matters had moved on so that there was no remaining apparent bias, and no need to remove the arbitrator.[15]

3.24 The court's analysis of the duty of disclosure was as follows. Whether under section 33 (the general duty of the tribunal to act fairly and impartially), or pursuant to an implied term to similar effect in the contract appointing the arbitrator, the arbitrator must act impartially. This requires the arbitrator to be free from actual and apparent bias.[16]

3.25 The court said that proper disclosure is itself a demonstration of an arbitrator's impartiality.[17] Indeed, non-disclosure might amount to apparent bias, because of its failure to pay due regard to the interests of the arbitral party kept uninformed.[18] An arbitrator is certainly in breach of their duties if they have knowledge of undisclosed circumstances which would render them liable to be removed under section 24.[19]

3.26 The court said that, if there are circumstances known to the arbitrator which <u>would</u> give rise to justifiable doubts as to their impartiality, then the arbitrator should decline the appointment.[20] If there are circumstances known to the arbitrator which <u>might</u> reasonably give rise to doubts as to their impartiality, these should be disclosed.[21]

3.27 Additionally, the court said that the fact that arbitrations are private and confidential puts a premium on frank disclosure.[22] Privacy and confidentiality otherwise limit the information available to parties to make their own assessment of an arbitrator's impartiality.

3.28 The court said that an arbitrator was under a duty to disclose what they actually knew. It left open the question of whether an arbitrator should additionally make reasonable inquiries about any possible conflict of interest, such that an arbitrator might also be

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13 [2020] UKSC 48, [2021] AC 1083 at [145], [147] by Lord Hodge.

14 [2020] UKSC 48, [2021] AC 1083 at [121] to [123], [157] by Lord Hodge.

15 [2020] UKSC 48, [2021] AC 1083 at [149] to [150] by Lord Hodge.

16 [2020] UKSC 48, [2021] AC 1083 at [76] by Lord Hodge, and [160], [167] to [168] by Lady Arden.

17 [2020] UKSC 48, [2021] AC 1083 at [70] by Lord Hodge.

18 [2020] UKSC 48, [2021] AC 1083 at [118] and [133] by Lord Hodge.

19 [2020] UKSC 48, [2021] AC 1083 at [76] by Lord Hodge, and [160], [167] to [168] by Lady Arden.

20 [2020] UKSC 48, [2021] AC 1083 at [108], [132] by Lord Hodge.

21 [2020] UKSC 48, [2021] AC 1083 at [74] to [76], [108], [132] by Lord Hodge.

22 [2020] UKSC 48, [2021] AC 1083 at [56] by Lord Hodge.

under a duty to disclosure what they reasonably ought to have known.[23] The court also said that the duty of disclosure is a continuing one.[24]

3.29 In all this, it is important to emphasise that disclosure is not primarily about admitting a conflict of interest. Quite the opposite: an arbitrator who persists in the appointment is confirming their belief that they remain impartial. The disclosure is intended as a commitment to transparency and candour, and as such purports to be a demonstration of impartiality. It is also an acknowledgement that, if justice is to be seen to be done, it is appropriate to afford the parties an opportunity to consider for themselves the neutrality of their arbitrator.[25] In contrast, if relationships and connections are kept secret, that can contribute to a sense of distrust if later discovered. Note too that parties can waive any apparent conflict of interest.[26] And it is common for parties to confirm an arbitrator's appointment following disclosure.

Disclosure and confidentiality

3.30 The relationship between confidentiality and disclosure was also discussed in *Halliburton v Chubb*. Where an arbitrator ought to reveal a connection to one of the parties, and that connection derives from other arbitration proceedings, how can the arbitrator reveal that connection without compromising the confidentiality of those other arbitration proceedings?

3.31 The court in *Halliburton v Chubb* said as follows. The duty of disclosure is not a separate exception to confidentiality. Rather, disclosure requires the express or implied (or perhaps more accurately inferred) consent of those owed the duty of confidentiality.[27] Any information disclosed is then itself also confidential.[28]

3.32 Inferred consent might arise in the following ways.

3.33 First, said the court, where party X appoints an arbitrator in one case, then appoints the same arbitrator in another case, that itself might indicate that party X consents to the arbitrator revealing, in both cases, the fact of their appointment by party X. And of course, party X's identity is already known to the other party in each case.[29]

3.34 This analysis might be even more forceful in those areas of arbitral activity, such as maritime, commodity, sports or insurance arbitration, where there is a smaller pool of practitioners, and parties understand and accept the likelihood of repeat or overlapping appointments.[30]

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23 [2020] UKSC 48, [2021] AC 1083 at [107] by Lord Hodge, and [162] by Lady Arden.

24 [2020] UKSC 48, [2021] AC 1083 at [120] by Lord Hodge; UNCITRAL Model Law, art 12(1).

25 International Bar Association, *Guidelines on Conflicts of Interest in International Arbitration* (2014) Explanation to General Standard 3.

26 International Bar Association, *Guidelines on Conflicts of Interest in International Arbitration* (2014) General Standard 4; Arbitration Act 1996, s 73(1).

27 [2020] UKSC 48, [2021] AC 1083 at [88] by Lord Hodge, and [180] by Lady Arden.

28 [2020] UKSC 48, [2021] AC 1083 at [102] by Lord Hodge.

29 [2020] UKSC 48, [2021] AC 1083 at [99] to [105] by Lord Hodge.

30 [2020] UKSC 48, [2021] AC 1083 at [43] to [44], [87] to [91] by Lord Hodge.

3.35 Second, said the court, where parties proceed under arbitration rules which explicitly require disclosure, those parties might be taken as consenting to such disclosure, at least to connections with them which arise through other arbitrations governed by the same rules.[31] This analysis is strengthened too where the arbitration rules allow for consolidation or concurrent hearings.[32] After all, such powers can only be exercised when there is knowledge of overlapping arbitrations.

3.36 It might further follow from this analysis that it can be inferred that any party who chooses arbitration seated in England and Wales similarly consents to their arbitrators complying with the mandatory duty of disclosure in the law of England and Wales.[33] Note, however, that this deemed consent is limited to the arbitrator communicating a bare minimum of information. Any more detailed information might require the express consent of the affected parties after all.[34] If further information is needed, and express consent is not forthcoming, the arbitrator may need to refuse the appointment.[35]

3.37 What is within that bare minimum of information? That has not been exhaustively decided by the case law; probably it varies from case to case. But that bare minimum does at least include the fact that the arbitrator, appointed by a party in this arbitration, has been appointed by that party in other arbitrations too, and perhaps a brief statement as to whether those other arbitrations arise out of the same facts or raise overlapping issues.[36]

FOREIGN LEGISLATION, AND ARBITRAL RULES

3.38 The UNCITRAL Model Law has express duties of independence and continuing disclosure.[37] Such duties can therefore be found in foreign legislation which directly enacts the Model Law.[38] Similar duties can also be found in other foreign legislation,[39] and in arbitral rules.[40]

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31 [2020] UKSC 48, [2021] AC 1083 at [90] by Lord Hodge.

32 [2020] UKSC 48, [2021] AC 1083 at [44] by Lord Hodge.

33 Such disclosure is a matter of practice in England and Wales already: [2020] UKSC 48, [2021] AC 1083 at [99] to [100] by Lord Hodge.

34 [2020] UKSC 48, [2021] AC 1083 at [101] by Lord Hodge.

35 [2020] UKSC 48, [2021] AC 1083 at [88] by Lord Hodge.

36 [2020] UKSC 48, [2021] AC 1083 at [146] by Lord Hodge.

37 UNCITRAL Model Law, art 12(1).

38 For example: International Arbitration Act 1991 (Singapore), sch 1 art 12; Arbitration Ordinance (Cap 309) (Hong Kong), s 25; Arbitration Act 1996 (New Zealand), sch 1 art 12.

39 For example: Federal Law No 6 of 2018 on Arbitration (United Arab Emirates), art 10.4; Swedish Arbitration Act, SFS 1999:116, updated as per SFS 2018:1954, ss 8, 9; Swiss Private International Law Act of 1987, art 179(6). The Dutch Code of Civil Procedure, Book Four, Arbitration, art 1023, specifies independence. See too the survey of foreign law in *Halliburton Co v Chubb Bermuda Insurance Ltd* [2020] UKSC 48, [2021] AC 1083 at [112] to [114] by Lord Hodge.

40 For example: SIAC Rules 2016, r 13; HKIAC Administered Arbitration Rules 2018, art 11; AMINZ Arbitration Rules 2022, rr 6.4, 6.9; UNCITRAL Arbitration Rules 2021, art 11; CIArb Arbitration Rules 2015, art 11; ICC Arbitration Rules 2021, art 11; LCIA Arbitration Rules 2020, rr 5.3 to 5.5; SCC Arbitration Rules 2017, art 18; CIETAC Arbitration Rules 2015, art 31; LME Arbitration Regulations 2022, r 3.10; DIAC Arbitration Rules

3.39 In Scotland, while the arbitrator has duties of disclosure and independence,[41] independence is then defined to mean any connection which gives rise to justifiable doubts as to impartiality.[42] Similarly, in Australia, justifiable doubts as to impartiality or independence are defined in terms of creating a real danger of bias.[43] What these two pieces of legislation seem to suggest is that independence is not a virtue in itself, but merely something relevant to ensuring impartiality.[44] In other words, consistently with the passage from the DAC discussed above, what matters is impartiality rather than independence.

DISCUSSION

Independence

3.40 A duty of independence is express in some foreign legislation and in some arbitral rules. Nevertheless, we are not persuaded that it is a virtue in itself. To this extent, we tend to agree with the DAC that what matters is impartiality. If the arbitrator is impartial, and is seen to be impartial, it should not matter whether they have a connection to the parties before them. Of course, some connections are so close that there is at least the risk of unconscious or apparent bias. But other connections might be so trivial or tenuous that no-one could reasonably consider the arbitrator's impartiality to be in question. What matters is not the connection, but its effect on impartiality and apparent bias.

3.41 We have heard repeatedly that in some areas of arbitral activity, complete independence is perhaps almost impossible to achieve, given the limited number of professionals, and the inevitable encounters with others as those professionals develop their expertise over the years. Indeed, some arbitration clauses explicitly require what we might call immersive area expertise.[45] This may be so particularly, for example, in maritime, commodity, insurance or sports arbitration. As discussed above, this has been noted judicially. To the extent that parties are kept informed, this does not appear to cause any problems in practice.

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

3.43 For these reasons, we do not propose the introduction of a new duty of independence.

2022, art 14. IFLA Financial Scheme Rules 2021, art 5.1, requires disclosure of conflicts of interest which go to impartiality. GAFTA Arbitration Rules No 125 (2020), r 3.7, rather than requiring independence generally, lists the specific forms of connections prohibited to an arbitrator.

[41] Arbitration Act (Scotland) 2010, sch 1 rr 8, 24.

[42] Arbitration Act (Scotland) 2010, sch 1 r 77.

[43] International Arbitration Act 1974 (Cth), s 18A.

[44] Perhaps in similar vein, ICSID Convention, art 14, requires arbitrators to exercise independent *judgment*.

[45] As previously noted by the DAC, *Report on the Arbitration Bill* (1996) para 103.

Consultation Question 2.

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

Disclosure

3.45 In contrast, a duty of disclosure is undoubtedly part of the law of England and Wales. It is vital to ensuring that justice be seen to be done. In other words, it ensures the apparent impartiality of the tribunal.

3.46 One of the purposes of the Arbitration Act 1996 was avowedly to restate the law of arbitration. It is a virtue of the Act that it recites, in one place, and easily accessible to users, the governing principles of arbitration. Disclosure is currently missing from this statement of the law. For these reasons, we propose that the duty of disclosure should be codified.

3.47 Given the variety of circumstances in which a duty of disclosure falls to be fulfilled, we do not propose reform which is prescriptive in technical detail. Rather, we propose codifying only the general duty. This also allows room for the common law to grow as arbitral practice evolves, and for arbitral rules to offer further particulars of how the general duty applies in the specific factual context of their own area of activity.

3.48 The Arbitration Act 1996 uses the language of justifiable doubt. The test for justifiable doubt is the same as the test for apparent bias. This test uses the language of the fair-minded observer. However, rather than multiply through paraphrase, we propose to keep the language of the Act uniform by expressing the duty of disclosure in terms of justifiable doubt (rather than apparent bias or the fair-minded observer).

3.49 Hence, we propose that there should be added to the Arbitration Act 1996 an express provision that arbitrators have a continuing duty to disclose any circumstances which might reasonably give rise to justifiable doubts as to their impartiality.

3.50 As noted above, the case law indicates that a failure to comply with the duty of disclosure can itself give rise to justifiable doubts as to the arbitrator's impartiality, risking their removal under section 24 of the Act.

Consultation Question 3.

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

3.52 This still leaves the question of whether an arbitrator's duty of disclosure is based upon their actual knowledge, or also upon what they ought to know after making reasonable inquiries.

3.53 On the one hand, it may be appropriate to resolve this uncertainty, since we are proposing to codify the duty of disclosure, so that arbitrators know precisely what is expected of them. On the other hand, in *Halliburton v Chubb*, Lady Arden considered whether it might be better left to the courts to develop the law. That way, she said, the law can keep pace with change, and take account of developing standards and expectations, particularly in international commercial arbitration.[46]

3.54 A duty to make reasonable inquiries is stipulated by the International Bar Association in its *Guidelines on Conflicts of Interest in International Arbitration*.[47] Such a duty was countenanced by Lord Hodge in *Halliburton v Chubb*.[48] It would be consistent with a duty of reasonable care generally expected of professionals.[49] In contrast, in Scotland, the duty of disclosure is based only upon the actual knowledge of the arbitrator.[50]

Consultation Question 4.

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

Consultation Question 5.

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

46 [2020] UKSC 48, [2021] AC 1083 at [162].

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

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

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

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

Chapter 4: Discrimination

4.1 In this chapter, we consider whether the Arbitration Act 1996 should prohibit discrimination in the appointment of arbitrators.[1] We also discuss the use of gendered language in the Act.

4.2 The particular issue is where an arbitration agreement specifies who can be appointed as arbitrator in terms which might be regarded as discriminatory. If one party seeks to appoint a different arbitrator, the other party might challenge that appointment.

4.3 We provisionally propose to adopt the language of the Equality Act 2010 so that, in broad terms, arbitral appointments cannot be challenged for reasons which are discriminatory. We think that arbitration benefits when free from prejudice.

INTRODUCTION

4.4 Diversity of arbitral appointments has improved, but not to parity.[2] For example, women were appointed as arbitrators in 23.4% of cases administered by the International Chamber of Commerce in 2020,[3] and in 32% of cases administered by the London Court of International Arbitration in 2021.[4] Generally this follows a trend of increasing appointment of women.[5] In 2021, a major survey reported that 61% of respondents felt that progress had been made with gender diversity, and 31% felt that progress had been made with ethnic diversity.[6] Notable initiatives include the ERA Pledge (Equal Representation in Arbitration),[7] which is a response to the under-representation of women on arbitral tribunals, and REAL (Racial Equality for Arbitration Lawyers).

4.5 The particular issue here concerns arbitration agreements which specify who is to be appointed as arbitrator in terms which might be regarded as discriminatory. For example, some arbitration agreements specify that the arbitrators must be "commercial men". The courts have upheld such agreements, albeit the case law is

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1 We are grateful in particular for the help of Dr David Barrett, Sylvia Noury QC, and Pete Kerr-Davis. The views in this chapter are our own.

2 U Sharma, "The invisible stigmatisation of female practitioners in international arbitration", (2021) 17(3) *International Journal of Law in Context* 371; H A Kadouf and U A Oseni, "The discrimination conundrum in the appointment of arbitrators in international arbitration" (2012) 29(5) *Journal of International Arbitration* 519.

3 *ICC Dispute Resolution 2020 Statistics*, p 14.

4 *LCIA 2021 Annual Casework Report*, p 20.

5 *ICCA Report of the Cross-Institutional Task Force on Gender Diversity in Arbitral Appointments and Proceedings* (2020) s 2.II.

6 White & Case, Queen Mary University of London, *2021 International Arbitration Survey*, p 16.

7 www.arbitrationpledge.com

not recent, giving a broad interpretation to the meaning of "commercial", but without addressing whether the restriction to "men" is acceptable.[8]

DISCUSSION

4.6 The leading case on discriminatory terms in arbitration agreements is *Hashwani v Jivraj*.[9] In that case, the parties entered into an arbitration agreement which provided that any dispute was to be resolved by arbitration before three arbitrators, all of whom should be respected members of the Ismaili community. One party sought to appoint a non-Ismaili arbitrator, which the other party challenged. The Supreme Court held the appointment void for failing to comply with the requirement that the arbitrator be Ismaili. The court said that an arbitrator, though appointed under a contract, was not appointed under a contract of employment, and so the employment law rules against discrimination did not apply. The court also held that being Ismaili would otherwise have been a genuine occupational requirement for the appointment, thereby being an admissible exception anyway to the rule against discrimination.

4.7 The Court of Appeal had reached a different decision on the latter point:[10]

> If the arbitration clause had empowered the tribunal to act ex aequo et bono[11] it might have been possible to show that only an Ismaili could be expected to apply the moral principles and understanding of justice and fairness that are generally recognised within that community as applicable between its members, but the arbitrators' function … is to determine the dispute between the parties in accordance with the principles of English law. That requires some knowledge of the law itself, including the provisions of the 1996 Act, and an ability to conduct the proceedings fairly in accordance with the rules of natural justice, but it does not call for any particular ethos. Membership of the Ismaili community is clearly not necessary for the discharge of the arbitrator's functions … .

4.8 In the Supreme Court, Lord Clarke said that the Court of Appeal's approach was too legalistic and technical. The question, he said, was whether the requirement for an Ismaili arbitrator was legitimate and justified, rather than strictly necessary.[12] He said that "one of the more significant and characteristic spirits of the Ismaili sect was an enthusiasm for dispute resolution contained within the Ismaili community".[13] The choice of an Ismaili arbitrator meant "a procedure in which the parties could have confidence and as likely to lead to conclusions of fact in which they could have particular confidence".[14]

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8 *Pando Compania Naviera SA v Filmo SAS* [1975] QB 742 (QBD). In *Rahcassi Shipping Co SA v Blue Star Line Ltd (The Bede)* [1967] 2 Lloyd's Rep 261 (Com Ct), the arbitration agreement specified "commercial men and not lawyers".

9 [2011] UKSC 40, [2011] 1 WLR 1872.

10 [2010] EWCA Civ 712, [2011] 1 All ER 50 at [29].

11 That is, according to a sense of fairness, rather than strictly in accordance with legal rules.

12 [2011] UKSC 40, [2011] 1 WLR 1872 at [70].

13 [2011] UKSC 40, [2011] 1 WLR 1872 at [67].

14 [2011] UKSC 40, [2011] 1 WLR 1872 at [70].

4.9 However, Lord Mance felt moved to say that, had the Ismaili community sought to engage an employed lawyer, restricting employment to members of the Ismaili community would likely be unjustified.[15]

Consultation Question 6.

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

4.11 Subsequently to *Hashwani v Jivraj*, Baroness Cox sought to put a Private Member's Bill before the House of Lords, seeking to apply equality legislation to arbitration.[16] The Bill did not proceed beyond Second Reading and did not become law.

4.12 The following three points are worth noting.

4.13 First, the Supreme Court decision in *Hashwani v Jivraj* has received criticism from some commentators,[17] but it has been welcomed by others.[18] There is no consensus that the decision itself should be reversed. Indeed, the conclusion that an arbitrator is not an employee seems sound.

4.14 Second, discrimination on the grounds of nationality is somewhat complex in the context of arbitration. The UNCITRAL Model Law states, on the one hand,[19] that no-one is precluded from acting as an arbitrator on the grounds of their nationality,[20] *unless the parties otherwise agree.* On the other hand, it provides that an appointing authority should take into account the advisability of appointing an arbitrator with a nationality different from the parties.[21] Some institutional arbitration rules similarly make nationality a relevant consideration.[22] Some presume that an arbitrator should have a different nationality from the parties.[23]

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15 [2011] UKSC 40, [2011] 1 WLR 1872 at [81] to [82].

16 Arbitration and Mediation Services (Equality) Bill; https://bills.parliament.uk/bills/1793.

17 *Merkin and Flannery on the Arbitration Act 1996* (6th ed 2020) p 266 n 88.

18 *Russell on Arbitration* (24th ed 2015) para 4-106; *Redfern & Hunter: Law and Practice of International Commercial Arbitration* (6th ed 2015) para 4.62.

19 UNCITRAL Model Law, art 11(1).

20 In the UAE, an arbitrator need not be of a specific gender or nationality, unless the parties otherwise agree: Federal Law No 6 of 2018 on Arbitration, art 10(3). But note the DIAC Rules on nationality (below).

21 UNCITRAL Model Law, art 11(5).

22 UNCITRAL Arbitration Rules 2021, art 6(7); CIArb Arbitration Rules 2015, art 6(5); ICC Arbitration Rules 2021, art 13(1); CIETAC Arbitration Rules 2015, art 30.

23 ICC Arbitration Rules 2021, arts 13(5) to 13(6); LCIA Arbitration Rules 2020, art 6.1; ICSID Convention, arts 38 to 39; DIAC Rules 2007, r 10.1; HKIAC Administered Arbitration Rules 2018, art 11.2.

4.15 These rules concerning differences of nationality are presumably to ensure (the appearance of) neutrality.[24] Sometimes similarity of background might also be relevant,[25] as the Court of Appeal accepted in *Hashwani v Jivraj*. It would be hasty to conclude, for example, that nationality or religion ought never to be relevant. An example might be where the dispute concerns details of a particular religious practice.

4.16 Third, a particular concern might be the extent of the consequences of *Hashwani v Jivraj*. For example, the judgment could be taken to mean that appointments could be restricted by reference to other protected characteristics like sexuality or age. To return to an earlier example, it might also allow appointments to be restricted to men.

4.17 The decision in *Hashwani v Jivraj* was based on a statutory instrument giving effect to an EU directive. Discrimination is now governed by the Equality Act 2010. The latter identifies the following protected characteristics: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation.[26] Discrimination is defined as treating one person less favourably than another because of a protected characteristic.[27] Discrimination is prohibited in various work contexts, for example against employees or police officers.[28] Nevertheless, it may not be discrimination if, having regard to the nature or context of the work, the requirement to have a protected characteristic is an occupational requirement which is applied as a proportionate means of achieving a legitimate aim.[29]

4.18 The Equality Act 2010 does not explicitly apply to arbitrators. But it does provide that a person must not discriminate against a barrister in relation to instructing them.[30] This is a situation analogous to appointing an arbitrator. A breach of the rules of the statute might be litigated in a county court or an employment tribunal. Additionally, a term of a contract is unenforceable in so far as it provides for treatment of another person that is of a prohibited description.[31]

PROPOSAL

4.19 We provisionally propose that discrimination should be addressed explicitly by providing as follows:

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

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[24] In the Netherlands, any agreement about nationality must be with a view to impartiality and independence: Dutch Code of Civil Procedure, Book Four, Arbitration, art 1023.

[25] H Dundas, “The return of normality” (2011) 77 *Arbitration* 467, 473.

[26] Equality Act 2010, s 4.

[27] Equality Act 2010, s 13.

[28] Equality Act 2010, Pt 5.

[29] Equality Act 2010, s 83(11); sch 9, s 1.

[30] Equality Act 2010, s 47(6).

[31] Equality Act 2010, s 142.

(2) any agreement between the parties in relation to the arbitrator's protected characteristic(s) should be unenforceable,

unless in the context of that arbitration, requiring the arbitrator to have that protected characteristic is a proportionate means of achieving a legitimate aim.

"Protected characteristics" would be those identified in section 4 of the Equality Act 2010.

4.20 This would be a world-leading initiative and send an important signal about diversity and equality. It benefits from the expertise built up under the Equality Act 2010. Here are two examples of how it might work in practice.

Example 1. An arbitration agreement states: "the arbitrator must be a man". Party A appoints a woman arbitrator. Party B cannot challenge this appointment simply because the arbitration agreement requires a man. That is to challenge the appointment on the basis of the arbitrator's protected characteristic. If Party B is to be successful in its challenge, it must show that being a man is an occupational requirement which is a proportionate way of achieving a legitimate aim.

Example 2. An arbitration agreement states: "the arbitrator must be a chartered philanthropist". Party A appoints someone who is not a chartered philanthropist. Party B can challenge the appointment on the basis that the arbitrator does not have the qualifications specified in the arbitration agreement. Being a chartered philanthropist is not a protected characteristic. It may be that the Chartered Institute of Philanthropists is indirectly discriminatory in the way it awards chartered status to members, so that too many men and too few women qualify. This scenario is not captured by the current proposal. If that state of affairs is to be challenged legally, then it is a matter for discrimination law more generally.

4.21 The proposal does not prescribe whom to appoint.[32] Rather, the proposal only applies when Party A makes an appointment, and Party B wants to object. To this extent, the proposal supports the autonomous choice of Party A. It does this only by prohibiting Party B from acting on prejudice.

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

[32] To the extent that an arbitration agreement does prescribe whom to appoint: this may be a standard term which the parties did not revisit (and now wish they did); or a party might change its mind, or be so advised by its lawyers; or an appointment might be made by an arbitral institution, which may prefer to have a freer hand in making their choice. For example, it is notable that, when given a free choice, appointments by the LCIA tend towards equality between men and women: *LCIA 2021 Annual Casework Report*, p 20.

4.23 The proposal would affect the following provisions of the Arbitration Act 1996. Under section 19, the court is to have "due regard" to the agreed qualifications required of any arbitrator it appoints.[33] Under section 24, one of the grounds for the court's removal of an arbitrator is that the arbitrator does not possess the required qualifications. Under section 30, the tribunal is competent to decide whether it is properly constituted, and that too could include whether its members have the agreed qualifications.[34] In all these cases, a discriminatory requirement would be ignored.

The New York Convention

4.24 How would the provisional proposal interact with the New York Convention? The New York Convention enables an award from an arbitration seated in England and Wales to be enforced in another Convention state. One of the grounds for resisting enforcement, under article V.1(d), is that "the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties". This suggests that, for example, a party could resist enforcement of an award if the arbitration agreement specified that the arbitrators were to be men when in fact they were women.

4.25 That said, we think that the risk of successful challenge under the New York Convention is more theoretical than practical, for the following reasons.

4.26 For a start, the 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.[35]

4.27 Further, a ground for resisting enforcement under article V.1(d) of the New York Convention does not guarantee that enforcement will be rejected. Rather, the court still retains a discretion whether to enforce anyway.[36] However, it may be that the discretion is rather narrow,[37] and predominantly concerned with allowing enforcement where the grounds for objection are subject to waiver or estoppel.[38] Otherwise, it may be that an incorrectly composed tribunal tends strongly towards rejecting enforcement.[39]

4.28 Nevertheless, what is an arbitral tribunal to do if, seated in state X, as agreed by the parties, the mandatory law of state X requires the tribunal to behave one way, when

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33 The same language is found in the UNCITRAL Model Law, art 11(5). "Due regard" is anyway not the same as saying that the appointment "must conform to" any agreed qualifications.

34 *Merkin and Flannery on the Arbitration Act 1996* (6th ed, 2020) p 301.

35 Art 11 of the UNCITRAL Model Law also provides for the court to appoint arbitrators in place of the parties. See too s 18 of the Arbitration Act 1996. Admittedly, such a replacement tribunal does not always find favour with foreign enforcing courts: A J van den Berg, "Recent Enforcement Problems under the New York and ICSID Conventions" (1989) 5(1) *Arbitration International* 2, 8 to 10.

36 *Redfern and Hunter: Law and Practice of International Arbitration* (6th ed 2015) para 11.59.

37 *Russell on Arbitration* (24th ed 2015) para 8-035.

38 *Merkin and Flannery on the Arbitration Act 1996* (6 th ed 2020) pp 854 to 860.

39 *Samukan Ltd v Commonwealth Secretariat (No 2)* [2007] EWCA Civ 1148, [2008] 2 All ER (Comm) 175.

the agreement of the arbitral parties requires the tribunal to behave another way? Either way the award is at risk of challenge. If it does not comply with the law of state X, it might be set aside by the courts of state X, and that in turn is also a ground for resisting enforcement abroad under article V.1(e) of the New York Convention. Or the award complies with the law of state X, but is challenged abroad for having a different composition of the tribunal from that agreed, pursuant to article V.1(d). There must be a solution to this "no-win" situation.

4.29 This situation is not addressed by the New York Convention. However, it is partly addressed by the (later) UNCITRAL Model Law. Article 34 is concerned with challenging an award before the courts of the seat. Article 36 is concerned with resisting enforcement of a foreign award. Both articles are based on the grounds of challenge in article V of the New York Convention.

4.30 Article 34(2)(a)(iv) of the UNCITRAL Model Law provides that an arbitral award may be set aside if:

> the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate.

4.31 In other words, where the composition of the arbitral tribunal was not as agreed by the parties, but only because a mandatory law of state X prescribed a different composition, this is not a ground for the courts of state X to set aside the award.

4.32 It has been suggested that this common sense solution to the impasse should apply to article V.1(d) of the New York Convention as well.[40] However, article 36 of the UNCITRAL Model Law does not repeat the proviso of article 34. Nevertheless, the combination of articles 34 and 36 suggests to us that a court, in exercising its discretion whether to enforce a foreign award, might consider as follows. First, whether the different composition of the tribunal was a result of the mandatory law of the seat. Second, what the enforcing court thinks of that foreign mandatory law.

4.33 In the present case, of course, the proposed mandatory law prohibits discrimination. This is something which ought not to attract the opprobrium of reasonable foreign courts. In which case, it might be thought likely that a foreign court would enforce an award seated in England and Wales, which is otherwise unimpeachable, but whose composition is not as agreed, but only because of compliance with our mandatory law.

4.34 In this regard, it is notable that, in England and Wales, the Supreme Court has suggested that the court might exercise its discretion to uphold an arbitral award, even if the award was invalid under its governing foreign law, where that foreign law was

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[40] A J van den Berg, "Recent Enforcement Problems under the New York and ICSID Conventions" (1989) 5(1) *Arbitration International* 2, 8 to 10; J Hill, "The Exercise of Judicial Discretion in Relation to Applications to Enforce Arbitral Awards under the New York Convention 1958" (2016) 36(2) *Oxford Journal of Legal Studies* 304, 331.

discriminatory, and thereby "outrages [the English or Welsh court's] sense of justice or decency".[41]

4.35 In any case, we consider it more important that the law in England and Wales takes a stance against discrimination. Section 1(b) of the Arbitration Act 1996 states 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. Put bluntly, it is in the public interest to end discrimination against people on the grounds of their protected characteristics.[42]

Consultation Question 7.

4.36 We provisionally propose that:

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

(2) any agreement between the parties in relation to the arbitrator's protected characteristic(s) should be unenforceable

unless in the context of that arbitration, requiring the arbitrator to have that protected characteristic is a proportionate means of achieving a legitimate aim.

"Protected characteristics" would be those identified in section 4 of the Equality Act 2010.

Do you agree?

GENDERED LANGUAGE

4.37 Another issue related to discrimination is the use of gendered language throughout the Arbitration Act 1996. The Act uses male pronouns. It has been wryly observed that the only time the word "her" is used, it is followed by the word "majesty". However, drafting practice has since moved on:[43]

> It is government policy that primary legislation should be drafted in a gender-neutral way, so far as it is practicable to do so.
>
> Gender neutrality applies not only when drafting free-standing text in a Bill but also when inserting text into older Acts which are not gender-neutral. This is unlikely to

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41 *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2010] UKSC 46, [2011] 1 AC 763 at [128] by Lord Collins.

42 There are economic as well as moral benefits from diversity of arbitral appointments: *ICCA Report of the Cross-Institutional Task Force on Gender Diversity in Arbitral Appointments and Proceedings* (2020) § 2.I.

43 *Office of the Parlimantary Counsel Drafting Guidance* (2020) paras 2.1.1 to 2.1.2.

cause difficulties. However, in very limited circumstances, exceptions may be made when amending an older Act where it might be confusing to be gender-neutral.

4.38 Any amendments to the Arbitration Act 1996 will follow this guidance.

Chapter 5: Arbitrator immunity

5.1 In broad terms, section 29 of the Arbitration Act 1996 provides arbitrators with immunity from liability for anything done in the discharge of their functions as an arbitrator. However, an arbitrator can still incur liability for resigning. And a line of case law suggests that arbitrators can be liable for the costs of applications for their removal made to the court by an arbital party.

5.2 In this chapter, we discuss whether arbitrators should be immune from liability for resignation, perhaps entirely, or perhaps unless their resignation is shown to be unreasonable. We also make a provisional proposal to strengthen arbitrator immunity, to preclude liability for court costs. We think that this could support the finality of arbitral awards by discouraging satellite litigation against arbitrators. It could also support arbitrator impartiality, by protecting against the pressure to conform to party demands or risk personal liability.

INTRODUCTION

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

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

5.5 The DAC said that arbitrators should have immunity for the same reason as judges: to enable them properly to perform an impartial decision-making function, and to ensure finality of the dispute resolution process.[1]

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

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

5.7 There are still ways of dealing with a recalcitrant arbitrator. For example, the parties can revoke the arbitrator's authority,[2] or apply to court to remove the arbitrator.[3] In both cases, the arbitrator may lose their entitlement to fees and expenses.[4]

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1 *Report on the Arbitration Bill* (1996) para 132. For a discussion of the origins of arbitrator immunity in English law, see N Tamblyn, "Arbitrator Immunity and Liability for Court Costs" (2022) 88(2) *Arbitration* 225.

2 Arbitration Act 1996, s 23.

3 Arbitration Act 1996, s 24.

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

5.8 Provisions conferring immunity on arbitrators can be found in some foreign legislation,[5] and in many arbitral rules.[6] However, other foreign laws appear to retain contractual liability for arbitrators.[7] There is no international consensus on arbitrator immunity.

5.9 In English law, despite section 29, immunity is compromised in two overlapping ways. First, if an arbitrator resigns, by default they incur liability, as discussed below. This is surely a disincentive to resignation, even when resignation is appropriate. Second, if an arbitrator does not resign, a party might apply to court for the arbitrator's removal. Case law, discussed below, holds that an arbitrator can incur liability for the costs of that application, even if the application is unsuccessful.

5.10 This puts the arbitrator in a very exposed position. If a party is displeased with an arbitrator, the arbitrator risks incurring liability, either for resigning, or for being removed instead of resigning. This jeopardy potentially undermines the ability of the arbitrator to make robust and impartial decisions. It also encourages collateral litigation against the arbitrator, undermining the finality of the arbitral dispute resolution process.

5.11 We take the topics of resignation and removal in turn.

RESIGNATION

5.12 Section 29(3) states that the immunity rule in section 29(1) "does not affect any liability incurred by an arbitrator by reason of [their] resigning", and cross-refers to section 25.

5.13 Section 25(1) states that "the parties are free to agree with an arbitrator as to the consequences of [their] resignation", both as regards the arbitrator's fees, and as regards "any liability thereby incurred" by the arbitrator (emphasis added). This language suggests that an arbitrator incurs liability for resigning. This conclusion is reinforced by the reservation in section 29(3). The DAC said that an arbitrator who

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

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

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

resigned would incur liability for breach of their agreement to arbitrate.[8] This is the accepted understanding.[9]

5.14 If the parties do not agree the consequences of an arbitrator's resignation, the arbitrator can apply to court under section 25(3) to "grant [the arbitrator] relief from any liability thereby incurred" (emphasis added), and for an order in respect of their entitlement to fees. To grant relief, the court must be satisfied that it was reasonable for the arbitrator to resign.[10] But even that might not be enough, since the court has a residual discretion whether or not to grant relief even when the resignation is reasonable.

5.15 When is it reasonable to resign? The DAC suggested that it may be reasonable to resign if the parties seek to adopt a procedure which the arbitrator considers conflicts with their overriding duty to adopt a fair and suitable procedure to avoid unnecessary delay and expense. Another example given by the DAC was where the arbitration is taking far longer than could have been expected, so as to impose an unfair burden on the arbitrator.[11] Others have suggested that good reasons for resignation might also include illness, bereavement, or public commitments.[12] Yet further reasons might include a subsequent and unforeseeable discovery, for example of a connection between the arbitrator and a witness, with an attendant risk of apparent bias.

5.16 There is no case law on when a resignation is positively reasonable, with some authors wondering whether the absence of case law reveals that arbitrators are not brave enough to risk an adverse costs order by applying for immunity following resignation.[13]

5.17 Importantly, it has been held that it is unreasonable to resign just because one party wishes it, has sought to impugn the arbitrator's impartiality, and has expressed a lack of confidence in the arbitrator. At first instance in *Halliburton Co v Chubb Bermuda Insurance Ltd*, Mr Justice Popplewell said:[14]

> In order to uphold the principle of party autonomy and the efficacy of the arbitral process, arbitrators and the courts should be vigilant not to accede to removal applications merely because the arbitrator would feel more comfortable if he or she did not have to sit in judgment over a party who has been critical and avowed a lack of confidence in the impartiality of the tribunal, albeit one which no fair-minded observer would feel. No tribunal wishes a party to be nursing a sense of grievance, however unjustified. However that is not a good reason for resignation or removal.

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8 *Report on the Arbitration Bill* (1996) para 111.

9 *Merkin and Flannery on the Arbitration Act 1996* (6th ed 2020) p 317; *Russell on Arbitration* (24th ed 2015) para 4-162.

10 Arbitration Act 1996, s 25(4).

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

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

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

14 [2017] EWHC 137 (Comm), [2017] 1 WLR 2280 at [63]. A similar point was made in the Supreme Court: [2020] UKSC 48, [2021] AC 1083 at [68] by Lord Hodge.

Discussion

5.18 As we have seen, there are a number of sound reasons why an arbitrator might resign. On the one hand, it might be said that arbitrators are discouraged from resigning even in appropriate cases because by default they incur liability for doing so. On the other hand, it may well be that unreasonable resignation should be discouraged.

5.19 Arbitrators can apply to court for relief from liability, but such an application incurs costs, and the London courts might not be readily accessible to non-lawyer or international arbitrators. Then again, if the arbitrator did not apply to the court for relief, and an arbitral party chose to sue upon the resignation, the arbitrator would be before the court anyway,[15] and could argue the reasonableness of their resignation.

5.20 Even then, it may be fairer to maintain the usual burden of proof, and require the party alleging unreasonable behaviour to prove it, rather than require an arbitrator to prove their reasonableness. However, the only sure way of encouraging appropriate resignations might be to remove all liability for resignation. That way at least, the arbitrator will have no fear of litigation hanging over them.

5.21 We think the arguments are finely balanced, and we do not at this stage make proposals either way. Instead, we ask consultees whether arbitrators should incur liability for resignation at all and, if so, whether such liability should only be incurred if the resignation is proved to be unreasonable.

5.22 Following the response of consultees, if ultimately we were to recommend reform, we would intend it to be mandatory (as is section 29 generally). The parties would still be free to supplement that mandatory provision with further agreement, for example by providing for full immunity, or addressing the resigning arbitrator's entitlement to fees.

Consultation Question 8.

5.23 Should arbitrators incur liability for resignation at all, and why?

Consultation Question 9.

5.24 Should arbitrators incur liability for resignation only if the resignation is proved to be unreasonable?

[15] But which court? It may be that an arbitral party suing an arbitrator might need to sue in the arbitrator's home court, which might not be in England and Wales.

REMOVAL

5.25 The Arbitration Act 1996 says nothing about an arbitrator losing immunity or incurring liability following revocation of their authority by the parties,[16] or following their removal by the court. Instead, the only reference is to an order as to fees following an arbitrator's removal.[17] This is in contrast to the position with resignation, where liability is expressly addressed, as we have seen. Thus, as a matter of statutory construction, it seems doubtful that the removal of an arbitrator should result in their losing their immunity. This appears to be deliberate: the DAC said that the parties should not be able to undermine the immunity granted to arbitrators simply by revoking their authority, and the parties should not achieve the same thing by applying to the court for the arbitrator's removal.[18]

5.26 And yet a run of cases, discussed below, suggests that an arbitrator might incur liability after all: at least for the costs of an application to court for their removal; and potentially for the costs of any application to court which challenges what an arbitrator has done.

Problematic case law

Wicketts v Brine Builders

5.27 The run of cases begins with *Wicketts v Brine Builders*.[19] In that case, the court removed an arbitrator, and then made two costs orders against him, as follows.

5.28 The first was for contesting (but eventually agreeing) an application for an injunction to restrain him from continuing with the arbitration while there was a pending application to court for his removal. The court said that the arbitrator should have adjourned the arbitration hearing pending the application for his removal. However, an arbitrator is explicitly permitted by the Arbitration Act 1996 to continue an arbitration pending an application to court for their removal.[20] There was no discussion about this in *Wicketts*. In those circumstances, it is concerning that the court made a costs order against an arbitrator for doing what statute entitled him to do.

5.29 The second costs order was for contesting and losing the application for his removal. The transcript records the arbitrator, who was representing himself, saying "I was under the impression that I am immune from suit". Beyond that, there was no further discussion of immunity, and no reference to statutory immunity under section 29, and no explanation why costs liability could be incurred despite that immunity.

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[16] Arbitration Act 1996, s 23.

[17] Arbitration Act 1996, s 24(4).

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

[19] (8 June 2001) (HHJ Seymour) (unreported) (TCC). It is discussed in detail at (2002) 2 *Arbitration Law Monthly* 31.

[20] Arbitration Act 1996, s 24(3).

Cofely Ltd v Bingham

5.30 Next is *Cofely Ltd v Bingham*. In that case, the court agreed to remove an arbitrator after he responded inappropriately to one party's inquiries about his relationship to the other party's solicitor.[21] The court held that there was apparent bias. Actual bias was not alleged. In the event, although the arbitrator contested the application for his removal, he resigned before judgment was handed down. Subsequently, a costs order was made against the arbitrator for contesting the application.[22]

5.31 This time the court was expressly referred to section 29 of the Arbitration Act 1996, but the judge said that that provision did not apply to court proceedings. The judge supported his decision by citing *Wicketts*, but there was no further reasoning.[23]

C Ltd v D

5.32 The third case to discuss is *C Ltd v D*.[24] The judge said that it "seems correct in principle" that immunity under section 29 did not preclude an arbitrator from being ordered to pay costs in relation to a removal application which the arbitrator had resisted. The judge otherwise gave no reasons. The only cases he cited in support were *Wicketts* and *Cofely*, despite the judge describing both as "exceptional", and *Cofely* as "no safe guide".[25] The court did say that costs awards against arbitrators were "extremely rare",[26] but without explaining why, or what guiding principles should apply.

5.33 On the facts of *C Ltd v D*, the application to remove the arbitrator became redundant because the arbitrator resigned. The court said that, had the application gone ahead, it would probably have failed. We might therefore conclude that the resignation was probably premature – and potentially unreasonable. Still, no costs order was made against the arbitrator.

5.34 Nevertheless, the case of *C Ltd v D* demonstrates how significant exposure to costs liability can be. Although the arbitral claim itself was only worth around €166,000, the costs incurred by the applicant, for which it sought payment, were in excess of £130,000.[27] And this was only the costs incurred at the High Court.

Halliburton Co v Chubb Bermuda Insurance Ltd

5.35 Some cases go to the Supreme Court, with all the additional costs entailed. In *Halliburton Co v Chubb Bermuda Insurance Ltd*,[28] the court was concerned with an

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21 [2016] EWHC 240 (Comm), [2016] All ER (Comm) 129.

22 [2016] EWHC 540 (Comm), [2016] 2 WLUK 879.

23 [2016] EWHC 540 (Comm), [2016] 2 WLUK 879 at [3] to [4] by Hamblen J.

24 [2020] EWHC 1283 (Comm), [2020] Costs LR 955.

25 [2020] EWHC 1283 (Comm), [2020] Costs LR 955 at [58] to [59] by Henshaw J.

26 [2020] EWHC 1283 (Comm), [2020] Costs LR 955 at [58]. There is some suggestion that claims against arbitrators are increasing as a way of challenging awards by the backdoor: Malintoppi, "Don't Shoot the Sheriff: The Threat of Legal Claims Against Arbitrators and Arbitral Institutions" (2021) 37 *Arbitration International* 487.

27 [2020] EWHC 1283 (Comm), [2020] Costs LR 955 at [5], [101].

28 [2020] UKSC 48, [2021] AC 1083.

arbitrator's duty of disclosure. That case contains a statement by Lord Hodge, without further analysis, that an arbitrator who breaches their duty of disclosure might incur the costs of an application to remove them, even if that challenge is ultimately unsuccessful.[29]

Discussion

5.36 In all this, there are four further points worth noting.

5.37 First, the language of "contesting removal" is perhaps somewhat misleading. If the parties wish to revoke the authority of an arbitrator, there is nothing the arbitrator can do about it.[30] An application under section 24 is only necessary where one of the parties is not willing to revoke the aurthority of the arbitrator, and the arbitrator has chosen, in light of that, to stand firm. At this point, the arbitrator is necessarily joined as a party to the application to court.[31] Even if the arbitrator does not actively resist the application, it is still customary good manners for the arbitrator to write to the court explaining their decision not to resign. By this stage, the complainant might have incurred significant costs simply in getting the court application up and running and heard.

5.38 Second, we have been told that professional indemnity insurance is not available for arbitrators to cover such costs orders. Arbitrators would have to pay any costs out of their own pocket, assuming they had the finances available at all.

5.39 Third, we see no basis for saying that court applications are outside the scheme of section 29. Under section 29, immunity extends to "anything done or omitted in the discharge or purported discharge of their functions as arbitrator." This wording is very broad. For example, when a complainant applies to court to remove an arbitrator, they are complaining about the arbitrator being the arbitrator. That is, they are complaining about the arbitrator discharging their functions. This complaint surely falls within the immunity granted by section 29.

5.40 More generally, immunity is only relevant when a complainant is alleging that an arbitrator has incurred liability. That allegation usually has bite only when made to the court. If immunity does not apply at court, then it has little worth. We consider that that immunity should include, not just the substantive merits at court, but also the costs of court proceedings.

5.41 Fourth, although the case law so far has been concerned with applications under section 24 to remove an arbitrator, the reasoning in the cases, such as it is, is not so limited. Potentially any application to court triggered by something done by the arbitrator might expose the arbitrator to costs liability. That could include, for example, applications under section 68 which complain about the arbitrator's conduct of the arbitral procedure. It might include applications under section 67, challenging an arbitrator's decision on jurisdiction, or under section 69, appealing an arbitrator's

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29 [2020] UKSC 48, [2021] AC 1083 at [111].

30 Arbitration Act 1996, s 23. See the discussion in *Merking and Flannery on the Arbitration Act 1996* (6th ed 2020) pp 270 to 271.

31 Civil Procedure Rules, r 62.6.

decision on a point of law. In other words, the exposure to costs liability is potentially wide-ranging.

Provisional proposals

5.42 The Arbitration Act 1996 grants immunity to arbitrators, yet a line of case law says that arbitrators can incur liability for the costs of applications to court. We have provisionally concluded those cases are contrary to the wording and intention of the statute. There is insufficient reasoning in the case law to support this result. It introduces a liability for which there is no insurance. It risks encouraging collateral challenges by parties disappointed with an arbitrator's ruling. It risks undermining the neutrality of an arbitrator who is cowed into complying with a party's demands for fear that a contrary stance might lead to court proceedings and personal liability for costs.

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

5.44 We therefore consider that it would be appropriate to reverse the line of case law discussed above, and confirm explicitly in the Arbitration Act 1996 that arbitrator immunity extends to the costs of court proceedings arising out of the arbitration.

Consultation Question 10.

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

Chapter 6: Summary disposal

6.1 In this chapter, we discuss whether the Arbitration Act 1996 should make express provision for arbitrators to adopt a summary procedure to resolve issues which are obviously without merit.

6.2 We provisionally propose that there be a non-mandatory provision which gives arbitrators the power to adopt a summary procedure to decide issues which have no real prospect of success and no other compelling reason to continue to a full hearing. We think that such an express provision would reassure arbitrators who wish to manage the arbitral proceedings in an efficient manner, while also ensuring that proceedings are conducted fairly.

DISCUSSION

6.3 In court proceedings, the court may decide a claim or issue without a trial. This is called summary judgment. The court may give summary judgment when an issue has no real prospect of success, and there is no other compelling reason why it should be disposed of at a trial.[1]

6.4 Summary judgment can save time and money. For example, it may be that, even if the facts alleged by the claimant are assumed to be true, still this reveals no cause of action in law. In such circumstances, it would be wasteful to have a trial which explored all the factual evidence if the end result was always going to be the same.

6.5 The Arbitration Act 1996 contains no provision for summary disposal. However, the following sections are relevant.

6.6 Section 33 provides:

(1) The tribunal shall –

(a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting [their] case and dealing with that of [their] opponent, and

(b) 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.

(2) The tribunal shall comply with that general duty in conducting the arbitral proceedings, in its decisions on matters of procedure and evidence and in the exercise of all other powers conferred on it.

[1] Civil Procedure Rules, Pt 24.

6.7 Section 34(1) provides:

> It shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter.

6.8 On the one hand, summary disposal could avoid unnecessary delay and expense, as required by section 33(1)(b). Also, the wide power given to the arbitral tribunal under section 34(1) to decide all procedural matters is probably compatible with the arbitral tribunal adopting a summary procedure in an appropriate case.

6.9 A number of stakeholders have made supportive representations to the Law Commission on several occasions over the past few years in favour of reform to provide for summary disposal.[2] Survey results also suggest that summary disposal would be a welcome innovation in terms of improving efficiency, especially in the banking and finance and construction sectors.[3]

6.10 This would be a world-leading development. Summary disposal is not a common feature of foreign arbitration legislation. There is no provision for it, for example, in the UNCITRAL Model Law. However, provision is made for summary disposal in some institutional arbitral rules.[4]

6.11 On the other hand, a summary procedure necessarily limits the opportunity for a party to put its case. The question is whether a summary procedure still provides a reasonable opportunity to put its case. To be clear, even in a summary procedure, an arbitrator must give each party a reasonable opportunity of putting its case, as is required by section 33(1)(a).

6.12 This matters, not just because of the duty in section 33(1)(a), but also because, under article V.1(b) of the New York Convention, a party can resist the recognition and enforcement of a foreign arbitral award on the grounds that the party against whom the award is invoked was unable to present their case.[5] Generally, an arbitral award from England and Wales must satisfy the New York Convention if it is to be enforceable abroad.

6.13 What counts as a "reasonable opportunity" to put one's case will vary according to the circumstances. Certainly a party has no right to continue with their arguments interminably until they have exhausted the arbitral tribunal into submission. Also, what

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2 Particularly in response to our consultations on our 13th and 14th programmes of law reform.

3 ICC Commission, *Report: Financial Institutions and International Arbitration* (2016) para 59; White & Case, Queen Mary University of London, *2018 International Arbitration Survey: The Evolution of International Arbitration* (2018) p 30; Pinsent Masons, Queen Mary University of London, *International Arbitration Survey—Driving Efficiency in International Construction Disputes* (2019) p 27; D Wallach, "The Emergence of Early Disposition Procedures in International Arbitration" (2021) 37(4) *Arbitration International* 835.

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

5 This in turn is reflected in art 34(2)(a)(ii) and art 36(1)(a)(ii) of the UNCITRAL Model Law, and in s 103(2)(c) of the Arbitration Act 1996.

is fair must be a balancing exercise between both parties. For example, if a defendant's case is impossibly weak, it is not fair to delay the claimant their award just because the defendant prefers to continue arguing.

6.14 There is some support in the case law for the notion that a summary procedure can be compatible with an arbitrator's duty of fairness.[6] It also finds support with authors.[7] And of course, summary judgment is available in court proceedings, as we have just seen; its availability does not mean that court proceedings are unfair.[8] On the contrary, fairness is achieved through a combination of procedural due process and a suitable threshold for summary judgment. We shall take each point in turn.

Procedural due process

6.15 In court proceedings, an application for summary judgment is usually made by one of the parties (although the court can also strike out a statement of case of its own initiative).[9] Usually an application for summary judgment occurs after the statements of claim and defence have been filed. Both parties are given notice of the application, and have an opportunity to submit written evidence and written submissions. There is usually an oral hearing where further oral submissions are made.[10]

6.16 Those arbitral rules which provide for summary disposal do not usually detail exhaustively the procedure to follow, no doubt because what is suitable can vary from case to case. However, they tend to prescribe two matters.[11]

6.17 First, they provide that the summary procedure is initiated only at the request of a party. This safeguards against the arbitral tribunal acting on a surfeit of procedural zeal. Second, they provide that both parties are given the opportunity, not merely to comment on the suitability of a summary procedure at all, but also on the form of any summary procedure. This goes towards ensuring that the parties are satisfied that they have had a reasonable opportunity to be heard.

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

7 *Merkin and Flannery on the Arbitration Act 1996* (6th ed 2020) p 372; *Russell on Arbitration* (24th ed 2015) para 5-107; *Redfern & Hunter: Law and Practice of International Commercial Arbitration* (6th ed 2015) para 6-040; B T Howes, A Stowell, W Choi, "The Impact of Summary Disposition on International Arbitration: A Quantitative Analysis of ICSID's Rule 41(5) on Its Tenth Anniversary" (2019) 13 *Dispute Resolution International* 7; A Raviv, "No more excuses, toward a workable system of dispositive motions in international arbitration" (2012) 28(3) *Arbitration International* 487; P Chong, B Primrose, "Summary judgment in international arbitrations seated in England" (2017) 33(1) *Arbitration International* 63; C Lightfoot, J Woolrich, and T Wingfield, "Summary Awards In International Arbitration – Slow Getting Up to Speed?" (2017) 32(12) *Mealey's International Arbitration Report*.

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

9 On striking out a statement of case, see Civil Procedure Rules, rr 3.3 and 3.4.

10 Civil Procedure Rules, rr 24.4, 24.5.

11 HKIAC Administered Arbitration Rules 2018, art 43; SCC Arbitration Rules 2017, art 39; ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration (2021), paras 110 to 112.

Suitable threshold

6.18 Fairness is achieved through a combination of procedural due process set against a suitable threshold for summary disposal. A respondent to an application for summary disposal has an abbreviated opportunity for argument, but they are not arguing their case as if the application were a truncated trial, or even a preliminary issue. Rather, they are arguing that their case has enough merit to proceed to a fuller consideration. The threshold for proceeding to trial should be set at a level which acknowledges the early stage of proceedings and the abbreviated nature of the evidence and arguments.

6.19 To designate that threshold, several arbitral rules use the phrase "manifestly without merit".[12] In court proceedings, as we have seen, the threshold is "no real prospect of success", along with "no other compelling reason" for the issue to proceed to trial.

PROVISIONAL PROPOSALS

6.20 Summary disposal has the potential to save time and money. We think that it can be compatible with an arbitral tribunal's duty to give each party a reasonable opportunity to put its case. We have heard how its explicit recognition in the Arbitration Act 1996 would be welcome.

6.21 In particular, we have heard how its explicit recognition might combat "due process paranoia". In other words, there is a perception that some arbitrators might be willing to adopt a summary procedure in some cases, but shy away from doing so for fear that their award will be challenged, under section 68, for the serious irregularity of failing to comply with their duty under section 33.

6.22 Overall, we provisionally propose making explicit provision for the possibility of a summary procedure. This would remove any doubt as to its availability. It would reassure arbitrators who sought so to act in appropriate cases. It would reassure foreign enforcing courts that summary disposals can be proper.

6.23 We think that a summary procedure ought to be adopted only on the application of one of the parties, rather than of the tribunal's own initiative, as mentioned above, to guard against excessive procedural zeal and to retain party autonomy over the process.

6.24 We think that it should be open to the parties to agree for or against summary disposal, just as it is currently open to the parties to agree more generally on matters of procedure. In other words, summary disposal should not be mandatory.

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[12] SIAC Rules 2016, r 29; HKIAC Administered Arbitration Rules 2018, art 43; AMINZ Arbitration Rules 2022, r 6.11(d); LCIA Arbitration Rules 2020, art 22.1(viii); ICSID Arbitration Rules 2022, r 41; ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration (2021), para 110.

Consultation Question 11.

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

6.26 It is worth emphasising that, just because one party has requested summary disposal, that alone should not, of course, mean that the request must be complied with. In particular, summary disposal should not be an additional interim procedural step invoked, for example, by a desperate defendant in order to delay the claimant's progression to trial. Unless the parties have agreed otherwise, it should be open to an arbitrator who receives a request for summary disposal to consider that the more appropriate procedure is to continue to trial as normal.

6.27 In similar vein, some arbitral rules have expedited procedures, for example for claims of smaller value or lesser complexity.[13] It may be more appropriate in a given case, rather than having summary disposal in a full procedure, for a dispute to proceed fully in an expedited procedure. This is a matter which an arbitrator may wish to discuss with the parties.

6.28 If the arbitral tribunal does accede to an application for summary disposal, we think that best practice would require the arbitral tribunal to consult with the parties on the form of that summary procedure. As noted above, this would go towards ensuring that the parties felt that they had been given a reasonable opportunity to put their case.

Consultation Question 12.

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

6.30 We think it appropriate to stipulate the threshold for summary disposal explicitly in the Arbitration Act 1996. This way all arbitrations seated in England and Wales would apply the same test. Arbitrators would not have to re-invent the wheel on each occasion. All this would help ensure certainty and consistency and, in the selection of a suitable threshold, fairness.

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

Consultation Question 13.

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

6.32 Two candidates arise for a suitable threshold. One is the phrase "manifestly without merit" which, as noted above, is found in several arbitral rules. To this extent, it might suggest something of an emerging trend, at least in international commercial arbitration.

6.33 The other is the language used in English and Welsh court proceedings: "no real prospect of success", along with "no other compelling reason" for the issue to proceed to trial.[14] This standard might be thought more domestic than international in origin, but other common law countries also provide for summary judgment in their court procedure rules.[15] It does have an understood meaning, explained in the case law.[16] In contrast, there is no settled jurisprudence on the meaning of "manifestly without merit", and we suspect that a court in England and Wales, when called upon to interpret it, would align its meaning anyway with the more familiar "no real prospect of success".

6.34 For these reasons, we provisionally propose adopting the threshold of "no real prospect of success". We also think that this is a fair threshold. It requires a respondent to show that they have a realistic, as opposed to a fanciful, prospect of success, with an argument that carries some degree of conviction.[17] In contrast, if a position is merely fanciful, it does not merit the time and expense of full investigation.

Consultation Question 14.

6.35 We provisionally propose that a claim or defence or issue may be decided following a summary procedure where it has no real prospect of success, and when there is no other compelling reason for it to continue to a full hearing. Do you agree?

6.36 Of course, any arbitral procedure must be fair and give each party a reasonable opportunity to put their case. However, if a respondent cannot show any real prospect

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14 An example of a compelling reason for a full hearing might be where the dispute concerns the meaning of a contractual term which could have repeated relevance to the parties in the context of a long-term contract, beyond this individual dispute.

15 Rules of the High Court (Cap 4A) (Hong Kong), r 14; Supreme Court of Judicature Act (Cap 322) Rules of Court 2021 (Singapore) O 9, r 17; High Court Rules 2016 (New Zealand), Pt 12; Uniform Civil Procedure Rules 2005 (New South Wales), Pt 13; Supreme Court (General Civil Procedure) Rules 2015 (Victoria) O 22 ("no real prospect of success").

16 See the commentary on CPR r 24.2 in *The White Book 2022*.

17 *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch), [2009] All ER (D) 13 (Mar) at [15] by Lewison J, approved by the Court of Appeal in *AC Ward & Sons Ltd v Catlin (Five) Ltd* [2009] EWCA Civ 1098, [2010] Lloyd's Rep IR 301 at [24] by Etherton LJ.

of success, or any other compelling reason for the matter to continue, despite being given a reasonable opportunity to do so, then it would be fair to resolve the dispute pursuant to a summary procedure, and thereby avoid unnecessary delay and expense.

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

7.1 Section 44 of the Arbitration Act 1996 provides that the court has power to make orders in support of arbitral proceedings. The types of orders are listed in sections 44(2)(a) to (e). Access to the court is mediated through sections 44(3) to (5).

7.2 In this chapter, we discuss whether there is any need to reform section 44. In particular, we consider whether orders under section 44 might be made against third parties, and how section 44 interacts with emergency arbitrator provisions in arbitral rules.

7.3 As for third parties, our provisional view is that orders under section 44 can be made against third parties, and we ask whether a minor change of language is needed to confirm that. However, we think that different rules will apply to the different types of order listed in sections 44(2)(a) to (e). We also propose that third parties should have the usual rights of appeal against orders affecting them, rather than the restricted rights of appeal which arbitral parties have.

7.4 Incidentally, we provisionally propose that section 44(2)(a) be amended to confirm that it relates to the taking of the evidence of witnesses by deposition only (and not also witness summonses).

7.5 As for emergency arbitrators, we think that the provisions of the Arbitration Act 1996 should not apply generally to emergency arbitrators. We also think that the Act should not include provisions for the court to administer a scheme of emergency arbitrators.

7.6 Our view is that emergency arbitrator provisions in arbitral rules need not restrict access to the court under section 44. However, we think that section 44(5) may be redundant in light of sections 44(3) and (4), and ask whether consultees consider that section 44(5) might be repealed.

7.7 We also identify two ways in which the Act might respond to a situation where an interim order by an emergency arbitrator has been ignored by an arbitral party, and we ask consultees which approach they prefer.

UNDERSTANDING SECTION 44

7.8 Section 44 provides as follows.

> (1) Unless otherwise agreed by the parties, the court has for the purposes of and in relation to arbitral proceedings the same power of making orders about the matters listed below as it has for the purposes of and in relation to legal proceedings.
>
> (2) Those matters are –
>
> > (a) the taking of the evidence of witnesses;

(b) the preservation of evidence;

(c) making orders relating to property which is the subject of the proceedings or as to which any question arises in the proceedings –

(i) for the inspection, photographing, preservation, custody or detention of the property, or

(ii) ordering that samples be taken from, or any observation be made of or experiment conducted upon, the property;

and for that purpose authorising any person to enter any premises in the possession or control of a party to the arbitration;

(d) the sale of any goods the subject of the proceedings;

(e) the granting of an interim injunction or the appointment of a receiver.

(3) If the case is one of urgency, the court may, on the application of a party or proposed party to the arbitral proceedings, make such orders as it thinks necessary for the purpose of preserving evidence or assets.

(4) If the case is not one of urgency, the court shall act only on the application of a party to the arbitral proceedings (upon notice to the other parties and to the tribunal) made with the permission of the tribunal or the agreement in writing of the other parties.

(5) In any case the court shall act only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively.

(6) If the court so orders, an order made by it under this section shall cease to have effect in whole or in part on the order of the tribunal or of any such arbitral or other institution or person having power to act in relation to the subject-matter of the order.

(7) The leave of the court is required for any appeal from a decision of the court under this section.

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

7.10 In other words, whatever orders the court can make in the context of civil proceedings in the High Court in England and Wales, it can also make for arbitral proceedings.[1]

7.11 The effect of section 2(1) is that the powers conferred on the court by section 44 apply in respect of arbitral proceedings which are seated in England and Wales (or Northern

[1] What orders the court could make in support of foreign legal proceedings is a separate matter, and irrelevant for the purposes of section 44: *A v C* [2020] EWCA Civ 409, [2020] 1 WLR 3504 at [38] by Flaux LJ, and at [65] by Males LJ.

Ireland). Section 2(3) provides that the powers also apply in respect of foreign-seated arbitral proceedings, unless, in the opinion of the court, the fact that the arbitral proceedings are foreign-seated makes an order under section 44 "inappropriate".

7.12 In short, whatever a court can do for domestic legal proceedings, it can do for domestic arbitral proceedings, and for foreign arbitral proceedings unless inappropriate.

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

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

7.15 In domestic legal proceedings, the law relating to the listed matters is complicated. It spans multiple parts of the Civil Procedure Rules.[3] Those rules have amassed a large body of case law.[4] But section 44 itself is not complicated. It simply imports complicated law.

SECTION 44 AND THIRD PARTIES

7.16 A vexed question has been whether an order under section 44 can be made against a third party, that is, against someone who is not party to the arbitration agreement or the arbitral proceedings. An initial line of cases, which "inclined to the view" that an order under section 44 might be made against a third party, coalesced into a decision that it could.[5] Then the court said that an order under section 44 could not be made against third parties, on a linguistic analysis of section 44.[6] This linguistic analysis found favour with some authors.[7] Others said that a purposive interpretation, informed by historical context, pointed to the opposite conclusion.[8] Now the Court of Appeal

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2 But not anti-suit injunctions: *AES Ust-Kamenogorsk v Ust-Kamenogorsk JSC* [2013] UKSC 35, [2013] 1 WLR 1889.

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

4 See, for example, the commentary in *The White Book 2022*.

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

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

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

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

has said, employing a different linguistic analysis, that an order under section 44 can be made against third parties, at least sometimes.[9]

7.17 The confusion lies in seeking to view section 44 as requiring a one-size-fits-all, single body of rules for all matters listed in sections 44(2)(a) to (e). Rather, section 44 imports the law on those matters, each of which has its own separate body of rules in domestic legal proceedings. Whether an order can be made against a third party will vary according to the nature of the order and its body of rules.

7.18 To illustrate this, in the following paragraphs, we seek to demonstrate how orders can already be made against third parties. We discuss: orders relating to witness evidence (section 44(2)(a)), orders for the inspection and preservation of evidence (sections 44(2)(b) and (c)), freezing injunctions and orders appointing a receiver (section 44(2)(e)).

Orders relating to witness evidence, and third parties

7.19 We are here concerned with two types of witness evidence. First, there is a witness summons, which requires a witness to attend court to give oral testimony or to produce documents to the court. Second, a witness can give oral testimony before an examiner who records that testimony, and the record, called a deposition, can be given in evidence at a later court hearing.

7.20 In domestic legal proceedings, taking witness evidence is governed by Part 34 of the Civil Procedure Rules, which covers both witness summons and depositions. Rules 34.1 to 34.7 concern witness summonses. Rules 34.8 onwards deal with deposition evidence. These are "two separate and distinct topics".[10] At the time when the Arbitration Act 1996 was enacted, legal proceedings were governed by the Rules of the Supreme Court, which did indeed deal with these two topics in discrete sections: witness summonses (then called "writs of subpoena") in Order 38, and deposition evidence in Order 39.

7.21 Section 44(2)(a) deals with "the taking of the evidence of witnesses". This language is broad enough to include both witness summonses and deposition evidence. However, section 43 of the Arbitration Act 1996 makes specific provision for witness summonses; it is headed "securing the attendance of witnesses". These sections therefore appear to overlap.[11] If witness summonses are available under both section 43 (which only deals with witness summonses) and section 44(2)(a) (which seemingly deals with both witness summonses and depositions), this renders section 43 potentially redundant. We do not think that this is the intention of the Act. There is no good reason to offer choice in how to obtain a witness summons,[12] and, as noted, when the Arbitration Act 1996 was enacted, the two regimes were separate in domestic legal proceedings. To make clear the proper province of section 44(2)(a), we

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

[10] *The White Book 2022*, para 34.0.1.

[11] *Merkin & Flannery on the Arbitration Act 1996* (6th ed 2020) p 475 seems to suggest that the two sections do overlap.

[12] CPR Practice Direction 62 at § 7 does not appear to envisage any choice.

provisionally propose that it be amended to state explicitly that it applies to deposition evidence only.

Consultation Question 15.

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

7.23 With that preliminary point clarified, we can now consider whether an order for deposition evidence can be made against a third party. In our view, this must be possible. As the court has acknowledged,[13] a claimant can hardly ask the court to order the claimant to provide the claimant with the claimant's witness evidence. Nor will the court order the defendant to produce witness evidence. If the defendant chooses to proffer no witness evidence, that is their choice. Instead, deposition evidence is sought of people who are neither the claimant nor the defendant.

7.24 For civil proceedings in the High Court in England and Wales, and thus also for arbitral proceedings, deposition evidence can be obtained from a witness within the jurisdiction. If the witness is outside the jurisdiction, the English court can send a letter of request to the foreign court where the witness is located, asking for a deposition to be taken locally. No doubt, in arbitral proceedings, this would be "inappropriate" if the arbitral proceedings were also seated outside England and Wales. For example, if a New York seated arbitration wants deposition evidence from a witness in France, it is probably not the business of the English courts.

7.25 In this way, an order for deposition evidence can be made against a third party within the jurisdiction, and a request can sometimes be raised in respect of a witness outside the jurisdiction if this is not "inappropriate".

Orders for the inspection and preservation of evidence, and third parties

7.26 Under section 38, an arbitral tribunal can make an order relating to property "which is owned by or is in the possession of a party to the proceedings".[14] It can "give directions to a party" to preserve evidence "in [their] custody or control".[15] Thus, the powers of the arbitral tribunal are limited in this regard to orders against a party.

7.27 There are no such qualifications in section 44 in respect of orders made by a court. Section 44 instead imports the full extent of the law as found in domestic legal proceedings. The court can make orders for the preservation and inspection of

13 *A v C* [2020] EWCA Civ 409, [2020] 1 WLR 3504 at [59] by Males LJ.

14 Arbitration Act 1996, s 38(4).

15 Arbitration Act 1996, s 38(6).

evidence under sections 44(2)(b) and (c), including against a third party, as case law has already confirmed.[16]

7.28 An order under section 44(2)(c) authorising a person to enter any premises to preserve or inspect property can only be made where the premises are in the possession or control of a party to the arbitration. In this context, orders to access third party property are not possible under the Arbitration Act 1996. This replicates the position in domestic legal proceedings under the Civil Procedure Rules.[17]

Freezing injunctions, and third parties

7.29 Section 44(2)(e) allows the court to make an order granting an interim injunction. This includes freezing injunctions. These seek to freeze a defendant's assets, preventing the defendant from dissipating those assets in their attempt to avoid enforcement following an adverse judgment. Freezing injunctions can be made against assets worldwide, but usually the defendant, or some of their assets, are subject to the jurisdiction of the English court.

7.30 In domestic legal proceedings, freezing injunctions tend to be made against the defendant, that is, a party to the proceedings. However, they are often served on third parties (like banks), and can be binding on them. The "penal notice" at the top of the standard form injunction makes this clear: "any other person who knows of this order and does anything which helps or permits the respondent to breach the terms of this order may also be held to be in contempt of court".[18] However, that applies to third parties within the jurisdiction. The standard form freezing injunction recites that it does not affect third parties outside the jurisdiction (except the defendant's agents).[19]

7.31 In domestic legal proceedings, freezing injunctions can also be made against third parties. This can happen, for example, when there is good reason to suppose that assets held by or in the name of the third party will eventually be available to satisfy a judgment against the defendant (for example, because the defendant is the beneficial owner of the assets, even if the third party is the legal owner).[20] Thus, it seems to us that a court can therefore make an order for a freezing injunction against a third party under section 44(2)(e).

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[16] *Unicargo v Flotec Maritime S de RL, The Cienvik* [1996] 2 Lloyd's Rep 395, 404 by Clarke J (commenting on a similar provision in the Arbitration Act 1950); *Assimina Maritime Ltd v Pakistan Shipping Corp, The Tasman Spirit* [2004] EWHC 3005 (Comm), [2005] 1 Lloyd's Rep 525.

[17] CPR r 25.1(d).

[18] The standard form freezing injunction can be found as an annex to CPR Practice Direction 25A.

[19] Clause 19.

[20] *TSB Private Bank International SA v Chabra* [1992] 1 WLR 231; *PJSC Vseukrainskyi Aktsionernyi Bank v Maksimov* [2013] EWHC 422 (Comm) at [7] by Popplewell J. In *Cruz City 1 Mauritius Holdings v Unitech Ltd (No 3)* [2014] EWHC 3704 (Comm), [2015] 1 All ER (Comm) 305, the target of the freezing order was a third party who was outside the jurisdiction, and whose assets were also outside the jurisdiction. The arbitration was seated in England. The freezing order was refused on the grounds that section 44 orders cannot be made against third parties. To that extent, we think that the decision is wrong.

Orders appointing a receiver, and third parties

7.32 An application to appoint a receiver is made against the defendant, but is to be served on the intended receiver.[21] When the receiver is appointed by the court, they accede to various rights and duties. To this extent, orders appointing a receiver under section 44(2)(e) clearly affect a third party (the receiver).

Summary

7.33 Let us summarise so far. First, section 44 is not a singular regime bespoke to arbitration. Rather, it imports the law on various matters, as that law applies in domestic court proceedings. Second, one size does not fit all for the matters listed in section 44(2). Each matter in section 44(2) has its own body of rules. Third, those rules often include the possibility of orders against third parties, but the precise extent will vary across the different matters.

7.34 The law relating to domestic legal proceedings, in respect of those matters listed in section 44(2), is necessarily nuanced, and it is evolving. It may or may not be more complex than we would like. Nevertheless, section 44 does not evaluate or moderate that law; it merely imports it. This keeps the law in arbitral proceedings up-to-date and aligned with the law in domestic legal proceedings.

7.35 We think that our analysis as to when orders can be made against third parties flows from the current wording of section 44. Nevertheless, we ask consultees whether it might be preferable for section 44 to be amended, to state explicitly that orders can be made against third parties. Of course, whether an order against a third party is available in any given case will vary according to the rules applicable in domestic legal proceedings.

Consultation Question 16.

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

Third party appeals

7.37 To the extent that section 44 orders can be made against third parties, this does produce the following anomaly, already noted in the case law.[22] Usually in court proceedings, a party who wishes to appeal can seek permission from the court from which it is appealing, or, if permission is not given by that court, they can seek permission from the court to which they are appealing.[23] However, section 44(7) removes the latter possibility. It provides that “the leave of the court is required for any appeal from a decision of the court under this section”, and does not give the option for parties to seek permission from the court to which they would be appealing.

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[21] CPR r 69.4.

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

[23] CPR r 52.3(3).

7.38 A restricted right of appeal might be appropriate where it is the arbitral parties who are seeking to appeal, in order to return matters from the court back to arbitration as soon as possible. All the more so when, under section 44(6), there is the possibility of allowing the arbitral tribunal to review any interim order made by the court. However, where an order is made against a third party, their usual rights of appeal should not be cut down. Accordingly, we provisionally propose that section 44(7) should be amended to make explicit that its limitation only applies to arbitral parties.

Consultation Question 17.

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

EMERGENCY ARBITRATORS

7.40 Some arbitral rules provide for the appointment of an emergency arbitrator.[24] The scenario is as follows. The parties have agreed to arbitration. The arbitral tribunal is not yet fully constituted. Nevertheless, there is a matter which cannot wait; for example, the preservation of evidence. A party can apply to the arbitral institution for it to appoint an emergency arbitrator. The emergency arbitrator is appointed on an interim basis, holding the fort until the (main) arbitral tribunal is fully constituted and can take over.

7.41 Emergency arbitrators, as a phenomenon, post-date the Arbitration Act 1996. They raise the following issues.

(1) Should the provisions of the Arbitration Act 1996, insofar as they apply to arbitrators, also apply to emergency arbitrators?

(2) If emergency arbitrators are appointed to grant interim orders, to what extent does that preclude a party applying under section 44 for an interim order from the court?

(3) Should the Arbitration Act 1996 address what happens when an interim order made by an emergency arbitrator is ignored by an arbitral party?

Applicability of the Arbitration Act 1996 generally

7.42 Should the provisions of the Arbitration Act 1996, insofar as they apply to arbitrators, also apply to emergency arbitrators?

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[24] CIArb Arbitration Rules 2015, app 1; ICC Arbitration Rules 2021, app V; LCIA Arbitration Rules 2020, art 9B; SCC Arbitration Rules 2017, app II; CIETAC Arbitration Rules 2015, app III; HKIAC Administered Arbitration Rules 2018, sch 4; AMINZ Arbitration Rules 2022, r 12; ACICA Arbitration Rules 2021, sch 1; SIAC Arbitration Rules 2016, sch 1. Separately, the rules of the London Court of International Arbitration also provide an expedited process for the appointment of the (main) arbitral tribunal: LCIA Arbitration Rules 2020, art 9A.

7.43 In Singapore's International Commercial Arbitration Act 1994, for example, by section 2, an arbitral tribunal is defined to include an emergency arbitrator. However, we do not propose to follow this approach. It could potentially render much of the Arbitration Act 1996 applicable to emergency arbitrators and, as the examples below demonstrate, that is frequently not appropriate.

7.44 For example, section 16 of the Arbitration Act 1996 (procedure for the appointment of arbitrators) is not suited to the appointment of emergency arbitrators: the timescale in section 16 is too long; and appointment depends on the cooperation of all parties.

7.45 We also do not think that the court should be involved in the appointment of emergency arbitrators under section 18 (failure of appointment procedure). It would create complexity to blur the court's urgent granting of interim measures under section 44, with a court being required urgently to appoint an emergency arbitrator to grant interim measures.

7.46 In Hong Kong's Arbitration Ordinance (Cap 609), for example, under section 22B(3), the court can enter judgment in terms of any relief ordered by an emergency arbitrator. We do not consider that this would be appropriate. Anything ordered by an emergency arbitrator is provisional only. It can be set aside by the fully constituted arbitral tribunal, or even expire automatically.[25] We do not think it appropriate for a court to enter judgment on something provisional and reversible.

7.47 It is thus our provisional view that the provisions of the Arbitration Act 1996 should not apply generally to emergency arbitrators.

Consultation Question 18.

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

7.49 Further, we have provisionally concluded that the Act should not provide an emergency arbitrator regime to be administered by the courts. No such scheme appears in the UNCITRAL Model Law. Rather, emergency arbitrator schemes appear in the rules of arbitral institutions. Typically, the institutions maintain a list of emergency arbitrators. They manage the screening process to ensure that the emergency arbitrator has no conflict of interests. They manage the payment of fees and the transmission of documents. This is a level of direct management in the arbitral process not suited to the courts.

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[25] CIArb Arbitration Rules 2015, app 1, art 6.9; ICC Arbitration Rules 2021, app V, art 6(6); LCIA Arbitration Rules 2020, art 9.11; SCC Arbitration Rules 2017, app II, art 9; CIETAC Arbitration Rules 2015, app III, art 6.6; HKIAC Administered Arbitration Rules 2018, sch 4, art 17; AMINZ Arbitration Rules 2022, sch 1, rr S1.7, S1.9; ACICA Arbitration Rules 2021, sch 1, rr 4.3, 5.2; SIAC Arbitration Rules 2016, sch 1, r 10.

7.50 Accordingly, we think that an emergency arbitrator should be appointed only where the parties have agreed a private scheme which administers for its availability. Similar reservations can be found in foreign legislation.[26]

Consultation Question 19.

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

Emergency arbitrators and section 44

7.52 If an emergency arbitrator is appointed to grant interim orders, to what extent does that preclude a party applying under section 44 for an interim order from the court?

7.53 Section 44(5) concerns the relationship between the court and the arbitral tribunal. It provides:

> In any case the court shall act only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively.

7.54 Does the existence of emergency arbitrator provisions mean that a "person vested by the parties with power" can act effectively after all, under section 44(5), so as to preclude an application to court? We have heard from stakeholders that this is the perceived consequence of the decision in *Gerald Metals SA v Timis*.[27] However, the reach of the ruling in that case has been exaggerated, as we now explain.

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

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

7.57 As for the freezing order against the Timis Trust, the claimant had already applied to the arbitral institution for the appointment of an emergency arbitrator, similarly seeking an order to prevent the trust from disposing of assets. In response to that application, the trust had given undertakings. The arbitral institution decided, in light of those undertakings, that there was no further urgency, and the matter could await the formation of the arbitral tribunal. No emergency arbitrator was appointed.[28]

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

27 [2016] EWHC 2327 (Ch), [2016] All ER (D) 31 (Oct). See too: *Merkin and Flannery on the Arbitration Act 1996* (6th ed 2020) pp 470 to 471.

28 [2016] EWHC 2327 (Ch), [2016] All ER (D) 31 (Oct) at [13].

7.58 The judge refused the freezing order against the trust. We agree with this decision. Section 44 is about the court providing support to an arbitral regime when necessary because the arbitral regime is unable to act effectively; it is not a process for overriding a decision of an arbitral institution which can act, but has chosen not to.[29]

7.59 The judge also said that he saw no real risk of unjustifiable disposal of assets by the trust. That depended on the contention that Mr Timis controlled the trust, and the judge had held that there was no good arguable case against Mr Timis.[30]

7.60 Otherwise, what Mr Justice Leggatt said about section 44 was perfectly orthodox. The judge said that it was common ground between the parties that the test of urgency under section 44(3) was to be assessed by reference to whether the arbitral tribunal had the power and the practical ability to grant effective relief within the relevant timescale.[31] That would include a consideration of what could be achieved under an expedited appointment process, and emergency arbitrator provisions. The judge accepted that even those might be ineffective. He gave the example of an application which needs to be made without notice.[32]

7.61 Mr Justice Leggatt did not say that the availability of emergency arbitrator provisions precluded an application under section 44. His clear message simply echoed section 44(5), that the court shall act only if the tribunal cannot act effectively or at all. We might add, other examples of when that might be the case, beyond applications without notice, could include where emergency arbitrator appointments are still too slow,[33] or when it is necessary to bind third parties.[34]

7.62 The decision of Mr Justice Leggatt was only one instalment in a series of applications under the name *Gerald Metals v Timis*. Claims of deceit and conspiracy were added, good arguable cases were pronounced, and disclosure orders and freezing injunctions were made. In other words, as the case evolved, interim orders were made available after all. The reported cases indicate that these all happened in the court proceedings, rather than under section 44.[35]

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

30 [2016] EWHC 2327 (Ch), [2016] All ER (D) 31 (Oct) at [14] to [15].

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

32 [2016] EWHC 2327 (Ch), [2016] All ER (D) 31 (Oct) at [6].

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

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

35 [2017] EWHC 668 (Comm); [2017] EWHC 3381 (Comm); [2017] EWHC 1375 (Comm).

Repeal of section 44(5)?

7.63 In effect, *Gerald Metals v Timis* was little more than a restatement of section 44(5). But is section 44(5) even necessary?

Reasons for including section 44(5)

7.64 Historically, legislation in England and Wales empowered the court to grant interim orders simply without prejudice to the power of the tribunal to do likewise.[36]

7.65 However, the DAC said that it was a valid criticism "that the Courts intervene more than they should in the arbitral process, thereby tending to frustrate the choice the parties have made to use arbitration rather than litigation".[37] Instead, said the DAC, the courts should "only intervene in order to support rather than displace the arbitral process".[38]

7.66 As regards section 44(5) in particular, the DAC said that it was "part of the redefinition of the relationship between arbitration and the Court",[39] and was intended "to prevent any suggestion that the Court might be used to interfere with or usurp the arbitral process".[40] To this extent, at the very least, section 44(5) might be said to have important symbolic value.

Foreign legislation and arbitral rules

7.67 The DAC said that section 44 corresponds in part to article 9 of the UNCITRAL Model Law. However, article 9 is actually of little assistance. It merely provides as follows:

> It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.

Similar phrasing is repeated in some arbitral rules.[41]

7.68 Some arbitral rules state expressly that a party can apply to court for an interim order, notwithstanding emergency arbitrator provisions.[42] Caution is needed here, however.

(1) Arbitral rules cannot bestow upon the court a jurisdiction otherwise prohibited by section 44. To the extent that sections 44(3) to (5) empower the court to act only in certain circumstances, arbitral rules cannot add to those circumstances.

(2) Section 44(1) applies "unless otherwise agreed by the parties". In our view, that proviso applies only to sections 44(1) and (2). In other words, the parties can

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36 Arbitration Act 1934, s 8(1); Arbitration Act 1950, s 12(6).

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

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

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

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

41 ICC Arbitration Rules 2021, art 28(2); SCC Arbitration Rules 2017, art 37(5).

42 LCIA Arbitration Rules 2020, art 9.13; CIETAC Arbitration Rules 2015, app III, art 5.4; HKIAC Administered Arbitration Rules 2018, sch 4, art 20; ACICA Arbitration Rules 2021, sch 1, r 7.1.

opt-out entirely or partially, agreeing that the regime in section 44 does not apply, or applies only in fewer circumstances than listed in section 44(2). But if the parties do not opt-out, then sections 44(3) onwards are mandatory.[43]

(3) However, arbitral rules might instantiate an agreement between the parties, pursuant to section 44(4), to allow applications to the court for interim measures in non-urgent cases.[44] An analogy might be drawn with those arbitration clauses which constitute an agreement between the parties to allow an appeal on a point of law.[45]

7.69 Since the Arbitration Act 1996 was enacted, the UNCITRAL Model Law has been amended. More relevant is article 17J:

> A court shall have the same power of issuing an interim measure in relation to arbitration proceedings, irrespective of whether their place is in the territory of this State, as it has in relation to proceedings in courts. The court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration.

This is similar to section 44(1), but there is no equivalent of section 44(5) in the UNCITRAL Model Law.

7.70 In Singapore, with international arbitrations, their legislation largely follows the same model as our section 44.[46]

7.71 In contrast, in Hong Kong, court powers are exercisable irrespective of whether similar powers might be exercised by the arbitral tribunal.However, the court may decline to grant an interim measure simply where it considers it “more appropriate” for the interim measure to be dealt with by the arbitral tribunal.[47]

7.72 Further still, in Scotland, there is no requirement that the tribunal is unable to act before the court’s powers are exercisable. Rather, where the arbitration has begun, the court’s powers are exercisable either if the tribunal consents, or if the application is urgent.[48]

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43 It is an open question whether, by opting-out of section 44, the parties might free themselves of the restrictions in section 44, and access wider court powers. See: *SAB Miller Africa v East Africa Breweries* [2009] EWCA Civ 1564, [2010] 2 Lloyd’s Rep 422; *Barnwell Enterprises Ltd v ECP Africa FII Investments LLC* [2013] EWHC 2517 (Comm), [2014] 1 Lloyd’s Rep 171 at [37] by Hamblen J. In our view, that would be incompatible with section 1(c).

44 However, the contrary view is expressed in *Merkin and Flannery on the Arbitration Act 1996* (6th ed 2020) p 474.

45 See para 9.33 below.

46 International Arbitration Act 1994, s 12A.

47 Arbitration Ordinance (Cap 609), s 45.

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

Arguments in support of redundancy

7.73 There is an argument that, in light of sections 44(3) and (4), section 44(5) is redundant.

7.74 Section 44(4) provides:

> If the case is not one of urgency, the court shall act only on the application of a party to the arbitral proceedings (upon notice to the other parties and to the tribunal) made with the permission of the tribunal or the agreement in writing of the other parties.

7.75 Thus, non-urgent applications require the permission of the arbitral tribunal, or the agreement of the parties. The court cannot be accused of trespassing into the domain of the arbitral tribunal, if the tribunal gives permission, or if the parties, whose agreement defines the jurisdiction of the tribunal, agree instead to revert to the court for these interim measures.

7.76 Meanwhile, section 44(3) provides:

> If the case is one of urgency, the court may, on the application of a party or proposed party to the arbitral proceedings, make such orders as it thinks necessary for the purpose of preserving evidence or assets.

7.77 First, this permits applications only narrowly, in relation to evidence and assets,and the application can only concern their preservation. To that extent, the court would only be preserving the current state of affairs, rather than doing anything active which might usurp the decision-making role of the arbitral tribunal.

7.78 Second, the application must be urgent. What counts as urgent? We suggest that this is determined by the ability of the arbitral regime to produce an order within the necessary time period. If an arbitral tribunal, or the emergency arbitrator provisions, cannot result in an order quickly enough, then the court should consider the matter to be urgent.

7.79 Note, therefore, that the meaning of urgency under section 44 is likely to be different from the meaning ascribed to it by arbitral institutions. To repeat, some arbitral rules provide for the appointment of an emergency arbitrator, when matters are urgent. Even if, from the point of view of the arbitral institution, matters are urgent enough to appoint an emergency arbitrator, nevertheless, from the point of view of the court, matters might not be urgent enough to invoke the court's assistance.

7.80 For example, suppose a party needs an interim order within 14 days. This may be sufficiently urgent for an arbitral institution to appoint an emergency arbitrator to grant such an order, pending the constitution of the (main) arbitral tribunal. If the emergency arbitrator can indeed grant the order within 14 days, it is not urgent enough to invoke the court's assistance. In contrast, if a party needs an interim order within the next few hours, only the court's assistance will likely be effective.

7.81 Third, the application must be necessary, and, it seems to us, in three ways: (i) the preservation of evidence or assets must be necessary; (ii) the order must be necessary because, without it, the evidence or assets would not otherwise be preserved; and (iii) it must be necessary for the order to come from the court.

7.82 There might be several reasons why it is necessary for the order to come from the court. Once again, the matter might be too urgent for the arbitral regime. Or it might be that the order must bind third parties (this being beyond the power of an arbitrator). Or an emergency arbitrator might have made an order which has been ignored, so that only the threat of contempt of court will ensure compliance with the order.

7.83 Thus, in light of sections 44(3) and (4), section 44(5) is at risk of redundancy. This might explain why an equivalent of section 44(5) does not appear in legislation in Scotland or Hong Kong, as set out above.

Proposal

7.84 On the one hand, the purpose of section 44 is for the court to support arbitral proceedings, not trespass on the domain of the arbitral tribunal or do their job for them, and section 44(5) seeks to reinforce that point.

7.85 On the other hand, section 44(5) does seem redundant in light of the restrictions of sections 44(3) and (4): either the application is made with consent (of the other parties or the tribunal), or it is urgent and necessary and merely preserves the current state of affairs. On top of this, the court still has a general discretion to refuse to act.

7.86 On balance, we are not currently persuaded that section 44(5) adds anything of practical rather than symbolic value. Further, we are mindful of the widespread perception among stakeholders that the interpretation of section 44(5) in *Gerald Metals* largely precludes recourse to the court when the parties have agreed emergency arbitrator provisions. We do not think that such is the case, but we do not wish to prolong the misperception in favour of a section which, as we say, does seem redundant. We think that this tips the balance in favour of repeal.

Consultation Question 20.

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

Non-compliance with the orders of emergency arbitrators

7.88 We have provisionally concluded above that the provisions of the Arbitration Act 1996 should not apply generally to emergency arbitrators, and that there should be no provisions by which the court administers a scheme of emergency arbitrators. But what should happen if an interim order made by an emergency arbitrator is ignored by an arbitral party? We consider three possibilities.

7.89 First, if a (fully constituted) arbitral tribunal issues an order, and the parties do not comply with it, then the tribunal can issue a peremptory order to the same effect, under section 41(5). If that is not complied with, the tribunal is empowered to act in certain ways, even dismissing a claim.[49] Alternatively, an application can be made to court for it to order compliance with the peremptory order, under section 42. In broad

[49] See: Arbitration Act 1996, ss 41(6) and (7).

terms, we might summarise the scheme as: order > peremptory order > court order. Should sections 41 and 42, as they currently stand, be available for emergency arbitrators?

7.90 In our view, section 41 is not suited to emergency arbitrators. For example, section 41(3) concerns inordinate and inexcusable delay in a claimant pursuing their claim, which should be irrelevant in circumstances where an arbitral institution recognises the urgent need for an emergency arbitrator. Further, a possible response to such delay is to dismiss the claim. This is also a possible response, under section 41(6), to a failure to comply with a peremptory order to provide security for costs. We consider that dismissing a claim is something which only the fully constituted arbitral tribunal ought to be doing, and not an emergency arbitrator appointed on an interim basis. Similarly, sections 41(4) and (7) talk about proceeding to an award, which, again, is only really applicable to the fully constituted arbitral tribunal, rather than the ruling of an emergency arbitrator.

7.91 Second, a new provision might be added to the Arbitration Act 1996. It might provide that, where a party fails to comply with any order or directions of the emergency arbitrator, without showing sufficient cause, then the emergency arbitrator may make a peremptory order to the same effect. If the peremptory order is ignored, then an application might be made to court for the court to order compliance with the peremptory order. In short, emergency arbitrators might get their own scheme of order > peremptory order > court order.

7.92 A third option is to allow the work to be done by section 44. After all, emergency arbitrators are appointed on an interim basis to grant interim measures, and interim measures are usually the province of section 44.

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

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

7.95 Currently, however, section 44(4) requires "the permission of the tribunal". It seems to us that an amendment would be necessary to allow for permission to be given also by an emergency arbitrator. This follows from our conclusion above that "tribunal", generally throughout the Act, should not be read as including an emergency arbitrator.

7.96 We think that the merits of the second and third options are finely balanced. The second option maintains the primacy of the arbitral regime for governing the arbitral proceedings. The third option is the more streamlined way of dealing with interim measures. Ultimately, we provisionally prefer the simplicity of the third option. We ask consultees for their views.

Consultation Question 21.

7.97 Which of the following ways of accommodating the orders of any emergency arbitrator do you prefer, and why?

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

(2) An amendment which allows an emergency arbitrator to give permission for an application under section 44(4) of the Arbitration Act 1996.

If you prefer a different option, please let us know.

Chapter 8: Challenging jurisdiction under section 67

8.1 Section 67 of the Arbitration Act 1996 makes provision for a party to arbitral proceedings to apply to the court to challenge the award of the arbitral tribunal on the basis that the tribunal lacks substantive jurisdiction.

8.2 In this chapter, we discuss whether the challenge before the court should be an appeal or a rehearing. We also review the remedies available to the court under section 67, and the question of whether a tribunal which has ruled that it has no jurisdiction can nevertheless issue a costs order.

8.3 We provisionally propose that:

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

(2) the tribunal has ruled on its jurisdiction in an award,

then any subsequent challenge under section 67 should be by way of an appeal and not a rehearing.

8.4 We also propose amendments to clarify the remedies available to the court, and to confirm that a tribunal can issue a costs order even when ruling that it has no jurisdiction.

CURRENT LAW ON CHALLENGING JURISDICTION

Arbitrations seated in England and Wales

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

8.6 The "substantive jurisdiction" of an arbitral tribunal is determined by the following: whether there is a valid arbitration agreement;[1] whether the arbitral tribunal is properly constituted; and what matters have been submitted to arbitration in accordance with the arbitration agreement.[2]

8.7 If a party wishes to object that the arbitral tribunal lacks jurisdiction, what happens next depends on whether the objecting party is participating in the arbitral proceedings.

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[1] An "arbitration agreement" is defined in s 6 of the Arbitration Act 1996. By s 5, it must be in writing.

[2] Together these three questions are the definition of an arbitral tribunal's "substantive jurisdiction": Arbitration Act 1996, s 82, which refers to s 30. The same list of questions appears in s 72 (Saving for rights of person who takes no part in proceedings).

Participating party

8.8 If a party participates in arbitral proceedings, but objects that the arbitral tribunal lacks jurisdiction, they must raise their objection promptly,[3] otherwise they risk losing the right to object later on.[4] A generic objection will not do: they must specify, even if in broad terms, the grounds of objection, and may not introduce materially different grounds of objection later on.[5]

8.9 Having raised their objection, the party who is participating in the arbitral proceedings now has three options.

8.10 First, under section 30 of the Arbitration Act 1996, unless otherwise agreed by the parties, the arbitral tribunal itself is competent to rule on whether it has jurisdiction in the matter before it. In such cases, the tribunal then has two options under section 31(4). Either it can issue an award dealing solely with the question of jurisdiction, or it can wait until it issues an award on the merits, and deal with the question of jurisdiction in that award as well.[6]

8.11 Second, the objecting party may apply to court, under section 32, for the court to decide the question of jurisdiction. However, this requires either the agreement of the other arbitral parties, or the permission of the arbitral tribunal and approval of the court.[7]

8.12 Third, the objecting party can invoke section 67. Under that section, a party can bring court proceedings to challenge: (a) an award by an arbitral tribunal ruling on its jurisdiction; or (b) an award by an arbitral tribunal on the merits, on the basis that the arbitral tribunal lacked jurisdiction.[8]

8.13 These three options for challenge can be combined (rather than being mutually exclusive). An objecting party can object to the arbitral tribunal, and then apply to the court under section 32.[9] Or it can object to the arbitral tribunal, and then challenge any award under section 67.[10]

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3 Arbitration Act 1996, s 31(1) to (3).

4 Arbitration Act 1996, s 73(1).

5 *Primetrade AG v Ythan Ltd, The Ythan* [2005] EWHC 2399 (Comm), [2006] 1 All ER 367. In *GPF GP Sarl v Republic of Poland* [2018] EWHC 409 (Comm), [2018] 2 All ER (Comm) 618 at [72], Bryan J said that any new point can be taken in a s 67 application. However, this particular point does not appear to be supported by authority, and has been otherwise contradicted: see eg *Russell on Arbitration* (24th ed 2015) para 8-070.

6 Section 31(4) also states: "if the parties agree which of these courses the tribunal should take, the tribunal shall proceed accordingly".

7 Arbitration Act 1996, s 32(2).

8 In other words, a challenge to an award under s 67(1) maps onto the two types of award in s 31(4).

9 The DAC might have intended s 32 to operate before a tribunal had ruled on its own jurisdiction: *Report on the Arbitration Bill* (1996) para 141. But see: *Film Finance Inc v Royal Bank of Scotland* [2007] EWHC 195 (Comm), [2007] 1 Lloyd's Rep 382.

10 However, s 32 is unlikely to be appropriate when a non-participating party invokes s 72, which in turn preserves that party's right to challenge an award under s 67: *Armada Ship Management (S) Pte Ltd v Schiste Oil and Gas Nigeria Ltd* [2021] EWHC 1094 (Comm), [2021] Bus LR 1375.

8.14 In an application under section 67 challenging the jurisdiction of an arbitral tribunal, the court will conduct a so-called “de novo” rehearing (a Latin phrase meaning literally “anew”). It will consider the matter afresh, as if for the first time. Put another way, the court is said to exercise an original rather than an appellate jurisdiction.

8.15 This is not explicit in the wording of section 67. However, in *Dallah v Pakistan*,[11] the Supreme Court said that the court in such cases will make an independent assessment of the matter. The decision of the arbitral tribunal carries no weight. The court can even engage in a full re-examination of the facts, regardless of how fully they were explored by the arbitral tribunal itself.

Non-participating party

8.16 It is worth emphasising that, just because a person is faced with arbitral proceedings, this does not mean that they have to participate. They cannot be compelled to spend time and money engaging in proceedings whose jurisdiction they deny.[12]

8.17 Instead, if the objecting party takes no part in the arbitral proceedings, they can apply to the court to question whether the arbitral tribunal has jurisdiction. This is provided for in section 72(1). They can also challenge any award under section 67.[13] Or they can resist enforcement of any arbitral award, under section 66(3), on the basis that the arbitral tribunal lacked jurisdiction to make the award.[14]

8.18 Alternatively, a claimant might bring court proceedings and, when the other party seeks a stay of those court proceedings in favour of arbitration, the claimant can resist the stay on the grounds that any arbitration agreement is null and void, inoperative, or incapable of being performed.[15]

Foreign arbitral awards

8.19 What we have said so far applies to arbitrations seated in England and Wales. If a party seeks to enforce in England and Wales a foreign arbitral award, that might be resisted under section 103 of the Arbitration Act 1996, which gives effect to article V of the New York Convention.

8.20 Under section 103, the recognition and enforcement of a foreign arbitral award can be resisted on various grounds, some of which align with what section 30 defines as matters of jurisdiction. Those grounds are: the arbitration agreement is not valid or the parties lacked capacity; the award deals with matters not falling within the terms of the arbitration agreement; or the composition of the arbitral tribunal was not in accordance with the agreement of the parties.

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11 *Dallah Real Estate & Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2010] UKSC 46, [2011] 1 AC 763 at [26] by Lod Mance, [96] by Lord Collins, [159] to [160] by Lord Saville.

12 DAC, *Report on the Arbitration Bill* (1996) para 295; *Dallah Real Estate & Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2010] UKSC 46, [2011] 1 AC 763 at [23] by Lord Mance.

13 So says s 71(2) of the Arbitration Act 1996.

14 The DAC described s 66 as ‘passive’, as opposed to the ‘positive steps’ of s 67: *Report on the Arbitration Bill* (1996) para 372.

15 Arbitration Act 1996, s 9(4).

8.21 An application under section 103 is also a rehearing, according to the Supreme Court in *Dallah v Pakistan*.[16] However, the rehearing need not involve a full trial. Instead, it might take the form of summary judgment, if the position of one party has no real prospect of success.[17]

APPEAL OR REHEARING?

8.22 To reiterate, where an arbitral party has participated in the arbitral proceedings and makes an application to the court under section 67, that application currently can take the form of a full rehearing.

8.23 An alternative suggestion is that the application should instead, by default, take the form of an appeal. In other words, the court hearing should be limited to a review of the decision of the tribunal. In such circumstances, the court would not ordinarily receive oral evidence or new evidence which was not before the tribunal, although the court could draw any inference of fact which it considers justified on the evidence. In this way, the application under section 67 would mirror an appeal in court proceedings.[18]

8.24 Below we consider whether there should be legislative reform to stipulate that, in such circumstances, an application under section 67 is by way of an appeal. We begin by considering the position in other jurisdictions.

Foreign law

8.25 Under article 16 of the UNCITRAL Model Law, an arbitral tribunal may rule on its own jurisdiction, either as a preliminary question or as an award on the merits. Only if the arbitral tribunal rules that it has jurisdiction, and only if it does so as a preliminary question, can an objecting party request the court "to decide the matter".[19] Otherwise, an objecting party must invoke either article 34 or article 36. Under article 34, an arbitral award can be challenged by an application to set it aside. Article 36 gives grounds for resisting recognition and enforcement of an arbitral award. In both cases, the grounds for challenge or resistance map onto article V of the New York Convention (and thus include jurisdictional challenges).

8.26 There are variations in how this has been adopted. In Hong Kong, for example, it is made explicit that a challenge is allowed only if the arbitral tribunal rules that it has jurisdiction.[20] In contrast, like England and Wales, other countries allow a challenge

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16 For criticism of that approach, see *Merkin and Flannery on the Arbitration Act 1996* (6th ed 2020) pp 866 to 868.

17 *Honeywell International Middle East Ltd v Meydan Group LLC* [2014] EWHC 1344 (TCC), 154 Con LR 113 at [68], [71] by Ramsay J; *Kabab-Ji SAL v Kout Food Group* [2021] UKSC 48, [2022] 1 All ER (Comm) 773.

18 Civil Procedure Rules, r 52.21.

19 UNCITRAL Model Law, art 16(3).

20 Arbitration Ordinance (Cap 609), s 34(4). Other countries similarly preclude a challenge against a rejection of jurisdiction, including: Federal Law No 6 of 2018 on Arbitration (UAE), art 19(2); Dutch Code of Civil Procedure, Book Four, Arbitration, art 1052(4); Swedish Arbitration Act, SFS 1999:116, updated as per SFS 2018:1954, s 2.

whether an arbitral tribunal rules for or against jurisdiction.[21] One set of institutional rules allows a challenge only if the arbitral tribunal rules against jurisdiction.[22]

8.27 In all this, the question still remains: is the challenge by way of a rehearing? Countries which have adopted the UNCITRAL Model Law tend to conduct a de novo hearing.[23] For example, this can be seen with decisions in Canada,[24] Australia,[25] and Hong Kong.[26] The judgment in *Dallah v Pakistan* tends to loom large in their analysis.

8.28 In the United States, under the Federal Arbitration Act, the court will conduct a de novo hearing unless the parties clearly and unmistakably agreed otherwise. What counts as such an agreement is academically contested,[27] and is the subject of a pending appeal to the Supreme Court.[28] In Scotland, an application to court to challenge the jurisdictional ruling of an arbitral tribunal is labelled an "appeal".[29] Despite that, it has been suggested that Scots law would follow the approach of English law in conducting a rehearing.[30] In Switzerland, in the context of international arbitrations, the courts tend to conduct a limited review, on the facts as found in the arbitral award, rather than a rehearing.[31] In Singapore, the hearing is said to be de novo, but new evidence is admitted only in limited circumstances akin to when new evidence might be admitted on an appeal.[32]

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21 Arbitration Act 2001 (Singapore), s 21(9); Arbitration Act 1996 (New Zealand), sch 1 s 16(3).

22 GAFTA Arbitration Rules No 125 (2020), r 8.1(b). An appeal to a GAFTA arbitral appeal board is by way of a rehearing: r 12.5.

23 Born, *International Commercial Arbitration* (3rd ed 2020) p 1199.

24 *The Russian Federation v Luxtona Ltd* [2021] OJ No 3616, (2021) ONSC 4604 – although this case was given leave to appeal in January 2022; *lululemon athletica canada inc v Industrial Color Productions Inc* [2021] BCJ No 2429, (2021) BCCA 428.

25 *Lin Tiger Plastering Pty Ltd v Platinum Construction (Vic) Pty Ltd* (2018) 57 VR 576, [2018] VSC 221; *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* (2011) 38 VR 303, [2011] VSCA 248.

26 *S Co v B Co* [2014] 6 HKC 421.

27 G Bermann, "After First Options: Delegation Run Amok" (2021) 32(1) *American Review of International Arbitration* 15.

28 *Beijing Shougang Mining Investment Co Ltd v Mongolia* (No 21-1244).

29 Arbitration (Scotland) Act 2010, sch 1 r 21.

30 Davidson, *Arbitration* (2nd ed 2012) para 8.19.

31 *Merkin and Flannery on the Arbitration Act 1996* (6th ed 2020) pp 683, 866 n 185; Bonomi & Reymond-Eniaeva, "Switzerland" in Bermann (ed), *Recognition and Enforcement of Foreign Arbitral Awards* (2017). For example, see: *Recofi v Vietnam* (2016) 4A_616/2015 at para 3.1.2 (Federal Supreme Court).

32 *Government of the Lao People's Democratic Republic v Sanum Investments Ltd* [2015] SGJC 15 at [43] to [44] by Leow JC, on appeal at [2016] SGCA 57; Kawharu, "Rehearing of Jurisdiction Issues: A Fresh Look at the Judicial Task" (2016) 32 *Arbitration International* 687. But see: *CLQ v CLR* [2021] SGHC(I) 15 at [26] to [28].

Arguments in favour of reform

8.29 The current approach of a rehearing, potentially with a repeat of the oral evidence, has drawn criticism from authors,[33] and from judges,[34] as well as from some stakeholders. There are two major concerns.

8.30 First, it has the potential to cause delay and increase costs through repetition.

8.31 Second, it raises a basic question of fairness. It allows a party to raise a jurisdiction challenge before the tribunal, and obtain an award, which will naturally set out the deficiencies in the evidence and argument. In light of that award, the losing party can seek to obtain new evidence, and develop their arguments, for another hearing before the court. At its most extreme, the hearing before the arbitral tribunal becomes a dress rehearsal; the arbitral award (by effect, not design) becomes a form of "coaching" for the losing party. In those circumstances, it is not an impossible consequence that the court might come to a decision on the evidence as to jurisdiction which is diametrically opposed to the original decision of the arbitral tribunal.[35]

Arguments against reform

8.32 There are pragmatic arguments against the need for reform to exclude the possibility of a de novo hearing.

8.33 First, 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.[36] This is down from 56 in 2017 to 2018.[37] 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. Of course, those whom it does affect will still want the law to be fair.

8.34 Second, the Commercial Court Guide discourages speculative applications under section 67. It provides that an application under section 67 is only appropriate if there are serious grounds to support it.[38] The court may decide to deal with the application without a hearing, especially where the court considers the application to have no real

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33 *Merkin and Flannery on the Arbitration Act 1996* (6th ed, 2020) pp 684 to 685; E Rubinina, "The Choice of Seat in Investment Arbitration" in *The Investment Treaty Arbitration Review* (7th ed 2022).

34 *Tajik Aluminium Plant v Hydro Aluminium AS* [2006] EWHC 1135 (Comm) at [42] by Morrison J. See too: *Ranko Group v Antarctic Maritime SA, The Robin* [1998] Lexis Citation 1813 (Toulson J).

35 As occurred, for example, in *Jiangsu Shagang Group Co Ltd v Loki Owning Co Ltd* [2018] EWHC 330 (Comm), [2018] 2 Lloyd's Rep 359.

36 Commercial Court Report 2020-2021 (February 2022) p 15. The report is available at: https://www.judiciary.uk/wp-content/uploads/2022/02/14.50_Commercial_Court_Annual_Report_2020_21_WEB.pdf

37 We are grateful to the Commercial Court for supplying us with these figures.

38 Commercial Court Guide (11th ed 2022) O8.4.

prospect of success.[39] A party who insists on an oral hearing, but then loses anyway, might receive an adverse costs order on an indemnity basis.[40]

8.35 Third, the courts still exercise control over what evidence can fairly be adduced in an application under section 67. Thus, in *Electrosteel Castings Ltd v Scan-Trans Shipping & Chartering Sdn Bhd*,[41] Mr Justice Gross said:

> Nothing said here should encourage parties to seek two evidential bites of the cherry in disputes as to the jurisdiction of arbitrators, not least because (1) evidence introduced late in the day may well attract a degree of scepticism and (2) the court has ample power to address such matters when dealing with questions of costs.[42]

8.36 In *The Kalisti*,[43] the court refused permission to adduce new evidence, because the applicant was in breach of an arbitral order as to disclosure, and was being selective in which documents it produced. Mr Justice Males said:[44]

> It is not the function of an [arbitral] award to operate as an advice on evidence enabling the claimant to plug the gaps in its case identified by the arbitrators.

8.37 However, the principal objection to reform appears to be theoretical. The DAC put the matter this way:

> [1] Clearly the tribunal cannot be the final arbiter of a question of jurisdiction, for this would provide a classic case of pulling oneself up by one's own bootstraps.[45]

And:

> [2] A challenge to jurisdiction may well involve questions of fact as well as questions of law. Since the arbitral tribunal cannot rule finally on its own jurisdiction, it follows that both its findings of fact and its holdings of law may be challenged.[46]

Provisional conclusions

8.38 We are not currently persuaded by the theoretical objections to reform.

8.39 As for the DAC's first point, if the hearing before the court is an appeal and not a reheaing, the court nevertheless remains the "final arbiter" on the question of the tribunal's jurisdiction.

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39 Commercial Court Guide (11th ed 2022) O8.6.

40 Commercial Court Guide (11th ed 2022) O8.7.

41 [2002] EWHC 1993 (Comm), [2002] 2 All ER (Comm) 1064.

42 [2002] EWHC 1993 (Comm), [2002] 2 All ER (Comm) 1064 at [23].

43 *Central Trading & Exports Limited v Fioralba Shipping Co, The Kalisti* [2014] EWHC 2397 (Comm), [2015] 1 All ER (Comm) 580.

44 [2014] EWHC 2397 (Comm), [2015] 1 All ER (Comm) 580 at [41].

45 *Report on the Arbitration Bill* (1996) para 138.

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

8.40 As for the DAC's second point, we can acknowledge that the court should have the final say, and that questions of jurisdiction might involve both fact and law. Still, it does not necessarily follow that the court should hear the evidence afresh, or entertain new evidence. Instead, the court might simply consider the evidence put before the arbitral tribunal, including witness statements or transcripts, and rely also on the arbitral tribunal's findings of fact.

8.41 More generally, we are considering a situation where both arbitral parties ask the arbitral tribunal to rule on its jurisdiction. One party is questioning the arbitral tribunal's jurisdiction to determine the merits of the arbitration, but both parties are asking the arbitral tribunal in the meantime to rule on its jurisdiction. By asking the tribunal to rule on its jurisdiction, the parties are conferring on the tribunal a "collateral" jurisdiction to decide the question as to whether it has jurisdiction over the merits, subject to review by the court.[47]

8.42 What we think a party should not be able to do, is ask a tribunal to issue an award, and for that party to insist that the award is binding, but only if the tribunal finds in its favour, and if not then to assert that the award can be ignored. It cannot be a case of "heads I win, tails it does not count". It may be appropriate to allow for an appeal, but we are not persuaded that it is fair to pursue a rehearing before the court which ignores what has gone on before the tribunal.

8.43 Therefore, we provisionally propose that:

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

(2) the tribunal has ruled on its jurisdiction in an award,

then any subsequent challenge under section 67 should be by way of an appeal and not a rehearing.

8.44 This would avoid the double hearing problem, but the court would retain the final say as to the jurisdiction of the arbitral tribunal. A party who wants the court to make a full inquiry on jurisdiction would still have that option, for example under section 32 or section 72. Our provisional proposal would bolster the finality of arbitral awards, and seek to avoid the situation where a party feels that the court should make a full inquiry, but wishes to have a practice run first before the tribunal.

8.45 None of this is in issue where the applicant under section 67 has taken no part in the arbitral proceedings. In that case, the court hearing is the first and only challenge. Counter evidence and argument will be presented for the first time. The arbitral tribunal has not been given any collateral jurisdiction. Instead, the parties are bound by the decision of the court.

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[47] Section 67 is mandatory. The parties cannot opt-out by agreeing otherwise. *LG Caltex Gas Co Ltd v China National Petroleum Corp* [2001] EWCA Civ 788, [2001] 1 WLR 1892 at [49] to [50] by Lord Phillips MR is surely wrong. See too: *Davidson: Arbitration* (2nd ed 2012) para 8.16.

Consultation Question 22.

8.46 We provisionally propose that:

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

(2) the tribunal has ruled on its jurisdiction in an award,

then any subsequent challenge under section 67 of the Arbitration Act 1996 should be by way of an appeal and not a rehearing.

Do you agree?

Consistency with section 32

8.47 We have considered whether the same provisional proposal should apply to section 32 as well.

8.48 To repeat, section 32 allows a party to apply to the court for the court to make a preliminary determination as to the jurisdiction of the arbitral tribunal. It can be invoked by a party before the tribunal has ruled on its jurisdiction. To that extent, it presents a quick route to a definitive court decision. It also means that the hearing before the court will be the first hearing.

8.49 However, section 32 can be invoked after the tribunal has ruled on its jurisdiction.[48] If there are objections about the fairness of allowing a party to have a second bite of the cherry under section 67, there is an obvious argument that those objections should apply equally under section 32.

8.50 That said, section 32 requires either the agreement of the parties or (at least)[49] the permission of the tribunal. Those extra hurdles might be thought sufficient to ensure that section 32 is not abused. In contrast, section 67 is available as of right. Nevertheless, it would be consistent to apply the same restrictions to section 32 as to section 67.

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[48] The DAC might have intended s 32 to operate before a tribunal had ruled on its own jurisdiction: *Report on the Arbitration Bill* (1996) para 141. But see: *Film Finance Inc v Royal Bank of Scotland* [2007] EWHC 195 (Comm), [2007] 1 Lloyd's Rep 382.

[49] Section 32 currently requires either the agreement of the parties, or the permission of the tribunal and the court. However, in chapter 10, we ask whether it might suffice simply to have either the agreement of the parties, or the permission of the tribunal (without additionally the permission of the court).

Consultation Question 23.

8.51 If section 67 of the Arbitration Act 1996 is limited, in some circumstances, to an appeal rather than a rehearing, do you think that the same limitation should apply to section 32, and why?

Consistency with section 103

8.52 As noted above, section 103 of the Arbitration Act 1996 gives effect to article V of the New York Convention. Thereunder, the recognition and enforcement of a foreign arbitral award can be resisted on various grounds, including that the arbitral tribunal lacked jurisdiction.

8.53 We do not think that any change to section 67 would require a matching change to section 103. We need to distinguish three scenarios.

8.54 First, incoming foreign-seated arbitral awards will be enforced or challenged in England and Wales under the New York Convention (or more precisely, under the domestic provisions which enact it).[50] Those arbitral awards are coming to England and Wales for the first time. The way in which they are handled might depend on a range of complicating factors, such as whether the party resisting enforcement objected before the arbitral tribunal, or before the courts at the seat of the arbitration,[51] or indeed what options were even available under the law of seat.

8.55 Second, outgoing arbitral awards seated in England and Wales will be enforced or challenged in the receiving foreign state also under the New York Convention.

8.56 Third, arbitral awards seated in England and Wales can be challenged domestically under section 67. Thus, the changes we are proposing to section 67 need have no effect on the treatment of awards under the New York Convention. Rather, the changes we are proposing are simply about balancing the relationship in domestic legislation between sections 30 and 31, and section 67, of the Arbitration Act 1996.

Consultation Question 24.

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

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50 They can also be enforced under s 66, but, by virtue of s 2, they cannot be challenged under s 67.

51 This might even raise an issue estoppel: *Dallah Real Estate & Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2010] UKSC 46, [2011] 1 AC 763 at [98] by Lord Collins.

REMEDIES UNDER SECTION 67

8.58 Under section 67(3), the court may: confirm the award of the arbitral tribunal; vary the award; or set aside the award in whole or in part.[52] There is no option to remit the award to the tribunal, as there is under section 68 (challenge for serious irregularity) or section 69 (appeal on a point of law). We do not think that the absence of the option to remit here is problematic; we think it sensible that the court decides the question of the tribunal's jurisdiction conclusively for itself.[53]

8.59 However, section 68 contains the options, both of setting aside the award, and declaring the award to be of no effect. The difference between those remedies appears to be this.[54] If an award is set aside, then the arbitral tribunal has not yet completed its duty, and can resume proceedings in order to render another award. If an award is declared to be of no effect, nevertheless the award continues to exist, meaning that the tribunal has completed its duty. The arbitral tribunal is "spent" (the Latin phrase is "functus officio"), so it cannot resume arbitral proceedings.

8.60 Under section 67, if the court decides that the arbitral tribunal has no jurisdiction, it would be odd to set aside the award and thereby allow the arbitral tribunal to resume the arbitral proceedings. The better approach would be to declare the award of no effect. This is precisely what section 67(1)(b) envisages, and yet that remedy is omitted from section 67(3).

8.61 The relevant passages from section 67 provide:

(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court –

(a) challenging any award of the arbitral tribunal as to its substantive jurisdiction; or

(b) for an order declaring an award made by the tribunal on the merits to be of no effect, in whole or in part, because the tribunal did not have substantive jurisdiction.

(2) …

(3) On an application under this section challenging an award of the arbitral tribunal as to its substantive jurisdiction, the court may by order –

(a) confirm the award,

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[52] Arbitration Act 1996, s 67

[53] Where the tribunal issues an award which states that it does not have jurisdiction, but the court disagrees, there is a difference between the following. First, the court will set aside the award. It does not remit the award to the tribunal, for the tribunal to revisit the award. Second, the court will remit the dispute to the tribunal, for the tribunal to continue along the path it had previously not gone down, that is, to determine the substantive dispute: see *Gold Pool JV Ltd v Republic of Kazakhstan* [2021] EWHC 3422 (Comm) at [114] by Andrew Baker J. We are here concerned only with the first point, not the second point.

[54] *Merkin and Flannery on the Arbitration Act 1996* (6th ed 2020) p 691; Ambrose, Maxwell, and Collett, *London Maritime Arbitration* (4th ed 2017) paras 22.125 to 22.126.

(b) vary the award, or

(c) set aside the award in whole or in part.

8.62 It may well be appropriate for an arbitral award to be set aside, so that the arbitral tribunal can resume arbitral proceedings. For example, if the arbitral tribunal rules that it does not have jurisdiction, and a party challenges this under section 67, and the court decides that the tribunal does have jurisdiction after all, then arbitral proceedings should continue. However, if the court decides that the arbitral tribunal does not have jurisdiction, then that should be the end of the arbitration proceedings, and the arbitral award should be declared to be of no effect.

8.63 For these reasons, we provisionally propose that section 67(3) be amended to contain the further remedy that the court may declare the arbitral award to be of no effect, in whole or in part.

Consultation Question 25.

8.64 We provisionally propose that, in addition to the existing remedies under section 67(3) of the Arbitration Act 1996, the court should have a remedy of declaring the award to be of no effect, in whole or in part. Do you agree?

COSTS

8.65 Where an arbitral tribunal has ruled that it does not have jurisdiction, can it nevertheless issue a binding award on costs incurred in the arbitration proceedings up to that point? We have heard some expressions of uncertainty from stakeholders.

8.66 In our provisional view, the answer is probably yes, and we consider that this would be the preferable position as a matter of policy.

8.67 Section 61 of the Arbitration Act 1996 empowers the arbitral tribunal to make an award allocating the costs of the arbitration, subject to any agreement of the parties. In this context, the arbitration might have been shorter than expected, because the arbitral tribunal has ruled that it has no jurisdiction to decide the merits of the dispute. Nevertheless, there has been an arbitration up until that dispositive award. We think that is something which section 61 can fasten upon.

8.68 The alternatives are either that the court might have to decide on costs,[55] which would involve the parties in yet more time and expense. Or costs could be irrecoverable if incurred up to a ruling by an arbitral tribunal that has no jurisdiction.

8.69 We think the latter proposition is unattractive. If the arbitral tribunal rules that it *does* have jurisdiction, the successful party would ordinarily recover its costs of meeting the challenge. If the arbitral tribunal rules that it *does not* have jurisdiction, the successful party would get nothing. Instead, the party who wrongly initiated arbitral proceedings

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55 Perhaps under s 63(4).

would otherwise walk away free of consequences, in circumstances where it has triggered the costs of bringing arbitration proceedings in the first place and progressing them to the point of an award. That imbalance seems unfair.

8.70 In our view, the fairest and tidiest solution is for the arbitral tribunal to be able to award costs, even when it has ruled that it has no jurisdiction to decide the merits of the dispute. To put the matter beyond doubt, we have propose that this should be provided for expressly in the Arbitration Act 1996.[56]

Consultation Question 26.

8.71 We provisionally propose that an arbitral tribunal should be able to make an award of costs in consequence of an award ruling that it has no substantive jurisdiction. Do you agree?

56 Similar provision can be found, for example, in the International Arbitration Act 1994 (Singapore), s 10(7).

Chapter 9: Appeal on a point of law

9.1 In a typical arbitration, the arbitrator will find the facts, and apply the law to those facts in order to reach a decision. What if the arbitrator gets the law wrong? Section 69 of the Arbitration Act 1996 limits the situations in which a party can appeal to the court, for the court to reconsider the contested question of law. In this chapter, we consider whether section 69 should be reformed.

9.2 Our provisional conclusion is that no reform is needed. We think that section 69 is a defensible compromise between securing the finality of arbitral awards and ensuring that blatant errors of law are corrected. It is a non-mandatory provision; arbitral parties and institutions have long settled on their preferred relationship with it, and we currently see no need to unsettle that.

HISTORICAL DEVELOPMENT OF SECTION 69

9.3 In order to evaluate section 69 of the Arbitration Act 1996, it helps to understand its historical precursors. The turning point came with the Arbitration Act 1979.

9.4 Prior to the Arbitration Act 1979, a party wishing to contest the law in an arbitral award could apply to the court under both the common law and the Arbitration Act 1950.

9.5 At common law, the court had an inherent power to set aside an arbitral award for a so-called error of law on the face of the award.[1] This meant that a party could apply to the court, asking it to set aside the arbitral award on the basis that the award's reasons contained an evident error of law. It seems that awards were regularly set aside on this basis.

9.6 Arbitrators who wished to avoid this outcome developed the practice of simply not giving any reasons for their award. Put simply, there could be no evident error of law if the law was not mentioned at all. The absence of reasons gave the court nothing to scrutinise, and so no grounds for objection. This practice found disfavour with judges at the time.[2] Giving reasons for an award can be important, not least because it ensures that the decision is well thought through, and it helps to explain the outcome to the parties so that they might better accept it.[3]

9.7 In addition to the common law, there was section 21 of the Arbitration Act 1950. This provided that an arbitral award or a question of law could be stated as a so-called special case for the decision of the court. In other words, the court could be asked to

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1 *Russell on Arbitration* (19th ed 1979) p 428.

2 Lord Diplock, "The Alexander Lecture: The Case Stated – Its Use and Abuse" (1978) 44(3) *Arbitration* 107, 108; J Steyn, "Arbitration and the English Courts" (1982) 47(3) *Arbitration* 162, 165; Commercial Court Committee Report on Arbitration (1975) Cmnd 7284, paras 6 to 7 and 25 to 31.

3 The DAC have said that "it is a basic rule of justice that those charged with making a binding decision affecting the rights and obligations of others should (unless those others agree) explain the reasons for making that decision": *Report on the Arbitration Bill* (1996) para 247.

decide a question of law arising in the arbitration. The arbitrator could ask the court to do this. Or a party could ask the court to order the arbitrator to ask the court.[4]

9.8 In *The Lysland*,[5] the Court of Appeal set a low bar for a party who wished to invoke section 21. Lord Denning said that an arbitrator should state a case for the court where the point of law was open to serious argument, could be accurately stated, and was necessary to determine the case; there was no further requirement that the question of law was of general importance.[6]

9.9 Further, the court had an inherent power to set aside an award for misconduct by the arbitrator. It could amount to misconduct if an arbitrator refused to state a case, or proceeded to an award instead of adjourning arbitral proceedings pending an application by a party under section 21.[7]

9.10 The parties could not contract out of section 21, because it was considered contrary to public policy to oust the jurisdiction of the court to secure the proper application of the law within arbitral proceedings.[8] This inability to contract out was thought to be a major cause of London losing international arbitration business to other jurisdictions.[9]

9.11 There was also a growing concern that a party who lost at arbitration could invoke section 21 as a tactic for delaying enforcement of the arbitral award.[10] Even Lord Denning in *The Lysland* urged arbitrators to be watchful against such abuse.[11] And yet the decision in *The Lysland* was described as "notorious" for making it "virtually impracticable" for an arbitrator to refuse to state a case if one of the parties requested it.[12]

9.12 The matter was investigated by the Commercial Court Committee. Its recommendations on appeals on a point of law[13] were enacted in section 1 of the

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4 Under the Common Law Procedure Act 1854, s V, an arbitrator could state a special case for the decision of the court. But the Arbitration Act 1889, s 19 added that an arbitrator shall state a special case if so directed by the court. This was entrenched in the Arbitration Act 1934, s 9, and the Arbitration Act 1950, s 21.

5 *Halfdan Greig & Co A/S v Sterling Coal and Navigation Corpn, The Lysland* [1973] 1 Lloyd's Rep 296.

6 [1973] 1 Lloyd's Rep 296, 306 to 307.

7 *Russell on Arbitration* (19th ed 1979) pp 428, 473.

8 *Czarnikow v Roth, Schmidt & Co* [1922] 2 KB 478, 484 by Bankes LJ. That was a decision under the Arbitration Act 1889. It held good until the Arbitration Act 1979: *Pioneer Shipping Ltd v BTP Tioxide Ltd, The Nema* [1982] AC 724, 740 by Lord Diplock.

9 *Russell on Arbitration* (20th ed 1982) p 284; Lord Diplock, "The Alexander Lecture: The Case Stated – Its Use and Abuse" (1978) 44(3) *Arbitration* 107, 111 to 112; J Steyn, "Arbitration and the English Courts" (1982) 47(3) *Arbitration* 162, 166; Commercial Court Committee Report on Arbitration (1975) Cmnd 7284, paras 18, 44 to 45.

10 *Granvias Oceanicas Armadora SA v Jibsen Trading Co, The Kavo Peiratis* [1977] 2 Lloyd's Rep 344, 349 by Kerr J; *Russell on Arbitration* (19th ed 1979) pp 317 to 318; Lord Diplock, "The Alexander Lecture: The Case Stated – Its Use and Abuse" (1978) 44(3) *Arbitration* 107, 109 to 110; J Steyn, "Arbitration and the English Courts" (1982) 47(3) *Arbitration* 162, 165 to 166; Commercial Court Committee Report on Arbitration (1975) Cmnd 7284, paras 20 to 24.

11 [1973] 1 Lloyd's Rep 296, 307.

12 *Pioneer Shipping Ltd v BTP Tioxide Ltd, The Nema* [1982] AC 724, 738, 740 by Lord Diplock.

13 Commercial Court Committee Report on Arbitration (1975) Cmnd 7284, paras 32 to 38.

Arbitration Act 1979. This abolished both the common law power to set aside an award for an error of law on its face, and section 21 of the Arbitration Act 1950.[14] They were replaced by a single regime. An appeal would lie to the court on any question of law arising out of an arbitral award.[15] The appeal could be brought by any party, but only with the consent of all the other arbitral parties or with the permission of the court.[16] The court would not give permission unless the determination of the question of law could substantially affect the rights of one or more of the arbitral parties.[17] The court could also order the arbitrator to give reasons for the award.[18] And the parties could opt-out of section 1: the right to appeal could be excluded by agreement between the parties.[19]

9.13 After the enactment of the Arbitration Act 1979, the House of Lords gave further guidance, in *The Nema*,[20] on when the court might give permission to appeal. Lord Diplock said that there should be "much stricter criteria" than those in *The Lysland*.[21] He said that if the question of law involved the interpretation of a one-off contractual clause, then permission to appeal should not be given unless it was apparent upon a mere perusal of the award that the arbitrator was obviously wrong.[22] He said that standard term contracts were different because there was a public interest in ensuring certainty of consistent application. But even then, Lord Diplock said that leave should not be given unless there was a strong case that the arbitrator was wrong.[23] All this was subject to a yet further caveat:[24]

> A superabundance of citable judicial decisions arising out of slightly different facts is calculated to hinder rather than to promote clarity in settled principles of commercial law.

9.14 As the DAC explained,[25] section 69 of the Arbitration Act 1996 largely sought to combine section 1 of the Arbitration Act 1979 with *The Nema* guidelines.

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14 Arbitration Act 1979, s 1(1).

15 Arbitration Act 1979, s 1(2). This new formulation favoured more modern language by doing away with the old language of special case and errors of law on the face of an award.

16 Arbitration Act 1979, s 1(3).

17 Arbitration Act 1979, s 1(4).

18 Arbitration Act 1979, s 1(5).

19 Arbitration Act 1979, s 3(1).

20 *Pioneer Shipping Ltd v BTP Tioxide Ltd, The Nema* [1982] AC 724.

21 [1982] AC 724, 742.

22 [1982] AC 724, 742.

23 [1982] AC 724, 743. Lord Diplock used the phrase "strong *prima facie* case". The Latin phrase "*prima facie*" connotes the idea that an argument is persuasive or proven, pending any counter-argument. This is not always the case: sometimes an argument fails to persuade even before anything has been said against it.

24 [1982] AC 724, 743.

25 *Report on the Arbitration Bill* (1996) paras 284 to 292.

CURRENT LAW: SECTION 69 OF THE ARBITRATION ACT 1996

9.15 Under section 69, a party to arbitral proceedings may appeal to the court on a question of law arising out of an arbitral award.[26] This requires either the agreement of all the other parties to the arbitration, or the permission of the court.[27] The court will give permission, under section 69(3), only if satisfied:

(a) that the determination of the question will substantially affect the rights of one or more of the parties,

(b) that the question is one which the tribunal was asked to determine,

(c) that, on the basis of the findings of fact in the award –

(i) the decision of the tribunal on the question is obviously wrong, or

(ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and

(d) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.

9.16 Questions of general public importance do not necessarily have to concern the general public. For example, following *The Nema*, it should suffice that the question of law relates to the correct interpretation of a standard form contract commonly in use in a particular industry.[28]

9.17 Whereas *The Nema* asked whether there was a strong case that the arbitrator was wrong, section 69(3)(c)(ii) asks whether the decision of the tribunal is at least open to serious doubt, which is a broader test.[29]

9.18 Section 69 applies "unless otherwise agreed by the parties".[30] Thus, parties can opt-out of section 69, and thereby agree that there can be no appeal from an arbitral award to the court on a point of law.

FOREIGN LEGISLATION

9.19 The UNCITRAL Model Law contains no provision for an appeal from an arbitral award to a court on a point of law. Thus, the availability of an appeal on a point of law is not widespread internationally. Nevertheless, a number of foreign statutes do include the

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26 Arbitration Act 1996, s 69(1).

27 Arbitration Act 1996, s 69(2).

28 *Merkin and Flannery on the Arbitration Act 1996* (6th ed 2020) p 746.

29 *CMA CGM SA v Beteiligungs-Kommanditgesellschaft MS "Northern Pioneer" Schiffahrtsgesellschaft mbH & Co* [2002] EWCA Civ 1878, [2003] 1 Lloyd's Rep 212 at [60].

30 Arbitration Act 1996, s 69(1).

availability of such an appeal. The following examples show the different ways in which those statutes are formulated.

9.20 First, however, a word on terminology. Some statutory provisions are "opt-out", that is, they apply by default, but the parties can agree to disapply them. Some provisions are "opt-in", that is, they only apply if the parties agree to apply them. (One debate, discussed below, is whether section 69 should be opt-out, as is currently the case, or opt-in.)

9.21 In New Zealand,[31] an appeal is opt-out for domestic arbitrations,[32] and opt-in for international arbitrations. An appeal can be brought with the consent of all parties or with the permission of the court. The statute provides that the court shall not give permission unless the determination of the question of law concerned could substantially affect the rights of one or more of the parties. This reflects the language of the Arbitration Act 1979 (England and Wales), before *The Nema* guidelines.

9.22 In Scotland,[33] an appeal is opt-out, and in Hong Kong,[34] an appeal is opt-in. Both have the same provisions as our section 69, but without the additional requirement of section 69(3)(d) (that despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question).

9.23 In Australian domestic arbitration legislation,[35] an appeal requires both the agreement of the parties and the permission of the court, but is otherwise in the same terms as our section 69.

9.24 In Singapore, an appeal is available, on an opt-out basis, for domestic arbitrations,[36] in the same terms as our section 69. As for international arbitrations, the Law Reform Committee of the Singapore Academy of Law recently recommended reform to make available an appeal on a point of law, only if the parties agree (and without being able to ask the permission of the court instead).[37] It recommended this because:[38]

> Giving parties an option to appeal is attractive in that it provides, self-evidently, an opportunity for parties to correct errors in questions of law in the award and opens up more opportunities for mercantile law to be developed.

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31 Arbitration Act 1996 (New Zealand), s 6; sch 2, s 5.

32 In broad terms, arbitration is viewed as domestic when all parties are resident or incorporated within the jurisdiction of the seat.

33 Arbitration (Scotland) Act 2010, s 7, sch 1, rr 69 and 70.

34 Arbitration Ordinance (Cap 609) (Hong Kong), s 99, sch 2, ss 5 and 6.

35 Australian domestic arbitration legislation is uniform across the different states and territories, eg Commercial Arbitration Act 2010 (NSW), s 34A.

36 Arbitration Act (Cap 10) (Singapore), s 49.

37 Singapore Academy of Law, Law Reform Committee, *Report on the Right of Appeal against International Arbitration Awards on Questions of Law* (2020).

38 Singapore Academy of Law, Law Reform Committee, *Report on the Right of Appeal against International Arbitration Awards on Questions of Law* (2020) p 2.

The Law Reform Committee also noted an increasing demand for a right to appeal on a point of law.[39]

9.25 Overall, these foreign statutes show a notable similarity of approach, with only minor adjustments as respective legislatures seek to draw the line in different places between finality of arbitral awards and availability of appeals on points of law.

EVALUATION OF SECTION 69

9.26 In broad terms, when it comes to the evaluation of section 69, there are two camps, with diametrically opposing views. There are those who feel that section 69 should be repealed to preclude any appeal on a question of law, and those who feel that section 69 should be liberalised to so that more appeals might be heard. We discuss each view in turn.

Should section 69 be repealed?

9.27 Some commentators have suggested that section 69 should be repealed so that no appeals are allowed.[40] The usual reason is to enhance the finality of arbitral awards, rather than dragging out the process through appeal.

9.28 In response, the following points are worth noting.

9.29 First, when a party seeks the court's permission to appeal on a question of law, that initial application is usually considered on paper,[41] with a limit to the allowed volume of documents.[42] This provides for a process of triage to reduce delay.

9.30 Second, the statistics suggest that section 69 is invoked in a tiny minority of cases and is therefore not causing any widespread problems. The Commercial Court's annual report suggests that there were 35 applications for permission to appeal under section 69 in the year 2020 to 2021, 37 in 2019 to 2020, and 54 in 2018 to 2019.[43] There were 89 in 2017 to 2018.[44] Figures from the Commercial Court Users Committee are largely

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[39] Singapore Academy of Law, Law Reform Committee, *Report on the Right of Appeal against International Arbitration Awards on Questions of Law* (2020) pp 15 to 17. Some arbitral rules provide an appeal mechanism to another arbitrator: eg GAFTA Arbitration Rules No 125, r 10; LSAC 2020, cl 11; AAA Optional Appellate Arbitration Rules 2013. However, less appetite for the possibility of appeal was recorded in the survey: Bryan Cave Leighton Paisner, *Annual Arbitration Survey: A right of appeal in International Arbitration* (2020).

[40] For examples from the literature, see: R Holmes and M O'Reilly, "Appeals from arbitral awards: should section 69 be repealed?" (2003) 69(1) *Arbitration* 1; M Needham, "Appeal on a Point of Law Arising out of an Award" (1999) 65(3) *Arbitration* 205. Objections to the inclusion of s 69 were also made when originally proposed: DAC, *Report on the Arbitration Bill* (1996) para 284.

[41] Arbitration Act 1996, s 69(5).

[42] Civil Procedure Rules, PD 62, § 12; Commercial Court Guide (11th ed, 2022) § O 8.1; TCC Guide (updated July 2019) § 10.2.

[43] Commercial Court Report 2020-2021 (February 2022) pp 12 to 13.

[44] We are grateful to the Commercial Court for supplying us with these figures.

similar.[45] Thus, even on a conservative estimate of the total number of international and domestic arbitrations seated in England each year, applications under section 69 occur in fewer than 1% of cases.[46]

9.31 Third, where an application under section 69 seeks the permission of the court for an appeal, permission is given in less than one third of applications.[47]

9.32 Fourth, section 69 is not mandatory. It is an opt-out provision. Those parties who wish to enhance the finality of their arbitral awards by precluding any appeal on a point of law are able to do so. In practice, some arbitral rules provide for this explicitly.[48]

9.33 Fifth, some parties value the possibility of an appeal to court. This is evidenced by the fact that some arbitral rules do not exclude an appeal under section 69.[49] Some rules go further to be explicit about the availability of an appeal on a point of law.[50] So too do some arbitration clauses. For example, under the JCT building contract,[51] if arbitration is chosen, by default that clause contains an express agreement that either party may appeal under section 69.

Should section 69 be more permissive?

9.34 On the other hand, some have suggested that section 69 sets the bar too high, so that too few appeals get heard.[52] Radical reform might include making section 69 mandatory (rather than opt-out). Milder reform might include enabling the court to give permission to appeal simply where there is a good arguable case that the decision of the arbitral tribunal is wrong. For example, the current test, which requires the decision to be obviously wrong, or at least open to serious doubt, might fail to capture cases where the arbitral tribunal correctly follows a first instance decision of the court, when that decision is itself arguably wrong.

9.35 In favour of a more permissive regime for appeals, one concern is that, because arbitration is private and confidential, this retards public debate about the law. Also, so

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45 Commercial Court User Committee Meeting (November 2021) p 5; Commercial Court User Group Meeting (November 2020) p 8; Commercial Court Users Group Meeting (November 2019) p 1. All these documents, including the Commercial Court Report, can be found here: https://www.judiciary.uk/announcement-court/commercial-court/.

46 For further statistical analysis, see: Osborne Clarke, *Arbitration in Court* (2021) p 3; A Spotorno, "Arbitration and the development of English law" (2019) 85(2) *Arbitration* 106.

47 Commercial Court Report 2020-2021 (February 2022) pp 12 to 13.

48 For example: CIArb Arbitration Rules 2015, art 34(2); ICC Arbitration Rules 2021, art 35(6); LCIA Arbitration Rules 2020, art 26.8; LME Arbitration Regulations, r 12.8; UKJT Digital Dispute Resolution Rules v 1.0 (2021), r 16.

49 For example, the availability of an appeal on a point of law is a familiar feature of maritime arbitrations.

50 For example, ICE Arbitration Procedure 2012, r 21.

51 JCT Standard Form of Building Contract (2016), cl 9.7.

52 Lord Thomas, "Developing commercial law through the courts: rebalancing the relationship between the courts and arbitration", The Bailii Lecture (9 Mar 2016).

the argument goes, it restricts access to the law, which constrains the public's understanding of their rights.[53]

9.36 However, this is a concern arising from privacy and confidentiality. The solution to it would be more transparency, not more appeals. Further, the complaint is anyway misconceived. Arbitral awards are not law. They do not create binding precedent. They merely resolve a dispute privately between parties, and are enforceable only against them.

9.37 Another concern is that, because the court hears too few appeals, this is having a detrimental effect on the development of commercial law.[54]

9.38 This concern seems somewhat askew. The real complaint seems to be that too many parties prefer to arbitrate, rather than bring court proceedings. The direct solution would be to encourage more court proceedings. It is a somewhat indirect solution merely to encourage more appeals from arbitral proceedings.

9.39 We have also heard a slightly different concern, that the flow of cases reaching, not just the High Court, but the Court of Appeal, might be increased, as follows.

9.40 Generally, in court proceedings, a party wishing to appeal the decision of the High Court must usually get permission to appeal. This tends to be sought, first, from the High Court, and if refused, second, from the Court of Appeal.[55]

9.41 With an application under section 69, the High Court might refuse permission to appeal the arbitral award, or the High Court might hear the appeal and rule against it anyway. Either way, if a party wishes to appeal the decision of the High Court, that requires the permission of the High Court.[56] There is no provision to ask the Court of Appeal for permission to appeal.

9.42 Thus, some have suggested that, if the High Court refuses permission to appeal its decision under section 69, it should be possible to ask the Court of Appeal for permission, or perhaps only in those cases where the decision of the High Court departs from the decision of the arbitral tribunal.

9.43 In response to all these concerns, the following points can be made.

9.44 First, although only a tiny percentage of arbitral awards are challenged under section 69, nevertheless in absolute numbers there is a reasonable volume of applications which get put before the court for its consideration each year, as we saw above.

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53 Lord Thomas, "Developing commercial law through the courts: rebalancing the relationship between the courts and arbitration", The Bailii Lecture (9 Mar 2016) para 23.

54 Lord Thomas, "Developing commercial law through the courts: rebalancing the relationship between the courts and arbitration", The Bailii Lecture (9 Mar 2016) paras 5, 22, 34.

55 Civil Procedure Rules, r 52.3(3).

56 Arbitration Act 1996, s 69(8).

9.45 Second, the statistics from the Commercial Court show that its case load is plentiful, with over 800 new claims brought every year.[57] We have heard emphatically that the Commercial Court is thriving, and that the development of English law is in fine health. The length and detail of leading textbooks, and the number of reported cases, seems to make the point.

9.46 Third, there seems to be no shortfall in cases for the Court of Appeal to consider. One report suggests that around 10% of applications under (all sections of) the Arbitration Act 1996 reach the Court of Appeal.[58]

9.47 Fourth, those parties keen to allow themselves the opportunity to appeal their arbitral awards can follow the example of the JCT contract and agree explicitly in the arbitration agreement that either party can appeal on a question of law. This avoids the need to seek the court's permission.[59]

Provisional conclusions

9.48 Overall, we think that there are two competing motivations. One is to enhance the finality of arbitral awards, and thereby the efficient resolution of disputes. This tends towards limiting appeals.

9.49 The other motivation, which tends towards enabling appeals, has not always been explicitly articulated in most commentary on section 69. We think it can be expressed as follows. It is desirable that the law be applied consistently, so that everyone has the same rights and duties (with the result that the law is indeed "common" to everyone). It is undesirable if there are pockets of activity where the law does not apply, or is applied incorrectly. Some mechanism of oversight to correct at least obvious errors of law might be thought appropriate.

9.50 We think that section 69 of the Arbitration Act 1996 is a compromise between these two motivations. It allows for the possibility of an appeal on a point of law. But it promotes the finality of arbitral awards, by allowing parties to opt-out of section 69, or otherwise restricting intervention to correcting blatant errors.

9.51 There has occasionally been lively debate about section 69. But we have seen no evidence to suggest that section 69 is problematic in practice. And we have seen no alternative approach to appeals on a point of law which is obviously better. The current approach already represents a defensible compromise position. And that compromise position is one that has been acted on: different arbitral rules and clauses have long settled on their preferred relationship with section 69.

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[57] Commercial Court Report 2020-2021 (February 2022) p 22; Commercial Court Report 2018-2019 (February 2020) p 10.

[58] One report suggests that around 10% of applications under the Arbitration Act 1996 reach the Court of Appeal: Osborne Clarke, *Arbitration in Court* (2021) p 5.

[59] *Taylor Woodrow Civil Engineering Ltd v Hutchinson IDH Development Ltd* (1998) 75 Construction Law Reports 1. It is similarly effective for applications under s 45 (preliminary point of law): *Taylor Woodrow Holdings Ltd v Barnes & Elliott Ltd* [2006] EWHC 1693 (TCC), [2006] 2 All ER (Comm) 735 at [54]. See too: DAC, *Report on the Arbitration Bill* (1996) para 292.

9.52 For these reasons, our provisional conclusion is that no reform of section 69 is needed.

Consultation Question 27.

9.53 We provisionally conclude that section 69 of the Arbitration Act 1996 strikes the right balance between competing interests in respect of the ability to appeal an arbitral award on a point of law. We do not therefore propose any reform to section 69. Do you agree?

Chapter 10: Minor reforms

10.1 This chapter discusses a number of provisional proposals for minor reform of the Arbitration Act 1996.

10.2 We consider the following topics:

(1) section 7 (separability of arbitration agreement);

(2) appeals from section 9 decisions (stay of legal proceedings);

(3) section 32 (determination of preliminary point of jurisdiction) and section 45 (determination of preliminary point of law);

(4) modern technology;

(5) section 39 (power to make provisional awards);

(6) when time runs under section 70 (challenge or appeal: supplementary provisions); and

(7) sections 85 to 88 (domestic arbitration agreements).

SECTION 7 (SEPARABILITY OF ARBITRATION AGREEMENT)

10.3 Section 7 of the Arbitration Act 1996 provides:

> Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement.

10.4 Section 7 contains a useful principle. The reason why it is useful can be demonstrated with the following example.

10.5 Suppose that two parties enter into a main contract which includes an arbitration clause. One party alleges that the contract was procured by bribery, and so is void for illegality. The other party denies this. The dispute is referred to arbitration. If the arbitrators agree that the main contract is void, and if that extends to all clauses of the main contract, then that includes the arbitration clause. If the arbitration clause is void, then the arbitral award is a nullity, and the parties are back where they started. If instead the arbitration clause is separable, then it can survive the demise of the main contract, and the arbitral award persists to resolve the dispute.

10.6 Section 2(1) of the Arbitration Act 1996 says that Part 1 of the Act applies to arbitrations seated in England and Wales. Section 7 is in Part 1, so it applies when the arbitration is seated in England and Wales. Section 2(5) additionally provides that if

the arbitration is seated abroad, still section 7 applies if the arbitration agreement is governed by English law. This was the intention of the DAC.[1]

10.7 However, section 4(5) provides that "the choice of a law other than the law of England and Wales … as the applicable law in respect of a matter provided for by a non-mandatory provision of this Part is equivalent to an agreement making provision about that matter". Section 7 itself applies "unless otherwise agreed by the parties". It is non-mandatory.[2] Because section 7 concerns the validity of an arbitration agreement,[3] if a foreign law governs the arbitration agreement, section 7 will be disapplied.

10.8 Some stakeholders have suggested that section 7 should be made mandatory. The principle of separability is mandatory under the UNCITRAL Model Law,[4] and in Scotland,[5] and in other foreign legislation,[6] and some institutional rules,[7] although not all of them.[8] The utility and importance of the principle of separability has been acknowledged in English case law by the House of Lords.[9]

10.9 On the one hand, we think that it is unobjectionable in principle to give the parties the choice to disapply section 7, for example by agreeing a foreign law to govern the arbitration agreement. At any rate, as just noted, many foreign laws (and arbitral rules) have a mandatory principle of separability anyway. So the principle, disapplied in section 7, may often be reintroduced by the foreign law.

10.10 On the other hand, it may be that consultees reply to this consultation paper, indicating a keen desire to make section 7 mandatory. That too would be unobjectionable, given its importance and utility. Accordingly, we would be pleased to hear whether stakeholders think that section 7 should be mandatory.

Consultation Question 28.

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

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1 *Supplementary Report on the Arbitration Act 1996* (1997) para 19.

2 It is not listed in the Arbitration Act 1996, sch 1.

3 *Enka Insaat ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38, [2020] 1 WLR 4117 at [92].

4 UNCITRAL Model Law, art 16(1).

5 Arbitration (Scotland) Act 2010, s 5.

6 Federal Law No 6 of 2018 on Arbitration (UAE), art 6; Dutch Code of Civil Procedure, Book Four, Arbitration, art 1053; Swedish Arbitration Act, SFS 1999:116, updated as per SFS 2018:1954, s 3; Swiss Private International Law Act of 1987, art 178(3).

7 LCIA Arbitration Rules 2020, art 23.2; UNCITRAL Arbitration Rules 2021, art 23(1).

8 In ICC Arbitration Rules 2021, art 6(9), separability applies "unless otherwise agreed".

9 *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40, [2007] 4 All ER 951.

APPEALS FROM SECTION 9 (STAY OF LEGAL PROCEEDINGS)

10.12 Section 9 allows a party to an arbitration agreement to apply to court to stay legal proceedings. It is in Part I of the Arbitration Act 1996. It does not state expressly that a party can appeal a decision of the High Court under section 9 to the Court of Appeal. Other sections of the Arbitration Act 1996 do provide expressly for appeal.

10.13 Indeed, an express right to appeal appears to be necessary. Paragraph 37(2) of schedule 3 to the Arbitration Act 1996 amended section 18(1) of the Senior Courts Act 1981, by adding sub-section (g), so that the Senior Courts Act 1981 reads as follows.

> (1) No appeal shall lie to the Court of Appeal –
>
> > (g) except as provided by Part I of the Arbitration Act 1996, from any decision of the High Court under that Part.

10.14 The result is that section 18(1) of the Senior Courts Act 1981 appears to preclude an appeal to the Court of Appeal from a decision of the High Court under section 9 of the Arbitration Act 1996. There is nothing in the DAC reports to suggest that this was intended.

10.15 The House of Lords has held that this was a drafting error.[10] In particular, Lord Nicholls noted that elsewhere in the Arbitration Act 1996, such as section 32, restrictions on the right to appeal were expressly set out. He said:

> The draftsman must have intended that, save to the extent that an appeal was expressly circumscribed, parties to court decisions under the various sections would be able to exercise whatever rights of appeal were available to them from sources outside the Act itself.[11]
>
> I am left in no doubt that, for once, the draftsman slipped up. … the new section 18(1)(g), substituted by paragraph 37(2), should be read as confined to decisions of the High Court under sections of Part I which make provision regarding an appeal from such decisions. In other words, "from any decision of the High Court under that Part" is to be read as meaning "from any decision of the High Court under a section in that Part which provides for an appeal from such decision."[12]

10.16 Authors agree with this analysis.[13] We provisionally propose taking this opportunity to correct the error.

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10 *Inco Europe Ltd v First Choice Distribution* [2000] 1 WLR 586.

11 [2000] 1 WLR 586, 590.

12 [2000] 1 WLR 586, 592.

13 *Russell on Arbitration* (24th ed 2015) para 7-039; *Merkin and Flannery on the Arbitration Act 1996* (6th ed 2020) p 213.

Consultation Question 29.

10.17 We provisionally propose to confirm that an appeal is available from a decision of the court under section 9 of the Arbitration Act 1996. Do you agree?

SECTIONS 32 AND 45 (COURT DETERMINATION OF PRELIMINARY MATTERS)

10.18 Section 32 concerns an application to the court to determine a preliminary point of jurisdiction. Section 45 concerns an application to the court to determine a preliminary point of law. Both have similar – but not quite identical – requirements which must be satisfied before such an application can be considered by the court. Some stakeholders have suggested that the requirements of both provisions could be reduced.

10.19 Section 32 provides:

(1) The court may, on the application of a party to arbitral proceedings (upon notice to the other parties), determine any question as to the substantive jurisdiction of the tribunal.

A party may lose the right to object (see section 73).

(2) An application under this section shall not be considered unless –

(a) it is made with the agreement in writing of all the other parties to the proceedings, or

(b) it is made with the permission of the tribunal and the court is satisfied –

(i) that the determination of the question is likely to produce substantial savings in costs,

(ii) that the application was made without delay, and

(iii) that there is good reason why the matter should be decided by the court.

(3) An application under this section, unless made with the agreement of all the other parties to the proceedings, shall state the grounds on which it is said that the matter should be decided by the court.

…

10.20 Section 45 provides:

(1) Unless otherwise agreed by the parties, the court may on the application of a party to arbitral proceedings (upon notice to the other parties) determine any question of law arising in the course of the proceedings which the court is satisfied substantially affects the rights of one or more of the parties.

…

(2) An application under this section shall not be considered unless –

(a) it is made with the agreement of all the other parties to the proceedings, or

(b) it is made with the permission of the tribunal and the court is satisfied –

(i) that the determination of the question is likely to produce substantial savings in costs, and

(ii) that the application was made without delay.

(3) The application shall identify the question of law to be determined and, unless made with the agreement of all the other parties to the proceedings, shall state the grounds on which it is said that the question should be decided by the court.

…

10.21 At present, therefore, an application under either section will not be considered by the court unless:

(1) the application is made with the agreement (in writing in the case of section 32) of all parties; or

(2) the application is made with the agreement of the arbitral tribunal and the court is satisfied that the relevant requirements specified in the provision are met.

10.22 In each case, whether the criteria for an application are satisfied will usually be decided by the court without a hearing.[14] If the criteria are satisfied, the court has a discretion whether to grant the application and make a determination.

10.23 The suggestion from stakeholders is to allow an application to court either where the parties agree or with the permission of the tribunal – without any further requirements. In other words, the suggestion is to repeal subsections (2)(b)(i) to (iii) in the case of section 32, and (2)(b)(i) and (ii) in the case of section 45. It has been observed that the courts rarely seem to labour over these subsections as it is.[15] This reform would make the sections more streamlined, and perhaps more attractive to use.

10.24 In our view, this would also involve repealing what we see as the corresponding requirement in sub-section (3) of each section, which requires the application to "state the grounds on which it is said that the matter should be decided by the court". This requirement does not apply if the application is made with the agreement of the parties. It only applies where the application is made with the permission of the

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[14] CPR PD 62 para 9.3.

[15] *Merkin and Flannery on the Arbitration Act 1996* (6th ed 2020) pp 360 to 361, 507; *Russell on Arbitration* (24th ed 2015) para 7-162. Note that similar provisions to the current wording of the Arbitration Act 1996 (England & Wales) can also be found in Arbitration (Scotland) Act 2010, sch 1, rr 23, 42, and Arbitration Act 2001 (Singapore) (domestic arbitrations), s 45.

tribunal. Thus, we think it requires the parties to address the criteria in subsections (2)(b)(i) to (iii) and would therefore be irrelevant if the latter were repealed.

10.25 As for the repeal of subsections (2)(b)(i) to (iii), we make the following points.

10.26 First, the concern about costs in subsection (2)(b)(i) seems out of place. The parties have agreed, or the tribunal has decided, that the application is warranted. In any case, costs of the arbitration will be decided later by the tribunal, under section 61, or assessed by the court, under section 63(4). The costs of the application to court, under section 32 or section 45, are costs which the court itself can rule on.

10.27 Similarly, the concern about delay in subsection (2)(b)(ii) also seems out of place, again when the parties have agreed, or the tribunal has decided, that the application is warranted, and any costs consequences are yet to be decided. At any rate, timeliness is already built into an application under section 32: a party who delays in objecting to the jurisdiction of the arbitral tribunal can lose the right to object, by virtue of section 73.[16]

10.28 Second, subsection (2)(b)(iii) of section 32, which requires the court to be satisfied that there is good reason why the matter should be decided by the court, is absent from section 45. If it is dispensable in section 45, it is probably not needed in section 32 either.[17]

10.29 Third, it is peculiar that the permission of the tribunal is not sufficient to allow the court to consider the application; the court must be satisfied as to further requirements. By contrast, the agreement of the parties is sufficient in itself to allow the court to consider the application. If the agreement of the parties suffices, so too should the permission of the tribunal. There can be no question of the court usurping the role of the arbitral tribunal, if the tribunal gives permission, or if the parties, whose agreement defines the jurisdiction of the tribunal, agree instead to revert to the court on these matters.

10.30 Fourth, the DAC said that the purpose of sub-section (2) was not to detract from the from the basic rule in section 30 (competence of the tribunal to rule on its own jurisdiction).[18] We think that this aim is sufficiently upheld by the requirement that the parties agree or the tribunal gives permission, without the further need for sub-sections (2)(b)(i) to (iii). Note also that the application must be made by a party; the tribunal cannot refer the matter of its own motion (and thereby too readily divest itself of its own duty to decide such matters).

10.31 Fifth, both sections 32 and 45 give the court a discretion to entertain the application (the court "may" determine the question raised). So the court can already refuse inappropriate applications.[19] This is not hampered by the loss of sub-sections (2)(b)(i)

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[16] This point is made explicitly in section 32(1).

[17] It does reappear in the Arbitration (Scotland) Act 2010, sch 1, r 42.

[18] *Report on the Arbitration Bill* (1996) para 147.

[19] The contrary claim in *Russell on Arbitration* (24th ed 2015) para 7-161 seems wrong – as is perhaps admitted by para 7-179. In *Taylor Woodrow Holdings Ltd v Barnes & Elliott Ltd* [2006] EWHC 1693 (TCC),

to (iii). And section 45 is not mandatory, so the parties can agree to opt-out of its availability.

10.32 However, if the court has a discretion, then what factors influence its exercise? If it would still consider factors such as whether the application was made without undue delay, and whether a determination is likely to lead to substantial savings in costs, then the repeal of the requirements in sub-sections (2)(b)(i) to (iii) would have less impact. In effect, they might be re-introduced by the back door of discretion.

10.33 Nevertheless, we are interested to hear from consultees on whether such amendments might be welcome.

Consultation Question 30.

10.34 Do you think that an application under section 32 of the Arbitration Act 1996 (determination of preliminary point of jurisdiction) and section 45 (determination of preliminary point of law) should merely require either the agreement of the parties or the permission of the tribunal, and why?

MODERN TECHNOLOGY

10.35 Naturally, the Arbitration Act 1996 does not refer explicitly to more recent technological developments or modern ways of working. However, various arbitral rules provide for: the examination of witnesses remotely (that is, through telecommunication technology);[20] holding hearings remotely;[21] electronic communication;[22] electronic documentation;[23] the presentation of evidence and argument electronically, with no right to an oral hearing;[24] an electronic award;[25] signing the award electronically[26] or with a cryptographic key;[27] and notifying the award electronically.[28]

[2006] 2 All ER (Comm) 735 at [56] by Jackson J, it was held that "may" did indeed give a discretion whether to entertain an application under s 45.

20 UNCITRAL Arbitration Rules 2021 / CIArb Arbitration Rules 2015, art 28(4).

21 ICC Arbitration Rules 2021, art 24(4), art 26(1); LCIA Arbitration Rules 2020, art 19.2; ICSID Arbitration Rules 2022, r 29(4)(f); LMAA Terms 2021, r 15(c); LME Arbitration Regulations 2022, r 7.4; AMINZ Arbitration Rules 2022, r 9.3; ACICA Rules 2021, rr 25.4, 35.5; LSAC 2020, cl 6.2(vi).

22 ICC Arbitration Rules 2021, art 3(2); LCIA Arbitration Rules 2020, art 4.

23 ICSID Arbitration Rules 2022, r 4(2). This is also encouraged in court proceedings: *Commercial Court Guide* (11th ed, 2022) J 2.1 to 2.2.

24 UKJT Digital Dispute Resolution Rules v 1.0 (2021), r 10.

25 UKJT Digital Dispute Resolution Rules v 1.0 (2021), r 12.

26 LCIA Arbitration Rules 2020, art 26.2; ICSID Arbitration Rules 2022, r 59(2); LMAA Terms 2021, r 24.

27 UKJT Digital Dispute Resolution Rules v 1.0 (2021), r 12.

28 LMAA Terms 2021, r 24; ACICA Rules 2021, r 42.5.

10.36 Some foreign legislation also makes reference to remote hearings and electronic documentation.[29]

10.37 We think that all this is compatible with the Arbitration Act 1996. For example, by section 52(3), the award shall be in writing and signed. By section 5(6), "in writing" includes its being recorded by any means. That can include an electronic document.[30] What counts as a signature is not defined by the Act, but, as the Law Commission has previously reported, an electronic signature is capable in law of being used to execute a document, provided that there is an intention to authenticate the document.[31] By section 55(2), an award shall be notified to the parties by service on them of copies of the award. By section 76(3), a notice or any document may be served by "any effective means". This can include service by email.[32]

10.38 More generally, some arbitral institutions have guides on the use of technology.[33] They tend to frame the benefits of technology in terms of improved cost and efficiency.[34]

10.39 The International Centre for Settlement of Investment Disputes talks explicitly about leveraging technology to reduce their environmental footprint.[35] This is also the message of the Campaign for Greener Arbitrations,[36] which has over 700 signatories.[37] The Campaign explains:[38]

> We conducted an initial study of a medium-large scale arbitration taking into account certain standard carbon-producing components of arbitrations such as the printing of submissions, long and short haul return flights, train and car journeys, hotel stays, and coffee cups etc. Using some underlying assumptions based on a major international arbitration case study, it was projected that just under 20,000 trees could be required to offset the total carbon emissions resulting from just this one

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29 Federal Law No 6 of 2018 on Arbitration (UAE), art 33(3); Dutch Code of Civil Procedure, Book Four, Arbitration, art 1072b.

30 See too *Merkin and Flannery on the Arbitration Act 1996* (6th ed 2020) p 54. The DAC sought to be as broad as possible, saying that "in view of rapidly evolving methods of recording we have made clear that 'writing' includes recording by any means": *Report on the Arbitration Bill* (1996) para 34. The Law Commission has recently confirmed that English law is progressive and adaptive, so that "in writing" and signature requirements can be met in an electronic context: *Electronic Execution of Documents* (2019) Law Com No 386, from para 2.13.

31 *Electronic Execution of Documents* (2019) Law Com No 386.

32 See too *Merkin and Flannery on the Arbitration Act 1996* (6th ed 2020) pp 809 to 810.

33 LMAA, *Guidelines for the Conduct of Virtual & Semi-Virtual Hearings* (2021); CIArb, *Framework Guideline on the Use of Technology in International Arbitration* (2021); ICC Commission Report, *Information Technology in International Arbitration* (2017).

34 CIArb, *Framework Guideline on the Use of Technology in International Arbitration* (2021) para 1.1; LCIA Arbitration Rules 2020, art 14.6(iii); UKJT Digital Dispute Resolution Rules v 1.0 (2021), r 9.

35 https://icsid.worldbank.org/resources/rules-amendments

36 https://www.greenerarbitrations.com/

37 Including such institutional signatories as CIArb, SCC, HKIAC, and AAA.

38 https://www.greenerarbitrations.com/impact.

arbitration. Long-haul flights alone can contribute over three quarters of these total carbon emissions.

10.40 The arbitration community can contribute to addressing climate change, in particular by reducing travel, especially air travel and, to a lesser extent, reducing waste (such as paper waste in terms of paper filings and perhaps even the use of disposable coffee cups). These are also actions highlighted by the Campaign for Greener Arbitrations. Thus, in light of climate change, remote hearings and electronic documentation become ever more relevant.[39]

10.41 Under section 34 of the Arbitration Act 1996, the arbitral tribunal decides all procedural matters, subject to the right of the parties to agree any matter. We think that this is wide enough to include giving directions for remote hearings and electronic documentation. Nevertheless, to underline the importance of these procedural matters, we ask consultees whether it might be worth making explicit reference to them in the Act.

Consultation Question 31.

10.42 Do you think that the Arbitration Act 1996 should make express reference to remote hearings and electronic documentation as procedural matters in respect of which the arbitral tribunal might give directions, and why?

SECTION 39 (POWER TO MAKE PROVISIONAL AWARDS)

10.43 Section 39 provides as follows:

Power to make provisional awards

(1) The parties are free to agree that the tribunal shall have power to order on a provisional basis any relief which it would have power to grant in a final award.

(2) This includes, for instance, making –

(a) a provisional order for the payment of money or the disposition of property as between the parties, or

(b) an order to make an interim payment on account of the costs of the arbitration.

(3) Any such order shall be subject to the tribunal's final adjudication; and the tribunal's final award, on the merits or as to costs, shall take account of any such order.

[39] The Campaign for Greener Arbitrations even offer a Model Procedural Order to help reduce the environmental footprint of any given arbitration.

(4) Unless the parties agree to confer such power on the tribunal, the tribunal has no such power.

This does not affect its powers under section 47 (awards on different issues, &c.).

10.44 Is a ruling under section 39 a provisional award, as the heading of section 39 suggests, or a provisional order, as the body of section 39 suggests? This matters because there are different court enforcement mechanisms for awards and orders.

10.45 Specifically, tribunal awards can be enforced by the court under section 66, or challenged before the court under section 67, on the basis that the tribunal lacks jurisdiction, or under section 68, on the basis of a serious irregularity, or under section 69, which governs an appeal on a point of law. Whereas with tribunal orders, if a party fails to comply, the tribunal itself might issue a peremptory order under section 41, and if that is still not complied with, the peremptory order might be enforced by the court under section 42. Sections 67 to 69 do not apply to tribunal orders (only tribunal awards).

10.46 So to reiterate, is a ruling under section 39 an award or an order? The case law is unsettled,[40] and authors suggest it might concern both awards and orders.[41] We prefer the argument that it should be the body of the section, not its heading, which is decisive.[42] Also, given that any ruling under section 39 is explicitly provisional, and subject to reconciliation in a final award, or even "reversal",[43] we think that it would be premature to subject a ruling under section 39 to the full range of challenges against awards (under sections 67 to 69). We think we should take the opportunity to remove the confusion. We propose that the heading be amended to refer to orders rather than awards, but it may be that consultees consider the difference in language to be justified.

Consultation Question 32.

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

10.48 Section 39(1) provides that an arbitral tribunal can order on a provisional basis any "relief" which it could grant in a final award. The default powers of an arbitral tribunal are set out in section 48, which is headed "remedies". For internal consistency,

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40 *BMBF (No 12) Ltd v Harland & Wolff Shipbuilding and Heavy Industries Ltd* [2001] EWCA Civ 862, [2001] 2 All ER (Comm) 385 (which upheld an award, without expressly discussing the point); *Pearl Petroleum Co Ltd v Kurdistan Regional Government of Iraq* [2015] EWHC 3361 (Comm), [2016] 4 WLR 2 (which did say explicitly that s 39 applied to orders).

41 *Merkin and Flannery on the Arbitration Act 1996* (6th ed 2020) pp 408 to 410; *Russell on Arbitration* (24th ed 2015) para 5-092.

42 *Pearl Petroleum Co Ltd v Kurdistan Regional Government of Iraq* [2015] EWHC 3361 (Comm), [2016] 4 WLR 2 at [18] by Burton J.

43 So said the DAC, *Report on the Arbitration Bill* (1996) para 202.

perhaps, it might be appropriate that section 39(1) be amended to refer also to "remedies" (not "relief"). However, consultees may again feel that the difference in language is justified.

Consultation Question 33.

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

SECTION 70 (CHALLENGE OR APPEAL: SUPPLEMENTARY PROVISIONS)

10.50 Under section 57, a tribunal can correct a clerical error in an award, or clarify any ambiguity. It can also make an additional award in respect of any claim which was presented to the tribunal but which was not dealt with in the award. The tribunal can do this, either of its own initiative, or on the application of a party.[44] An application by a party must be made within 28 days of the date of the award.[45] Any correction of an award must usually be made within 28 days of the date the application was received by the tribunal.[46] Any additional award must usually be made within 56 days of the date of the original award.[47]

10.51 Further, as noted above, tribunal awards can be challenged before the court under section 67, on the basis that the tribunal lacks jurisdiction, or under section 68, on the basis of a serious irregularity, or under section 69, which governs an appeal on a point of law. Where a party makes an application under sections 67 or 68, or seeks to appeal under section 69, it must also comply with the further requirements of section 70.

10.52 Section 70 provides as follows:

(1) …

(2) An application or appeal may not be brought if the applicant or appellant has not first exhausted –

(a) any available arbitral process of appeal or review, and

(b) any available recourse under section 57 (correction of award or additional award).

(3) Any application or appeal must be brought within 28 days of the date of the award or, if there has been any arbitral process of appeal or review, of the date when the applicant or appellant was notified of the result of that process.

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[44] Arbitration Act 1996, s 57(3).

[45] Arbitration Act 1996, s 57(4).

[46] Arbitration Act 1996, s 57(5).

[47] Arbitration Act 1996, s 57(6).

10.53 Thus the time limit in section 70(3) for making an application or bringing an appeal takes account of section 70(2)(a) but not section 70(2)(b). This matters because the time limits in section 57, as we have just seen, extend past the 28 day time limit of section 70(3).

10.54 This is not the case in the UNCITRAL Model Law,[48] or in Scottish legislation,[49] which defer the running of time until after any correction or additional award.[50]

10.55 This matter has been corrected in England and Wales through case law.[51] That case law states that, if there has been an application under section 57 for a correction, then time runs from the date of that correction. We consider that this is appropriate. It is unfair on a would-be appellant, and of little use to the court, to require a would-be appellant to launch an appeal to court before they understand the (uncorrected) arbitral award, or even before the additional award deals with the issue to be appealed.

10.56 However, the case law stresses that the application to the tribunal for correction or clarification must be *material* to the application or appeal under sections 67 to 69. A correction is material if it is necessary to enable a party to know if they have grounds to challenge an award.[52] Again, we consider that this is appropriate. For example, an appellant cannot ask the arbitral tribunal to make a correction of an inconsequential typographical error in an undisputed part of the arbitral award and, while that request is considered or acted upon, thereby win itself more time in which to appeal. The strict time limit of 28 days should not be circumvented in that way.

10.57 We propose that section 70(3) be amended to codify the case law so that the time for bringing an application or appeal does not start to run until the outcome of any material application under section 57 is known.

10.58 In the case law, as noted above, time is said to run from the date of the correction.[53] But what if the request for correction is rejected by the arbitral tribunal? The UNCITRAL Model Law says that time runs from when "the request has been disposed of" by the arbitral tribunal.[54] Scottish legislation says that time runs from "the date on which the tribunal decides whether to correct the award".[55] We think, for simplicity and consistency, that it is best to adopt the language already found in section 70(3), so

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48 UNCITRAL Model Law, art 34(3).

49 Arbitration (Scotland) Act 2010, sch 1, r 71(4).

50 Scottish legislation allows for the correction of an award: Arbitration (Scotland) Act 2010, sch 1, r 58. Whereas the UNCITRAL Model Law allows for correction, interpretation, and an additional award: art 33.

51 *K v S* [2015] EWHC 1945 (Comm), [2015] 2 Lloyd's Rep 363; *Daewoo Shipbuilding & Marine Engineering Co Ltd v Songa Offshore Equinox Ltd* [2018] EWHC 538 (Comm), [2018] 1 Lloyd's Rep 443.

52 *K v S* [2015] EWHC 1945 (Comm), [2015] 2 Lloyd's Rep 363 at [24] by Teare J; *Daewoo Shipbuilding & Marine Engineering Co Ltd v Songa Offshore Equinox Ltd* [2018] EWHC 538 (Comm), [2018] 1 Lloyd's Rep 443 at [62] by Bryan J.

53 *K v S* [2015] EWHC 1945 (Comm), [2015] 2 Lloyd's Rep 363 at [20] by Teare J; *Daewoo Shipbuilding & Marine Engineering Co Ltd v Songa Offshore Equinox Ltd* [2018] EWHC 538 (Comm), [2018] 1 Lloyd's Rep 443 at [61] by Bryan J.

54 UNCITRAL Model Law, art 34(3).

55 Arbitration (Scotland) Act 2010, sch 1, r 71(4)(b).

that time runs from the date when the applicant or appellant was notified of the result of its request.

Consultation Question 34.

10.59 We provisionally propose that section 70(3) of the Arbitration Act 1996 should be amended so that, if there has been a request under section 57 for a correction or additional award material to the application or appeal, time runs from the date when the applicant or appellant was notified of the result of that request. Do you agree?

10.60 Section 70(6) provides that the court may order the applicant or appellant to provide security for costs. Section 70(7) provides that the court may order the applicant or appellant to bring into court any money payable under an arbitral award. Section 70(8) provides:

> The court may grant leave to appeal subject to conditions to the same or similar effect as an order under subsection (6) or (7).
>
> This does not affect the general discretion of the court to grant leave subject to conditions.

10.61 This section has attracted the following criticism from authors:[56]

> The reference in section 70(8) to “leave to appeal” is not to leave to appeal a question of law under section 69(3), but to leave to appeal to the Court of Appeal, presumably against the court’s decision to make an order under section 70(6) or 70(7). However, that would be an anomalous situation: (a) the court makes an order obliging the challenger to provide security; (b) the challenger applies for leave to appeal to the Court of Appeal; (c) the judge grants leave on condition that the applicant puts up the same security. Needless to say, there are no reported decisions on this provision. We are not even sure why it is there.

10.62 Section 70(8) has no equivalent in the Scottish legislation.[57]

10.63 Nevertheless, we are of the view that section 70(8) can be given a sensible meaning. If a party has made an application to court under sections 67 to 69, and the court has found against them, they may appeal, but this requires the permission of the court whose judgment they are appealing.[58] If that court chooses to give permission to appeal its decision, that permission might be conditional on security for costs or payment into court.[59] In other words, section 70(8) is not about appealing a decision

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56 *Merkin and Flannery on the Arbitration Act 1996* (6th ed 2020) p 776.

57 Arbitration (Scotland) Act 2010, sch 1, r 71.

58 Arbitration Act 1996, ss 67(4), 68(4), 69(6), 69(8).

59 *Russell on Arbitration* (24th ed 2015) para 8-128.

under sections 70(6) or (7); it is about appealing a decision under sections 67 to 69. For this reason, we do not currently propose that section 70(8) should be repealed.

Consultation Question 35.

10.64 We provisionally conclude that section 70(8) of the Arbitration Act 1996 (granting leave to appeal subject to conditions) should be retained as we consider that it serves a useful function. Do you agree?

SECTIONS 85 TO 88 (DOMESTIC ARBITRATION AGREEMENTS)

10.65 Sections 85 to 87 concern domestic arbitration agreements, but have never been brought into force. Section 85 defines domestic arbitration agreements as those where the seat of the arbitration is in the UK, and all the parties are resident or incorporated or managed in the UK. Section 86 gives the court an additional discretion to refuse to stay legal proceedings in the case of domestic arbitration. Section 87 restricts the ability of the parties in domestic arbitrations to opt-out of section 45 (preliminary determination of a point of law) and section 69 (appeal on a point of law).

10.66 Section 88, which is in force,[60] provides a power to repeal the previous sections.

10.67 The DAC were not persuaded that there should be any distinction between domestic and international arbitrations, but acknowledged that they had "not had an opportunity to make all the soundings we would like on this subject", and so preserved some distinctions in these separate sections.[61]

10.68 We do not think that there should be any distinction between domestic and international arbitrations. After 25 years of the Arbitration Act 1996 operating without these sections, we do not think it appropriate to reintroduce distinctions from earlier legislation. Accordingly, we provisionally propose that the power in section 88 be exercised to repeal sections 85 to 87.

Consultation Question 36.

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

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60 Arbitration Act 1996 (Commencement No 1) Order 1996 (SI 1996/3146), art 3.

61 DAC, *Report on the Arbitration Bill* (1996) paras 317 to 331.

Chapter 11: Other stakeholder suggestions not short-listed for review

11.1 The chapters of this consultation paper, and our provisional proposals for reform, focus on a shortlist of topics. As we explained in Chapter 1, we adopted this approach for three reasons. First, we had heard repeatedly that the Arbitration Act 1996 ("the Act") works well; root and branch reform was not needed or wanted. Second, there was a large measure of agreement among stakeholders about which topics would benefit most from review. Third, we were mindful of the practical benefits to the arbitration community of completing this project within a shorter timeframe.

11.2 We would also add that it is not the role of the Act to solve in advance every possible hypothetical scenario that might arise in an arbitration context. Part of the success of the Act is that it is a framework which leaves space, for example, for party modification through the use of arbitral rules, or for the evolution of principles through the common law.

11.3 Nevertheless, we did receive many other suggestions from stakeholders about possible areas of review, and we have considered them all. This chapter sets out the principal ones. In particular, it presents in abbreviated form an indication of the main reasons why these topics did not make our shortlist. Please note that, although we have included a very brief explanation of the reasoning (or part of the reasoning) given to support the suggestion, in order to give some context, we do not attempt to give a comprehensive explanation. The consultation paper is written for a general audience, but this chapter, because it seeks to cover much ground concisely, presumes a level of expert knowledge.

11.4 We have not reached a final decision on the suggestions in this chapter. We would be pleased to hear from consultees who feel that any suggestion in this chapter needs revisiting in full.

Consultation Question 37.

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

11.6 Similarly, we would be pleased to hear from consultees who feel that any other topic not covered in this consultation paper also needs reviewing.

Consultation Question 38.

11.7 Is there any significant topic within the Arbitration Act 1996, not addressed in this consultation paper, which you think is in need of review and potential reform? If so, what is the topic, and why does it call for review?

Law governing the arbitration agreement

11.8 Suggestion: there should be a default rule that the law governing the arbitration agreement is the law of the seat, for example because the approach in *Enka v Chubb* was wrong.[1]

11.9 In *Enka v Chubb*, the Supreme Court decided unanimously (on this point) that an express or implied choice of law to govern the main contract carries across as an implied choice of law to govern the arbitration agreement. Consistently with *Enka v Chubb*, the parties can otherwise agree that the law of the arbitration agreement be the law of the seat. That agreement can be recorded in the arbitration clause, or in arbitral rules.[2]

11.10 Otherwise, said the majority in *Enka v Chubb*, if there was no choice of law for the main contract or the arbitration agreement, then the arbitration agreement would be governed by the law with which it is most closely connected, which is usually the law of the seat.[3] So the common law already has a default rule in favour of the law of the seat.

11.11 Scottish legislation has a default rule that, absent any specification in the arbitration agreement, then the law of the arbitration agreement is the law of the seat, "unless the parties agree otherwise".[4] But, to repeat, *Enka v Chubb* says that where the parties expressly or impliedly chose the law of the main contract, that is also an implied choice of law for the arbitration agreement; it is "an agreement otherwise". To avoid that consequence would require a rule that the law of the arbitration agreement is the law of the seat with the only exception being where the arbitration agreement itself expressly chooses a different law.

11.12 The DAC deliberately omitted conflict of laws provisions from the Act.[5] This was understandable; conflict of laws is wider than arbitration. We are not yet persuaded that the Act needs to introduce a new regime which departs from *Enka v Chubb*.

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1 *Enka Insaat ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38, [2020] 1 WLR 4117.

2 For example: LMAA Terms 2021, art 6; LCIA Arbitration Rules 2020, art 16.4.

3 The minority thought the closest connection would be to the law of the main contract (rather than the law of the seat).

4 Arbitration (Scotland) Act 2010, s 6. This is default rule applies where Scotland has been agreed by the parties as the seat. Perhaps a better approach would be for the default rule to apply where Scotland was the seat, however that seat came to be agreed or designated or determined. See too: Swedish Arbitration Act, SFS 1999:116, updated as per SFS 2018:1954, s 48.

5 *Supplementary Report on the Arbitration Act 1996* (1997) para 7.

Third party funding

11.13 Suggestion: the Act should address the issue of third party funding, for example by requiring a party to disclose whether they have third party funding.

11.14 Overall, we are not persuaded that there is a need to address third party funding in the Act. Some arbitral rules require the parties to disclose whether they have third party funding,[6] and parties can already adopt these rules if they wish. We have heard how the principal purpose for such disclosure is to reveal whether there might be a relationship between the funder and an arbitrator which goes to the question of impartiality. Impartiality and disclosure are topics which we address already, in Chapter 3.

11.15 We also note the following points.

11.16 Third party funding might increase costs and reduce the likelihood of settlement. But the tribunal can control costs, for example under section 65, and has a discretion in awarding costs (how much and to whom), under sections 61 and 63. Then again, third party funding might be necessary for some parties. Third party funding should not, for example, be determinative in deciding whether there should be security for costs.

11.17 A third-party funder's success fee can be recoverable and awarded as part of the arbitration costs.[7] Success fee uplifts for an advocate or litigation service provider are not recoverable.[8] Damages-based agreements, whereby a legal team recovers a percentage of their client's awarded damages, are enforceable,[9] but irrelevant in this context because payable by the client, not by the other party in the form of costs.

Artificial intelligence

11.18 Suggestion: the Act should address explicitly arbitration conducted by artificial intelligence, as an emerging approach to dispute resolution.

11.19 Some foreign legislation provides that an arbitrator must be human.[10] We think that the Act functions on a similar assumption. Disputes can certainly be resolved by artificial intelligence or algorithmic decision-making, but we do not think that these fit into the concept of arbitration as currently reflected in the Act.

11.20 For example, could an algorithmic decision-maker be removed by the court (under section 24)? Would the court have to appoint another algorithm in its place (perhaps under section 18)? Presumably an algorithm itself does not need to be paid, so to whom are fees paid? This then raises questions about immunity (under section 29),

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6 ICC Arbitration Rules 2021, art 11(7); HKIAC Administered Arbitration Rules 2018, arts 34.4, 44; ACICA Rules 2021, rr 48(d), 54; ICSID Arbitration Rules 2022, r 14.

7 *Essar Oilfields Services Ltd v Norscot Rig Management Pvt Ltd* [2016] EWHC 2361 (Comm), [2016] 2 Lloyd's Rep 481; *Tenke Fungurume Mining SA v Katanga Contracting Services SAS* [2021] EWHC 3301 (Comm).

8 Courts and Legal Services Act 1990, s 58A(6).

9 Courts and Legal Services Act 1990, s 58AA.

10 Federal Law No 6 of 2018 on Arbitration (UAE), art 10(1); Dutch Code of Civil Procedure, Book Four, Arbitration, art 1023. See too: Arbitration (Scotland) Act 2010, sch 1, r 3.

and whether this should extend to the algorithm-provider behind the algorithm. The general duties of fairness and impartiality (under section 33), and the proposed duty of disclosure, might also be complex or strained when applied to a computer programme.

11.21 It may well be that artificial intelligence becomes a leading form of alternative dispute resolution. Whether it should be classified as arbitration is a different matter. It may be that questions like those raised in the previous paragraph can be satisfactorily addressed, but at present there is no established practice to work with. We think that legislating would be premature.

11.22 There are other forms of effective dispute resolution which are also not arbitration. For example, we think that smart contracts which automatically effect certain outcomes in certain pre-determined circumstances are not arbitration, but pre-agreed adjustments.

11.23 There are also "automatic dispute resolution processes". These are processes "associated with a digital asset that is intended to resolve a dispute between interested parties by the automatic selection of a person or panel or artificial intelligence agent whose vote or decision is implemented directly within the digital asset system". This definition comes from the UKJT Digital Dispute Resolution Rules v 1.0 (2021) (DDRR), which implicitly acknowledges that this too is not arbitration. Indeed, it may be inappropriate to impose on a voter the same duties as are imposed on an arbitrator under the Act. In the meantime, the DDRR, which provide for arbitration as well, show that arbitration under the Act is compatible with resolving disputes relating to emerging technology.

11.24 We think that, if there was a desire in future for "arbitration" by artificial intelligence, that would require a separate part of the Act setting out a more appropriate or perhaps bespoke framework. We are not aware of a need for such a review at this time.

Investor-state arbitrations

11.25 Suggestion: the Act should address investor-state arbitrations explicitly, on the basis that they have distinctive characteristics which need bespoke provision.

11.26 Most investor-state arbitrations occur under the ICSID Convention. The UK's own model bilateral investment treaty primarily provides for ICSID arbitration (rather than arbitration in London).[11] The ICSID Convention is given the force of law by the Arbitration (International Investment Disputes) Act 1966. By section 3, most of the Arbitration Act 1996 is disapplied. So investor-state arbitration tends to be a separate regime. Sometimes investor-state arbitrations fall outside the ICSID Convention. Where those cases involve London arbitration, the courts seem content with the workings of the Arbitration Act 1996 as usual.[12] We are not currently persuaded that there is any lack which needs reform.

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[11] https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2847/download

[12] *Republic of Ecuador v Occidental Exploration and Production Co* [2005] EWCA Civ 1116, [2006] QB 432; *Gold Reserve Inc v Bolivarian Republic of Venezuela* [2016] EWHC 153 (Comm), [2016] 1 WLR 2829; *Kyrgyz Republic v Stans Energy Corp* [2017] EWHC 2539 (Comm), [2018] 2 All ER (Comm) 244; *GPF GP Sarl v Republic of Poland* [2018] EWHC 409 (Comm), [2018] 2 All ER (Comm) 618. See too: *Dicey, Morris & Collins on the Conflict of Laws* (15th ed 2012) para 16-187.

Data protection

11.27 Suggestion: the Act should address matters of data protection, because issues of cyber security affect how arbitration is now practised.

11.28 We think this is better addressed through legislation whose focus is itself data protection. Data protection law is of general application and we have not yet heard arguments to suggest that there is justification for arbitration-specific data protection provisions.

Delay

11.29 Suggestion: the Act should contain more powers for arbitrators to control against delay caused by parties, for example because section 41(3) sets the bar too high.

11.30 Under section 41(3), the tribunal can dismiss a claim for inordinate and inexcusable delay. But this is not all. Under section 34(3), the tribunal can set time limits for complying with its directions. Under section 40, the parties shall do all things necessary for the expeditious conduct of proceedings, including complying with tribunal directions. If a party fails to comply, then a tribunal can make a peremptory order under section 41(5). Where a party fails to comply with a peremptory order, a number of strong consequences are expressly provided. Under section 42, the court can make an order requiring a party to comply with a peremptory order. This seems to us an appropriate regime, and we have not yet been persuaded of what might replace it. In particular, articles 17 H and I of the UNCITRAL Model Law, although structured differently, seem to us to produce a similar outcome.

Section 3 (seat)

11.31 Suggestion: replace “seat” with “place” because the current word “seat” is vague; introduce the word “venue” and define it so as to distinguish it from “place”.

11.32 “Seat” is the subject of section 3. We think that it has an understood meaning, and that “place” is not a clearer alternative. Defining further words like “venue” might add to the confusion. Strict definitions might also cause problems when parties themselves misuse words in their arbitration agreement. And “venue” anyway might be problematic, for example with remote hearings.

11.33 Suggestion: stipulate that the determination is to be made by the court, to clarify how section 3 operates.

11.34 We think that the determination in the final sentence of section 3 might be made by the tribunal as well as the court. The tribunal might “designate” the seat under the first sentence, if so authorised, or it might instead “determine” it under the final sentence. Despite some case law to the contrary,[13] we incline to the view that the court might also be able to make the determination itself, in a suitable case. We do not propose to reverse those contrary first instance decisions: they might be revisited by the courts; some case law might already be read as offering an alternative view;[14] and those

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[13] *Chalbury McCouat International Ltd v PG Foils Ltd* [2010] EWHC 2050 (TCC), [2011] 1 All ER (Comm) 435; *Crowther v Rayment* [2015] EWHC 427 (Ch), [2015] Bus LR 690 at [34] by Andrew Smith J.

[14] *Shahoua v Sharma* [2009] EWHC 957 (Comm), [2009] 2 Lloyd’s Rep 376 at [34] by Cooke J.

contrary decisions side-stepped the problem anyway.[15] We are not persuaded that there is a real problem here in need of fixing through legislative reform.

11.35 Suggestion: stipulate that the designation can be express or implied.

11.36 We think that this follows anyway as a matter of common law so that no change is needed.

Section 4(5) (foreign law and non-mandatory provisions)

11.37 By section 4(5), a choice of foreign law in respect of a matter will disapply the non-mandatory provisions of the Act on that matter.

11.38 Suggestion: section 4(5) should apply only where the parties, having chosen foreign law on X, explicitly disapply the Act's laws on X, because otherwise it creates complexity in identifying precisely which provisions of the Act no longer apply (and which might still continue to apply after all).

11.39 This suggested approach appeared in some case law.[16] It was inconsistent with the stated intention of the DAC.[17] It was subsequently doubted in the Court of Appeal.[18] It has attracted criticism from authors.[19] It was overruled by the Supreme Court.[20] We are not yet persuaded of the need to reinstate it.

11.40 We also tend to think that the suggestion is wrong in principle. If the parties choose foreign law on X, that must surely disapply English law on X, including that English law which appears in the Act, at least where English law on X is non-mandatory. There cannot be two different laws, one English and one foreign, both governing X. The suggestion would leave open that possibility.

11.41 It has been acknowledged that, if the parties choose a foreign law to govern the arbitration agreement, it can be difficult to decide whether a particular provision of the Act relates to the arbitration agreement, and so should be disapplied, or is instead concerned with procedural matters, and so remains in place.[21] Maybe so, but that process of characterisation is inevitable. First, parties are free to agree that a foreign law governs the arbitration agreement, in which case this must be addressed. Second, if a party raises an issue X, it will always be necessary to decide whether a provision

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[15] By invoking section 2(4).

[16] *C v D* [2007] EWCA Civ 1282, [2008] 1 Lloyd's Rep 239 at [19] by Longmore LJ; *National Iranian Oil Co v Crescent Petroleum Co International Ltd* [2016] EWHC 510 (Comm), [2016] 2 Lloyd's Rep 146 at [10] to [17] by Burton J.

[17] *Supplementary Report on the Arbitration Act 1996* (1997) paras 7, 12

[18] *Sulamérica Cia Nacional de Seguros SA v Enesa Engelharia SA* [2012] EWCA Civ 638, [2013] 1 WLR 102 at [24] by Moore-Bick LJ.

[19] *Merkin and Flannery on the Arbitration Act 1996* (6th ed 2020) pp 49 to 52.

[20] *Enka v Chubb* [2020] UKSC 38, [2020] 1 WLR 4117 at [85] to [90] by Lords Hamblen and Leggatt, with whom Lord Kerr agreed.

[21] DAC, *Supplementary Report on the Arbitration Act 1996* (1997) paras 9, 12; *Enka v Chubb* [2020] UKSC 38, [2020] 1 WLR 4117 at [93].

of the Act applies to X, regardless of whether the arbitration agreement is governed by English or foreign law.

11.42 If there is complexity, it does no good to add to it by having a foreign law also apply to X in addition to the Act. At any rate, guidance can be found in the case law concerning which provisions of the Act are substantive and which procedural.[22] Our provisional conclusion is that any residual complexity is best left to be resolved by the courts on a case-by-case basis.

Section 9 (stay of legal proceedings)

11.43 Suggestion: the definition of legal proceedings should be expanded, for example so that employment tribunal proceedings might also be stayed.

11.44 Legal proceedings are defined in section 82 as civil proceedings in the High Court or county court. It may well be that employment tribunal proceedings cannot be stayed under section 9. It may be that they can be stayed on another basis. We are not yet persuaded that there are policy reasons necessitating that other forms of proceedings be brought within the purview of the Act.

11.45 Suggestion: clarify whether the standard of proof for section 9(4) is a good arguable case or the balance of probabilities.

11.46 At present, the case law indicates that the court can decide the matter on the balance of probabilities, but if there is an apparently persuasive assertion that an arbitration agreement exists, then a court might prefer to grant a stay and remit the matter to the tribunal for it to decide in the first instance.[23] We think that this current position is defensible, and its development is a matter best left to the courts.

Section 12 (extension of time for beginning arbitration)

11.47 Suggestion: the Act should stipulate that the court can extend time bars which appear in the contract and not just in the arbitration agreement.

11.48 Section 12(1) begins "where an arbitration agreement…provides that a claim shall be [time] barred". It is usual to find time bars as separate contract terms, rather than in the arbitration clause itself. This does not appear to have prevented the court from extending such time bars, to allow arbitration to begin.[24] We are not yet persuaded of any policy reason to review that approach, and are content to leave its further consideration to the courts as necessary.

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[22] Sections 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 v Chubb* [2020] UKSC 38, [2020] 1 WLR 4117 at [81], [89], [92], [193(vi)]. See too the commentary in: *Russell on Arbitration* (24th ed 2015) paras 2-122, 2-131; *Davidson: Arbitration* (2nd ed 2012) paras 9.06, 9.08.

[23] *Joint Stock Co Aeroflot Russian Airlines v Berezovsky* [2013] EWCA Civ 784, [2013] 2 Lloyd's Rep 242 at [72] to [80] by Aikens LJ.

[24] *Lantic Sugar Ltd v Baffin Investments (The Lake Michigan)* [2009] EWHC 3325 (Comm), [2010] 2 Lloyd's Rep 141.

Section 13 (limitation)

11.49 Suggestion: explain how section 35 of the Limitation Act 1980 applies to arbitration.

11.50 If a claim is brought within time, section 35 allows a counterclaim to be raised, even if, had that counterclaim been brought separately, it would now be out of time. The extent to which this principle applies in arbitration has been addressed in the case law.[25] We think that the question is best addressed by the courts on a case-by-case basis.

Section 14 (commencement of arbitral proceedings)

11.51 Suggestion: replace section 14 with the language of UNCITRAL Model Law, article 21, on the basis that the latter is clearer.

11.52 Article 21 is more of a one-size-fits-all provision, compared to the specifics of section 14. The DAC did consider using article 21, but chose instead to go with section 14, although without giving their reasons.[26] Certainly article 21 is simpler, but it would likely raise its own questions in due course which the English case law would need to address, for example around the meaning of the words "particular dispute" and "received". Meanwhile, section 14 has English case law already, which confirms that it should be interpreted broadly and flexibly, to give effect to the intention of the parties, emphasising substance over form.[27] We are not currently persuaded that article 21 is a better approach than section 14 and its explanatory case law.

Section 17 (default appointment of sole arbitrator)

11.53 Suggestion: the Act should stipulate that any agreement to contract out of section 17 should not have the effect of altering the requirement to give notice under section 17(1) unless the agreement expressly disapplies section 17(1).

11.54 Section 17 begins "unless the parties otherwise agree". If they do otherwise agree, section 17 does not apply. We do not think that, despite the parties agreeing otherwise, nevertheless some parts of section 17 remain unless expressly disapplied. There is case law supporting our view.[28] We think that our view applies generally to non-mandatory clauses. It is consistent, for example, with section 4(5) (discussed above). And it risks confusion and uncertainty if, despite agreeing otherwise, some parts (which parts?) remain.

Section 30 (jurisdiction)

11.55 Suggestion: the definition of "substantive jurisdiction" in section 30 should be non-exhaustive, because the current definition lacks clarity and may be drawn in the wrong place.

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[25] For example, see the discussion of the case law in *Merkin and Flannery on the Arbitration Act 1996* (6th ed 2020) pp 232 to 235.

[26] *Report on the Arbitration Bill* (1996) para 76.

[27] *Bulk & Metal Transport v Voc Bulk Ultra Handymax Pool LLC, The VOC Gallant* [2009] EWHC 288 (Comm), [2009] 1 Lloyd's Rep 418; *Easybiz Investments v Sinograin* [2010] EWHC 2565 (Comm), [2011] 1 Lloyd's Rep 688.

[28] *Minermet SpA Milan v Luckyfield Shipping Corporation SA* [2004] 2 Lloyd's Rep 348.

11.56 The courts, at least at first instance, have confirmed that the definition is exhaustive.[29] A reform to make it non-exhaustive risks uncertainty: what needs to be added? There must still be limits to what constitutes jurisdiction, even if the definition in the Act is non-exhaustive, and the courts will need to define those limits. The Act defines jurisdiction, but that definition too requires the courts to apply it across different fact patterns. So either way, it seems to us that the key issue is how the courts approach the matter. They seem to us to be adopting a pragmatic approach, and we are not yet persuaded that there is any need for legislative intervention.

11.57 Suggestion: the Act should clarify the difference between jurisdiction and admissibility and arbitrability.

11.58 Jurisdiction is defined in section 30. To the extent that something falls outside section 30, it is not a question of jurisdiction. It might thus be a question of admissibility. We see no need for a definition of admissibility. It is jurisdiction, not admissibility, which has consequences under the Act. Also, admissibility is an imprecise concept, with different meanings in different international jurisdictions, whose practices affect international arbitration generally, which in turn can feed back into expectations about London arbitration. To the extent that it needs defining, it is best left to be developed cautiously by the courts. We note that there has seemingly been no call for a decision on it so far.[30]

11.59 On balance, we are not persuaded of the need currently to address justiciability / arbitrability either. For example, if a contract is unenforceable because illegal, that is a factual and legal question for the tribunal in the usual way. The court also has a discretion to refuse enforcement of an award, under section 66. This might be appropriate where its enforcement would be contrary to public policy; compare, for example, section 103(3). The Act is not the place to codify doctrines like illegality, which are much wider than arbitration.[31] So too the issue of state immunity – which took an international convention (the ICSID Convention) to resolve the difficulties of state immunity in investor-state arbitrations.

Section 31 (objection to jurisdiction of tribunal)

11.60 Suggestion: the Act should clarify the relationship between section 31 (objection to substantive jurisdiction of the tribunal) and section 73 (loss of right to object).

11.61 Section 73 is a one-size-fits-all provision about timely objections which can apply across a range of different circumstances. It provides that a party must raise an objection "either forthwith or within such time as is allowed by the arbitration agreement or the tribunal or by any provision of this Part". We think that a natural reading is to say that if the party complies with one of these time periods, then the objection is timely. That would also give effect to the language of "either…or…or…or". The purpose of section 73(1) seems clear enough: "any provision of this Part" might provide a time frame; but that might be displaced (for non-mandatory provisions) by

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[29] *Union Marine Classification Services LLC v Government of the Union of Comoros* [2015] EWHC 508 (Comm), [2015] 2 Lloyd's Rep 49 at [23] by Eder J; *C v D1* [2015] EWHC 2126 (Comm) at [135] by Carr J.

[30] *Merkin and Flannery on the Arbitration Act 1996* (6th ed 2020) p 319.

[31] See N Tamblyn, "The Defence of Illegality in Private Law" (2021) 43 *Liverpool Law Review* 33.

the arbitration agreement (including arbitration rules); or time might be extended by a direction from the tribunal; and if there is no time period anywhere, then an objection must be "forthwith".

11.62 Section 31 itself has time limits. We think that, if a party complies with the section 31 time limits, then they have complied with section 73 as well. It would also be pointless to provide for time limits in section 31 which section 73 then renders redundant by overriding them. Our view is supported by case law.[32]

11.63 Note also the following distinction. Section 31(1) states that "a party is not precluded from raising such an objection by the fact that [they have] appointed or participated in the appointment of an arbitrator". This is a separate point from whether the party has participated in the proceedings for the purposes of section 73.[33] In other words, there are two separate matters: whether the party has participated in the arbitral proceedings; and whether their objection to jurisdiction was sufficiently prompt.

11.64 Suggestion: the language in sections 31(1) and (2) should be made consistent.

11.65 The difference seems to be: a tribunal lacks jurisdiction from the outset (section 31(1)); a tribunal has jurisdiction from the outset, but then exceeds it (section 31(2)). There does not appear to be any particular difficulty with this provision in practice, and the courts seem flexible in applying it.[34]

Section 32 (preliminary point of jurisdiction)

11.66 Suggestion: the Act should clarify the relationship between section 32 (determination of preliminary point of jurisdiction) and 72 (saving for rights of person who takes no part in proceedings).

11.67 In *Armada Ship Management (S) Pte Ltd v Schiste Oil and Gas Nigeria Ltd*,[35] the court held that, where one party was not participating, an application under section 32 would likely be inappropriate. This was also the view of the DAC.[36] We agree with this position.

11.68 The court in *Armada* refused to accede to the section 32 application. The court said that section 72 was not preserved despite a section 32 application. This is because section 72 allows a party to challenge an award for lack of jurisdiction, not to challenge a judicial determination of jurisdiction.[37]

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32 *A v B* [2017] EWHC 3417 (Comm), [2018] Bus LR 778, [42] to [44] by Phillips J.

33 *Frontier Agriculture Ltd v Bratt Brothers* [2015] EWCA Civ 611, [2015] 2 Lloyd's Rep 500 at [35] by Sir Stanley Burton.

34 *Exportadora de Sal SA de CV v Correyaje Maritimo Sud-Americano Inc* [2018] EWHC 224 (Comm), [2018] 1 Lloyd's Rep 399 at [45] by Andrew Baker J.

35 [2021] EWHC 1094 (Comm), [2022] 1 All ER (Comm) 1091.

36 *Report on the Arbitration Bill* (1996) para 141.

37 [2021] EWHC 1094 (Comm), [2022] 1 All ER (Comm) 1091 at [48] by Cockerill J.

11.69 The court in *Armada* said that a section 32 application is "unlikely to be appropriate" where section 72 is engaged.[38] This is not the same as saying never appropriate. An amendment to the Act which makes it never appropriate might be rash. We think that this is a matter best left to development through the courts.

Section 33 (general duty of the tribunal)

11.70 Suggestion: the Act should clarify the relationship between section 33 (general duty of the tribunal) and section 34 (procedural and evidential matters) when the parties agree a procedure which the tribunal disapproves of.

11.71 This relationship was explicitly addressed by the DAC.[39] They said that the tribunal should try to persuade the parties against any procedure which the tribunal thought inappropriate. If the parties are not persuaded to change their minds, the tribunal should either adopt the procedure agreed by the parties, in which case the parties could not later complain that in doing so the tribunal breached its duties under section 33, or the tribunal should resign. We might add, another option could be in how the tribunal controls or awards costs. We provisionally consider this guidance sufficiently clear.

Section 34 (amending statements of case)

11.72 Suggestion: the tribunal should be empowered to allow amendments for closely related but new issues, for example to reduce arguments about whether a new claim falls outside a particular reference.

11.73 For consensual arbitration, the tribunal only has the authority given to it by the parties. If a new claim falls outside the scope of the reference, that is that, no matter how close it is to those claims which fall within. The tribunal already can decide its own jurisdiction, which includes what matters have been submitted to arbitration: section 30(1)(c). And the tribunal can allow amendments: section 34(2)(c). But we do not think that the tribunal should have the power to bring within the reference matters which properly fall outside it. Where arbitration is consensual, tribunals cannot force a jurisdiction on an unwilling party. We are not yet persuaded that this is a workable change.

Section 35 (consolidation)

11.74 Suggestion: arbitrators should be given greater powers to consolidate arbitral proceedings, in particular better to deal with disputes under chain contracts.

11.75 Under section 35, the tribunal has no power to consolidate proceedings, unless the parties agree. It is difficult to see how this could be otherwise when arbitrations are usually private and consensual. Also, to the extent that arbitrations are confidential, it is difficult to see how a tribunal could learn of or openly discuss consolidation with other arbitral proceedings. However, the parties are free to agree otherwise, and some arbitral rules provide for joinder and consolidation.[40] The Act allows for consolidation if the parties agree, and arbitral rules can and do provide for agreed

38 [2021] EWHC 1094 (Comm), [2022] 1 All ER (Comm) 1091 at [41] by Cockerill J.

39 *Report on the Arbitration Bill* (1996) paras 154 to 163.

40 See para 2.8 above.

consolidation. We are not yet persuaded that there is a gap which needs legislative intervention, or that such intervention is possible.

Section 40 (general duty of the parties)

11.76 Suggestion: section 40 should be repealed, because non-compliance has no consequences.

11.77 Section 40(1) provides that "the parties shall do all things necessary for the proper and expeditious conduct of the arbitral proceedings". By section 40(2), this includes complying with the directions of the tribunal. Section 40 does not specify the consequences of non-compliance. But section 41 takes the matter up. Section 41(1) begins "the parties are free to agree on the powers of the tribunal in case of a party's failure to do something necessary for the proper and expeditious conduct of the arbitration". It then sets out default powers for the tribunal. So while section 40 might not provide any consequences for its breach, it is not a stand-alone provision. Rather, breach of section 40 triggers section 41.[41]

Section 41 (dismissing claims after peremptory order)

11.78 Suggestion: the Act should clarify that an award dismissing a claim under section 41(3) or section 41(6) precludes a party from starting that claim afresh.

11.79 It is not usual, for example, for awards following a full process nevertheless to include an order preventing the parties from starting a new arbitration on the same issues. Section 58 provides that (all) awards are final and binding. That creates an estoppel.[42] We consider that such an estoppel applies equally to section 41, and how that estoppel operates is best left to the courts to decide case by case.

Section 42 (court enforcement of tribunal peremptory orders)

11.80 Suggestion: the Act should stipulate that the court shall order compliance with a peremptory order unless persuaded otherwise, and the default should be the enforcement of the tribunal order.

11.81 Rather than have a default rule in favour of the court rubber-stamping the peremptory order, we think the current situation is correct: the court should have an unfettered discretion whether to lend the weight of state coercion to a tribunal's peremptory order. A court order might not be appropriate, for example, where there has been a material change of circumstances, or the tribunal has exceeded its authority, as the case law acknowledges.[43] We are not yet persuaded that the current approach needs changing.

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[41] To similar effect, see: *Russell on Arbitration* (24th ed 2015) paras 5-184 to 5-185; *Pearl Petroleum Co Ltd v The Kurdistan Regional Government of Iraq* [2015] EWHC 3361 (Comm), [2016] 1 Lloyd's Rep 441 at [21], [25] by Burton J; DAC, *Report on the Arbitration Bill* (1996) para 205.

[42] *Merkin and Flannery on the Arbitration Act 1996* (6th ed 2020) p 597; *Russell on Arbitration* (24th ed 2015) paras 6-162, 6-176.

[43] *Emmott v Michael Wilson & Partners (No 2)* [2009] EWHC 1 (Comm), [2009] 1 Lloyd's Rep 233 at [62] by Teare J.

Section 43 (securing the attendance of witnesses)

11.82 Suggestion: the Act should clarify whether section 43 applies regardless of the seat of the arbitration.

11.83 Section 43(3)(b) requires the arbitration to be "conducted" in England and Wales. This relates to venue, not seat. Section 2(3) makes that clear. Section 43(3)(a) requires the witness to be in the UK. Together, sections 43(3)(a) and (b) are concerned to ensure that the court has geographical reach over the witness when requiring their attendance. Our provisional view is that the Act is already sufficiently clear.

11.84 Suggestion: the Act should clarify that it suffices for the witness to be within the UK temporarily, and that attendance could be by way of videolink as well as in person.

11.85 We think that both these possibilities are within the current wording of the Act. The specifics will vary from case to case, and are best left to be addressed by the courts.

Section 44 (interim measures)

11.86 Suggestion: section 44(6) should be amended so that it applies "unless the court orders otherwise", because the default position should be to return control to the tribunal.

11.87 Currently, section 44(6) applies "if the court so orders", and parties can routinely submit draft orders to the court which do return control the tribunal. We are not yet persuaded that any change here would be sufficiently impactful.

Section 46 (rules applicable to substance of dispute)

11.88 Suggestion: the Act should stipulate that the tribunal shall apply the conflict of laws rules applicable at the seat.

11.89 Section 46(3) allows the tribunal to apply the conflict of laws rules which it considers applicable. That could include the law of the seat. This is the same as article 28(2) of the UNCITRAL Model Law. We are not aware of any recurring practical problem here. Also, the parties can always apply to the court for a preliminary determination of a point of law under section 45, and, following *Enka v Chubb*, the English courts will apply English conflict of laws rules.

Section 47 (partial awards)

11.90 Suggestion: the Act should clarify that a partial award under section 47 can include costs.

11.91 Section 61 allows the tribunal to make an award on costs. It is expressed in the singular, and seems to suggest one award on costs. But under the Interpretation Act 1978, section 6(c), the singular includes the plural. And there is nothing in section 47 precluding a partial award from including costs. The practice of arbitrators seems to be unaffected, with many said to be issuing costs orders (rather than awards)

anyway.[44] Some arbitral rules expressly provide the tribunal with that power.[45] We are not yet persuaded of any need for legislative intervention.

Section 48 (remedies)

11.92 Suggestion: if arbitrators award specific performance, and the award debtor does not comply, the Act should explicitly enable the award creditor to go back to the arbitrators and ask for a new award of damages.

11.93 If a tribunal has concluded its work and exhausted its remit (the Latin phrase is "functus officio"), there is nothing more it can do. If a party asks for the remedy of specific performance, and is granted it, and is then disappointed, the tribunal cannot assist. But equally, if a party asks for damages, and does not get paid, still there is nothing further the tribunal can do. Instead, whether the award is for damages or specific performance, the party can seek to enforce the award through the court.

11.94 In the context of specific performance, this particular problem might also be avoided by the tribunal making a partial award, rather than a final award.

11.95 Suggestion: the Act should clarify whether section 48 only applies to final awards.

11.96 Section 48 is concerned with remedies, not awards. Remedies are wider than awards. For example, remedies are also relevant to provisional orders under section 39. We are not yet persuaded of any need to limit section 48 to final awards only.

Section 49 (interest)

11.97 Suggestion: the Act should clarify that the tribunal's power to award interest is without prejudice to the parties' right to claim interest under the Late Payment of Commercial Debts (Interest) Act 1998 (the "1998 Act"), despite the 1998 Act post-dating the Arbitration Act 1996.

11.98 Section 49(1) states that the parties are free to agree on the powers of the tribunal as regards the award of interest. That could include the applicability of the provisions of the 1998 Act. Otherwise, section 49(3) states that, by default, the tribunal can award simple or compound interest at such rates and for such periods as it considers meets the justice of the case. That is broad enough to include the rates and periods under the 1998 Act. Further, section 49(6) states that section 49 does not affect any other power of the tribunal to award interest. That could include the 1998 Act. At any rate, if the contract is governed by English law, the 1998 Act might be applicable anyway, and the tribunal could apply it (as they might apply any relevant English statute, whether pre- or post-dating the Arbitration Act 1996). We currently think that there is no need to make explicit reference to the 1998 Act, and anyway it could create problems to list all possible English statutes which currently might apply to an arbitral dispute, when that list might change in the future. We do not consider, however, that a party should be able to claim interest separately under two (or more) separate enactments.

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[44] *Merkin and Flannery on the Arbitration Act 1996* (6th ed 2020) pp 607 to 608.

[45] LCIA Arbitration Rules 2020, art 26.1; LMAA Terms 2021, sch 2, para 19 (rulings on discrete costs).

Section 50 (extension of time for making an award)

11.99 Suggestion: section 50 should be repealed because it is not needed.

11.100 There do not appear to be any reported cases on section 50. And there does indeed appear to be significant overlap with time extensions under section 79. But we are not aware that section 50 is creating practical problems requiring its repeal, and we have heard how the presence of section 50 is reassuring to some arbitrators.

Section 57 (correction of award)

11.101 Suggestion: the Act should clarify whether the adoption of arbitral rules replaces section 57 wholly or only partially.

11.102 Section 57(1) states that the parties are free to agree on the powers of the tribunal to correct an award or make an additional award. Section 57(2) states that section 57 applies "if or to the extent" that there is no such agreement. If this phrasing creates some uncertainty in the relationship with arbitral rules, the arbitral rules themselves could readily remove that uncertainty, for example by saying that "these rules replace section 57 entirely", or more generically "these are the sole and exclusive rules for issue X".

11.103 However, the following anomaly is noted. Part 1 of the Act contains various non-mandatory provisions which provide default rules. Those default rules apply "unless otherwise agreed by the parties" or "unless the parties otherwise agree" (which is presumably the same thing) or "if there is no such agreement" or "if or to the extent that there is no such agreement". It is peculiar to use different phrasing. For example, perhaps "to the extent" provides that a section might partially apply, retaining those rules not covered by the parties' agreement; whereas "unless otherwise agreed" might exclude all the statutory default provisions if the parties have agreed anything on that issue, even if what they have agreed is less extensive.

11.104 Nevertheless, this does not appear to have caused any problems in practice,[46] and currently we are content to leave the matter for the courts.

Section 58 (effect of award)

11.105 Suggestion: the Act should explain the meaning of an award being "final and binding".

11.106 This is a phrase which has appeared since the Arbitration Act 1889.[47] It can be found in arbitral rules, for example the UNCITRAL Arbitration Rules.[48] An award is final and binding "on the parties", and so not binding on non-parties.[49] The New York Convention also says that awards shall be recognised as binding,[50] so too the

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46 *Federal Insurance Co v Transamerica Occidental Life Insurance Co* [1999] 2 Lloyd's Rep 286.

47 Arbitration Act 1889, first sch, para (h). See too: Arbitration Act 1950, s 16.

48 UNCITRAL Arbitration Rules 2021, art 34(2).

49 DAC, *Report on the Arbitration Bill* (1996) para 563.

50 New York Convention, art III.

UNCTIRAL Model Law.[51] Section 58 reflects an international consensus of language, and should be taken at face value.

11.107 "Final" means that it cannot be relitigated. Some foreign legislation states explicitly that an award is res judicata (a Latin phrase literally meaning "matter adjudged" which signifies that an issue cannot be relitigated).[52] There is no doubt that in England and Wales, awards can also create an estoppel.[53]

11.108 "Binding" means that it must be complied with. Indeed, it is an implied term of the arbitration agreement that the parties will perform the award.[54] The award can be enforced by the court through section 66, or an action can be brought for breach of that implied term.

11.109 Section 58 begins "unless otherwise agreed by the parties". This is because some arbitral rules allow an appeal to a second arbitral panel.[55] The award of the first instance tribunal is not final and binding while an appeal is available.[56] Nevertheless, the first instance award does become final and binding when there is no appeal; or the appeal panel can issue an arbitral award which is final and binding. If the parties agree to a non-binding arbitration, that is not an arbitration properly so called. The Act only applies to processes which result in an award which is final and binding.[57]

11.110 Overall, the common law contains a significant amount of detail on these topics, much of it fact specific. Estoppel in particular applies more widely than arbitration; what will be estopped will vary from case to case. Currently we think that these are matters best left to the courts.

Section 60 (agreement to pay costs in any event)

11.111 Suggestion: the Act should stipulate that the parties are free to re-confirm after the dispute has arisen any agreement to pay costs in any event.

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51 UNCITRAL Model Law, art 35(1).

52 For example, Federal Law No 6 of 2018 on Arbitration (UAE), art 52; Dutch Code of Civil Procedure, Book Four, Arbitration, art 1059(1).

53 *Merkin and Flannery on the Arbitration Act 1996* (6th ed 2020) p 597; *Russell on Arbitration* (24th ed 2015) para 6-176

54 *Associated Electric and Gas Insurance Services Ltd v European Reinsurance Co of Zurich* [2003] UKPC 11, [2003] 1 WLR 1041 at [9] by Lord Hobhouse; *The Prestige* [2021] EWCA Civ 1589, [2021] All ER (D) 37 (Nov) at [108].

55 For example: GAFTA Arbitration Rules no 125, r 10; LSAC 2020, cl 11.

56 *Berkeley Berke SIPP Administration LLP v Charlton* [2017] EWHC 2396 (Comm), [2018] 1 Lloyd's Rep 337 at [17] by Teare J.

57 *IS Prime v TF Global Markets* [2020] EWHC 3375 (Comm); *Berkeley Berke SIPP Administration LLP v Charlton* [2017] EWHC 2396 (Comm), [2018] 1 Lloyd's Rep 337; *O'Callaghan v Coral Racing Ltd* [1998] All ER (D) 607 (CA); *Walkinshaw v Diniz* [2000] 2 All ER (Comm) 237, 254 to 255 by Thomas J; *David Wilson Homes Ltd v Survey Services Ltd* [2001] EWCA Civ 34, [2001] 1 All ER (Comm) 449; *England & Wales Cricket Board v Kaneria* [2013] EWHC 1074 (Comm). See too: *Merkin and Flannery on the Arbitration Act 1996* (6th ed 2020) pp 58, 599; *Russell on Arbitration* (24th ed 2015) para 1-001.

11.112 This is already compatible with the Act. It can be seen in practice, for example, in the LCIA Arbitration Rules 2020, article 28.5. We do not consider that there is a need to confirm this explicitly in the Act.

Sections 61 to 65 (costs)

11.113 Suggestion: the Act should provide greater powers for the arbitral tribunal to control party costs, for example to ensure that party costs are kept within sensible bounds.

11.114 By section 33, the tribunal shall adopt procedures which avoid unnecessary delay or expense. Under section 34, the tribunal shall decide all procedural and evidential matters, subject to any other agreement by the parties. Together these empower the tribunal to adopt cost-effective procedures.

11.115 Further, under section 63(5), the recoverable costs are determined on the basis that there shall be allowed a reasonable amount in respect of all costs reasonably incurred. By section 63(3), the tribunal may determine the recoverable costs of the arbitration on such basis as it thinks fit. All this allows the tribunal to keep within reasonable bounds what costs a losing a party must pay.

11.116 Further still, under section 65, the tribunal can direct that the recoverable costs be limited in advance to a specified amount. Altogether, we consider that these existing provisions appear sufficient as mechanisms by which to control party costs.

11.117 Suggestion: the language of costs in sections 61 and 63 should be updated, particularly in light of the Civil Procedure Rules (which post-date the Act).

11.118 Previously, the Arbitration Act 1889 provided that "the costs of the reference and award shall be in the discretion of the arbitrators…who may direct to and by whom and in what manner those costs…shall be paid, and may tax or settle the amount of costs to be so paid".[58] This was repeated in the Arbitration Act 1950.[59]

11.119 In the Arbitration Act 1996, section 61 provides a default rule: costs should follow the event. Section 63 provides another default rule: "recoverable costs" means a reasonable amount reasonably incurred. These sections adopted the language of the Rules of the Supreme Court (RSC).[60] Those were the court rules then in force. However, the RSC rules on costs were more extensive than the regime adopted in the Act. It seems that the DAC preferred to keep the Act simplified.

11.120 The RSC has since been replaced by the Civil Procedure Rules (CPR). The CPR recasts the general principle: the unsuccessful party shall pay the costs of the successful party.[61] Although the language has changed, the underlying principle is still the same. It would be unusual to make legislative reform if there were no intended change to the law.

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[58] Arbitration Act 1889, sch 1, para i.

[59] Arbitration Act 1950, s 18(1).

[60] DAC, *Report on the Arbitration Bill* (1996) para 268; RSC O 62 rr 3(3), 9, 12(1), app 2 r 1.

[61] CPR r 44.2(2)(a).

11.121 The CPR also add that, when recoverable costs are assessed on the standard basis (but not the indemnity basis), in addition to being reasonable in amount and reasonably incurred, they must also be proportionate.[62] We think that, if arbitrators wished to apply a similar requirement, they could do so, invoking their general discretion under section 63(3).

11.122 Once again, the CPR rules on costs are far more extensive than the regime found in the Act. Like the DAC, we think that a simplified approach is best for the Act. It makes the Act easier to use. Arbitrators could (but need not) refer to the CPR for guidance if they felt that was useful.[63] Otherwise, to the extent that the parties wish to supplement the Act, arbitral rules often have costs provisions. The language of costs in arbitral rules is not uniform, so there is no consensus on language alternative to the CPR. Overall, we are not yet persuaded that there is any need to reform these sections of the Act, which seem to encompass all relevant principles sufficiently. We have not heard that the current language is causing any difficulties in practice.

11.123 Suggestion: the Act should explicitly address without prejudice offers.

11.124 The tribunal has a wide discretion as to costs in section 61(2), and case law has confirmed this can include taking account of without prejudice offers.[64] It is true that without prejudice offers are not explicitly addressed in the Act but, as noted above, the regime on costs in the Act is slimmed down compared to the CPR. We are not persuaded that without prejudice offers should be singled out for addition, and the variety of ways in which such offers might arise, and might or might not be relevant, suggests to us that this is best left to the tribunal's general discretion.

11.125 Suggestion: the Act should clarify that the parties are able to agree the basis on which costs are to be assessed and allocated.

11.126 Section 63 provides default provisions for how to assess costs. By section 63(1), the parties are free to agree what costs of the arbitration are recoverable. That is broad enough to include, for example, that an identified cost is recoverable (counsel's fee of £5,000), or that a type of cost is recoverable (reasonable counsel's fees). Allocation is addressed by section 61, and is also subject to any agreement of the parties. We think that the Act sufficiently allows the parties already to agree the basis on which costs are assessed and allocated.

11.127 Suggestion: section 63(4) should be repealed.

11.128 We think that costs should usually be assessed by the tribunal. But if the tribunal does not or cannot, we are not persuaded that a party should be precluded from going to court for a determination of its recoverable costs. Further, under section 64, the recoverable costs of the arbitration include the arbitrators' reasonable fees, and it might be more appropriate for the court, rather than the arbitrators, to assess those. In

[62] CPR r 44.3(2).

[63] *Merkin and Flannery on the Arbitration Act 1996* (6th ed 2020) pp 607 to 613, 617; *Russell on Arbitration* (24th ed 2015) paras 6-138 to 6-139, 6-143.

[64] *Linpave Building Ltd v Gillingham FC* (2003) 69 Arbitration 141; *Danae Air Transport ASA v Air Canada* [1999] 2 Lloyd's Rep 547.

the absence of further reasons for its repeal, we are not yet minded to propose legislative reform.

Section 66 (enforcement of awards)

11.129 Suggestion: the Act should clarify the relationship between enforcement under Parts 1 and 3.

11.130 Part 3 only applies to New York Convention awards. But section 104 expressly preserves the right to enforce a New York Convention award under section 66 (in Part 1). And yet section 66(4) says that nothing in that section affects the provisions of Part 3. The consequence appears to be this. Awards seated in England and Wales are enforced under section 66. They can be challenged under sections 67 and 68. New York Convention awards can be enforced under either section 66 or section 101. They cannot be challenged under sections 67 and 68; see too section 2. But they surely cannot avoid challenge under section 103. Other foreign-seated awards are enforced under section 66.

11.131 Suggestion: the Act should clarify whether it allows for partial enforcement of arbitral awards.

11.132 Partial enforcement is certainly available for New York Convention awards.[65] It is probably available for Part 1 awards for the same reasons.[66] Indeed, the existence of partial enforcement is acknowledged by the Commercial Court Guide.[67] We think that this matter can be left to the courts to develop the factual circumstances in which partial awards are enforceable.

11.133 Suggestion: the distinction between enforcing an award in the same manner as a court judgment, and entering judgment in terms of the award, should be removed, because the distinction serves no useful purpose.

11.134 By section 66(1), the award itself can be enforced (in the same manner as a court judgment); by section 66(2), a court judgment can be created (in terms of the award).[68] The latter might have consequences unavailable to an arbitral award, like contempt, or post-judgment statutory interest. Or, because the judgment is a new event, it might have consequences in terms of time running. It might also result in merger (see below). As to which section (or both) to invoke, “one may be more appropriate than the other if enforcement is sought in a jurisdiction where having either an award or an English court judgment facilitates the process”.[69]

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65 *Nigerian National Petroleum Corp v IPCO (Nigeria) Ltd (No 2)* [2008] EWCA Civ 1157, [2009] 1 Lloyd’s Rep 89.

66 *Merkin and Flannery on the Arbitration Act 1996* (6th ed 2020) p 633 n 64; *Russell on Arbitration* (24th ed 2015) para 8-031 n 144.

67 *Commercial Court Guide* (11th ed, 2022) para O 11.5.

68 This option first appeared in the Arbitration Act 1934, s 10. See too: Arbitration Act 1950, s 26.

69 *Russell on Arbitration* (24th ed 2015) para 8-009.

11.135 We have not yet heard of any problem here in practice. An applicant can make at the same time an application under section 66(1) and section 66(2). The same distinction also appears in section 101(2) and (3).

11.136 Suggestion: when judgment is entered in terms of the award, the Act should stipulate that there is no merger of the award in the judgment.

11.137 Merger came up for discussion in *The Prestige*. In that case, the claimant argued that a tribunal award did not merge with the court judgment. At first instance,[70] Mr Justice Butcher described this point as "thoroughly arguable".[71] He did not decide the point. (Principally, the case was concerned with conflicts of law and state immunity.) In the Court of Appeal,[72] the court said that there was no question of merger where the award was merely declaratory (the type of award in that case).[73]

11.138 We are not yet persuaded by the claimant's arguments at first instance, for example that merger is incompatible with section 66(4) (which provides that nothing in that section affects the recognition or enforcement of an award under any other enactment or rule of law). The saving in section 66(4) could mean that sections 66(1) and (2) do not, by their existence, eradicate the common law action; it does not necessarily mean that they are cumulative options, rather than alternatives. Some authors suggest, without reasoning, that there is no merger,[74] others hint that there is merger.[75] There is other case law which also suggests that there is merger.[76]

11.139 Nevertheless, despite this uncertainty, we are not yet aware that there are any significant problems faced in practice by arbitral parties, and we have not yet heard from stakeholders what the consequence of reform would be. In those circumstances, we think that the matter is best left to the courts to resolve should the matter arise.

Section 68 (serious irregularity)

11.140 Suggestion: the Act should clarify whether remission of the award is to the same tribunal.

11.141 Section 68(3) is couched in terms of remission of the award to "the" tribunal. On normal language, we think that this would be "the" tribunal in section 68(1) affected by serious irregularity. For example, section 68(3) does not say remission to "a" or

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70 [2020] EWHC 1920 (Comm), [2021] 3 All ER 660.

71 [2020] EWHC 1920 (Comm), [2021] 3 All ER 660 at [90(3)].

72 [2021] EWCA Civ 1589, [2021] All ER (D) 37 (Nov).

73 [2021] EWCA Civ 1589, [2021] All ER (D) 37 (Nov) at [106].

74 *Merkin and Flannery on the Arbitration Act 1996* (6th ed 2020) p 631. *Dicey, Morris & Collins on the Conflict of Law* (15th ed 2018) para 16-162, appears to suggest no merger, but the case law cited in support does not go as far as the text suggests.

75 *Russell on Arbitration* (24th ed 2015) para 8-008. The question is not directly addressed in *Spencer Bower and Handley: Res Judicata* (5th ed 2019).

76 *Sonatrach v Statoil Natural Gas LLC* [2014] EWHC 875 (Comm), [2014] 2 All ER (Comm) 857 at [55] to [57] by Flaux J (and the cases there cited).

"another" tribunal. Indeed, there is no other tribunal to remit the award to.[77] We are not yet persuaded of the need for any legislative reform here.

Section 69 (appeal on a point of law)

11.142 Suggestion: this should be available only to domestic (not international) arbitrations.

11.143 The DAC were not attracted to the idea of separate regimes for domestic and international arbitrations.[78] Some foreign legislation has moved to unify separate domestic and international arbitration regimes.[79] Nevertheless, the Act provided for a separate regime – in sections which were never brought into force, and which anyway came with a power to repeal.[80] We have suggested the repeal of these sections, in Chapter 10.[81] We see no convincing reason to treat domestic and international arbitrations separately, and only a very few stakeholders have suggested that different rules should apply. The arguments about finality apply to both domestic and international arbitrations; so too the arguments about correcting errors of law. And section 69 is already non-mandatory, so anyone can opt-in or opt-out or "otherwise agree" an alternative regime.

11.144 Suggestion: the Act should stipulate that there is no right to an oral hearing to reconsider the grant or refusal of leave to appeal on a point of law.

11.145 Section 69(5) provides that the court shall determine an application for leave to appeal without a hearing, unless it appears to the court that a hearing is required. Thus, the decision to hold a hearing is in the discretion of the court.[82] Section 69(6) provides that the leave of the court is required for any appeal from a decision of the court under this section to grant or refuse leave to appeal. Thus, if a party is unhappy with the decision to grant or refuse leave to appeal, its recourse is (only) an appeal.[83]

11.146 Contrast this with applications under sections 67 and 68. Those also provide that the leave of the court is required for any appeal from a decision of the court under those sections. But there is otherwise no reference in the Act to a decision without a hearing. Instead, the Commercial Court Guide, paragraph O 8.6, records that the court has power under CPR rules 3.3(4) and 23.8(c) to dismiss the application without a hearing. However, the Commercial Court Guide, paragraph O 8.7 also says that, if

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77 It may be that where an award is set aside, the serious irregularity might so taint the tribunal that remission of the dispute (not the award) should be to a different tribunal: see *Secretary of State for the Home Department v Raytheon Systems Ltd* [2015] EWHC 311 (TCC), [2015] Bus LR 626. However, in such a case, best practice might be to invoke section 24 (power of court to remove arbitrator).

78 *Report on the Arbitration Bill* (1996) paras 317 to 331.

79 For example, Hong Kong. And see the discussion about proposed reforms to Singaporean law, in the context of appeals on a point of law, in Chapter 9.

80 Arbitration Act 1996, s 88.

81 From para 10.65 above.

82 Nor is an oral hearing required by article 6 of the European Convention on Human Rights: *BLCT (13096) Ltd v J Sainsbury plc* [2003] EWCA Civ 884.

83 A respondent who wishes to resist an application for leave to appeal is to file a respondent's notice in the terms set out in the *Commercial Court Guide* at paras O 8.1(f) to (h).

the application was dismissed without a hearing, the affected party can apply to set aside the order and seek directions for a hearing. This aligns with CPR rule 3.3(5).

11.147 Thus, if an application under section 69 is dismissed without a hearing, the only option is appeal, as a matter of statute, whereas under sections 67 and 68, there can be an oral re-hearing, as a matter of court rules, as well as an appeal under statute. Thus, the suggested reform is already the position under the Act.

11.148 In *WSB v FOL*,[84] the court refused permission to an applicant to appeal an arbitral award on a point of law. It did this without a hearing. The court also rejected the applicant's complaints under sections 67 and 68, this too without a hearing, pursuant to CPR rules 3.3(4) and 23.8(c). The applicant sought to set aside the order dismissing its complaints. It did not seek to appeal the order. The judge said that there was no right to insist upon an oral re-hearing of the decision not to grant permission for a section 69 challenge.[85] We think that this decision is right.

Section 70 (appeals and challenges to arbitral awards)

11.149 Suggestion: appeals from arbitral awards should go only as far as the High Court, with no further right of appeal, to increase the finality of arbitral awards.

11.150 Something similar can be found in Ireland.[86] We address how appeals are statistically rare in Chapters 8 and 9.[87] We are not aware of any structural problem here which causes regular delay. Even if only very few cases make it to the Court of Appeal and the Supreme Court, we think it useful that this is possible.

11.151 Suggestion: the Act itself should provide guidance on when, under section 70(7), the court should order money payable under an award to be paid into court pending a challenge to the award.

11.152 We think that such guidelines are best left to be developed by the courts.[88]

11.153 Suggestion: the Act should stipulate a default rule that money payable under an award shall be paid into court pending a challenge.

11.154 The court currently has a discretion, and we have not yet heard a compelling reason to fetter or nudge it with a default presumption. For example, such a presumption seems inappropriate where an applicant has a strong application based on egregious procedural irregularity tainting the award.

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84 [2022] EWHC 586 (Comm).

85 [2022] EWHC 586 (Comm) at [9] to [13] by Calver J.

86 Arbitration Act 2010 (Ireland), s 11.

87 See para 8.33 and para 9.30 above.

88 For a discussion of the case law, see for example *Merkin and Flannery on the Arbitration Act 1996* (6th ed 2020) pp 770 to 776, which describes the absence of guidance in the Act as "unsurprising".

Section 72 (saving of rights for non-participants)

11.155 Suggestion: the Act should stipulate that section 72(1) only applies to pre-award relief; it was suggested that the use of present tense is confusing.

11.156 Section 72(1) does not expressly limit itself to pre-award relief. No such limitation is suggested by the DAC. The case law perhaps tends to the view that it is not so limited, although the matter has not been finally resolved.[89] Section 72(2) explicitly only refers to post-award challenges, but it too uses the present tense throughout. We are not yet persuaded that there is a major principle here in need of resolution, and so we are content to leave the matter to the courts to consider in a relevant factual context, should the matter arise.

11.157 Suggestion: the time limits in section 70(3) should be disapplied when challenging under section 72(2).

11.158 Section 72(2) expressly disapplies the procedural steps in section 70(2), but not the time limits in section 70(3). However, section 80(5) provides that rules of court relating to time periods also apply to the Act. And CPR rule 62.9 allows the court to extend the time periods of section 70(3). So what we have overall is a default time period for challenging awards, which is short, not inappropriately (to encourage the finality of arbitral awards), but with the court able to extend the time period in suitable cases (for example, where a non-participating party has only recently learned of the award or its attempted enforcement). Currently we think that this arrangement is acceptable (even if the pathway is somewhat complicated).

Section 78(5) (reckoning periods of time)

11.159 Suggestion: section 78(5) should be amended to remove the anomalies when reckoning periods of time.

11.160 Under section 78(5), where something must be done within a certain time period, and that time period is seven days or less, then Saturdays, Sundays, and public holidays are excluded from the reckoning. This has the following consequence. An eight-day time period would run from Monday to the following week's Tuesday, whereas a seven-day time period would run from Monday to the following week's Wednesday, giving longer when it was originally a shorter time period.

11.161 This is a strange consequence, but that situation will always remain unless there is a rule that Saturdays, Sundays, and public holidays will always or never count in the reckoning of time. Always counting could prove very demanding, if not unfair, if the time period is very short and falls over a bank holiday weekend, for example, when it may prove very difficult to get any required work successfully completed. Always counting risks turning 28 days into 40 days, building in delay, or causing a need to recalibrate all time periods. It seems simpler to keep matters as they are: to make shorter time periods fairer, even if it creates a slight anomaly, rather than eliminate the anomaly and risk creating unfairness or delay.

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[89] *Russell on Arbitration* (24th ed 2015) para 7-152; *Merkin and Flannery on the Arbitration Act 1996* (6th ed 2020) pp 786 to 788, which also acknowledges that in some cases section 72(1) could be relevant both pre- and post-award.

Section 92 (County Court arbitration)

11.162 Suggestion: section 92 should be repealed, because it is redundant.

11.163 Section 92 provides that nothing in Part 1 of the Act applies to arbitration under section 64 of the County Courts Act 1984. That section in turn provides that rules of court may prescribe when county court cases may be referred to arbitration. All this has largely been overtaken by the new regime created by the CPR. However, section 64 has not been repealed, and whether it is completely redundant is not entirely clear.[90] In which case, we consider that repeal is an unnecessary risk when the section is causing no problems.

Section 102 (evidence for recognition and enforcement of foreign award)

11.164 Suggestion: the Act should list who can authenticate and certificate.

11.165 Section 102 enacts the language of article IV of the New York Convention, and so reflects our international obligations. The wording is expansive, and covers whatever authenticating process the law currently accepts. We think that it could create problems if we attempt to list all currently acceptable authentication practices, when those practices might change in the future.

[90] *White Book* (2022) vol 2 para 9A-542.

Chapter 12: Consultation Questions

Consultation Question 1.

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

Paragraph 2.47

Consultation Question 2.

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

Paragraph 3.44

Consultation Question 3.

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

Paragraph 3.51

Consultation Question 4.

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

Paragraph 3.55

Consultation Question 5.

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

Paragraph 3.56

Consultation Question 6.

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

Paragraph 4.10

Consultation Question 7.

12.7 We provisionally propose that:

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

(2) any agreement between the parties in relation to the arbitrator's protected characteristic(s) should be unenforceable;

unless in the context of that arbitration, requiring the arbitrator to have that protected characteristic is a proportionate means of achieving a legitimate aim.

"Protected characteristics" would be those identified in section 4 of the Equality Act 2010.

Do you agree?

Paragraph 4.36

Consultation Question 8.

12.8 Should arbitrators incur liability for resignation at all, and why?

Paragraph 5.23

Consultation Question 9.

12.9 Should arbitrators incur liability for resignation only if the resignation is proved to be unreasonable?

Paragraph 5.24

Consultation Question 10.

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

Paragraph 5.45

Consultation Question 11.

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

Paragraph 6.25

Consultation Question 12.

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

Paragraph 6.29

Consultation Question 13.

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

Paragraph 6.31

Consultation Question 14.

12.14 We provisionally propose that a claim or defence or issue may be decided following a summary procedure where it has no real prospect of success, and when there is no other compelling reason for it to continue to a full hearing. Do you agree?

Paragraph 6.35

Consultation Question 15.

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

Paragraph 7.22

Consultation Question 16.

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

Paragraph 7.36

Consultation Question 17.

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

Paragraph 7.39

Consultation Question 18.

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

Paragraph 7.48

Consultation Question 19.

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

Paragraph 7.51

Consultation Question 20.

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

Paragraph 7.87

Consultation Question 21.

12.21 Which of the following ways of accommodating the orders of any emergency arbitrator do you prefer, and why?

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

(2) An amendment which allows an emergency arbitrator to give permission for an application under section 44(4) of the Arbitration Act 1996.

If you prefer a different option, please let us know.

Paragraph 7.97

Consultation Question 22.

12.22 We provisionally propose that:

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

(2) the tribunal has ruled on its jurisdiction in an award,

then any subsequent challenge under section 67 of the Arbitration Act 1996 should be by way of an appeal and not a rehearing.

Do you agree?

Paragraph 8.46

Consultation Question 23.

12.23 If section 67 of the Arbitration Act 1996 is limited, in some circumstances, to an appeal rather than a rehearing, do you think that the same limitation should apply to section 32, and why?

Paragraph 8.51

Consultation Question 24.

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

Paragraph 8.57

Consultation Question 25.

12.25 We provisionally propose that, in addition to the existing remedies under section 67(3) of the Arbitration Act 1996, the court should have a remedy of declaring the award to be of no effect, in whole or in part. Do you agree?

Paragraph 8.64

Consultation Question 26.

12.26 We provisionally propose that an arbitral tribunal should be able to make an award of costs in consequence of an award ruling that it has no substantive jurisdiction. Do you agree?

Paragraph 8.71

Consultation Question 27.

12.27 We provisionally conclude that section 69 of the Arbitration Act 1996 strikes the right balance between competing interests in respect of the ability to appeal an arbitral award on a point of law. We do not therefore propose any reform to section 69. Do you agree?

Paragraph 9.53

Consultation Question 28.

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

Paragraph 10.11

Consultation Question 29.

12.29 We provisionally propose to confirm that an appeal is available from a decision of the court under section 9 of the Arbitration Act 1996. Do you agree?

Paragraph 10.17

Consultation Question 30.

12.30 Do you think that an application under section 32 of the Arbitration Act 1996 (determination of preliminary point of jurisdiction) and section 45 (determination of preliminary point of law) should merely require either the agreement of the parties or the permission of the tribunal, and why?

Paragraph 10.34

Consultation Question 31.

12.31 Do you think that the Arbitration Act 1996 should make express reference to remote hearings and electronic documentation as procedural matters in respect of which the arbitral tribunal might give directions, and why?

Paragraph 10.42

Consultation Question 32.

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

Paragraph 10.47

Consultation Question 33.

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

Paragraph 10.49

Consultation Question 34.

12.34 We provisionally propose that section 70(3) of the Arbitration Act 1996 should be amended so that, if there has been a request under section 57 for a correction or additional award material to the application or appeal, time runs from the date when the applicant or appellant was notified of the result of that request. Do you agree?

Paragraph 10.59

Consultation Question 35.

12.35 We provisionally conclude that section 70(8) of the Arbitration Act 1996 (granting leave to appeal subject to conditions) should be retained as we consider that it serves a useful function. Do you agree?

Paragraph 10.64

Consultation Question 36.

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

Paragraph 10.69

Consultation Question 37.

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

Paragraph 11.5

Consultation Question 38.

12.38 Is there any significant topic within the Arbitration Act 1996, not addressed in this consultation paper, which you think is in need of review and potential reform? If so, what is the topic, and why does it call for review?

Paragraph 11.7

Appendix 1: Terms of reference

The Law Commission is asked to undertake a review of the current legal framework for arbitration, and in particular the Arbitration Act 1996.

The review will determine whether there are any amendments which could and should be made to the current legal framework to ensure that it is fit for purpose and that it continues to promote the UK as a leading destination for commercial arbitrations.

The Commission and the Department recognise the value of arbitration to the UK economy, and resolve that the review should be conducted in a manner which aims to enhance the competitiveness of the UK as a global centre for dispute resolution and the attractiveness of English and Welsh law as the law of choice for international commerce. The review will be conducted in close consultation with non-Governmental stakeholders, particularly legal practitioners involved in arbitrations, to ensure their views are accurately taken into account.

The Commission will publish a scoping study or report with recommendations for law reform, depending on the outcome of its consultation with stakeholders and in agreement with the Department.

Appendix 2: Acknowledgements

We are grateful to all those who gave their time to share their ideas with us in meetings or in correspondence during the preparation of this consultation paper:

Allen & Overy LLP

Amanda Lee

Audley Sheppard QC

Bryan Cave Leighton Paisner LLP

Chartered Institute of Arbitrators

Chartered Institute of Arbitrators, London Branch

Clyde & Co LLP

Dr David Barrett

David Joseph QC

Debevoise & Plimpton LLP

Edward Album

Grain and Feed Trade Association

Lord Hoffmann

Institute of Family Law Arbitrators

Institution of Civil Engineers

International Chamber of Commerce

Dr Julian Brown

Kate Davies

Krystal Lee

London Court of International Arbitration

London Maritime Arbitrators Association

Louis Flannery QC

Prof Dr Maxi Scherer

Meg Kinnear

Pete Kerr-Davis

Pierre-Yves Tschanz

Practical Law Arbitration, Thomson Reuters

Racial Equality for Arbitration Lawyers

Ricky Diwan QC

Prof Rob Merkin QC

Royal Institution of Chartered Surveyors

Salim Moollan QC

Mrs Justice Sara Cockerill and judges from the Commercial Court

Sir Richard Aikens

Slaughter and May

Prof Stavros Brekoulakis

Stephen Lewis

Dr Stuart Dutson

Sylvia Noury QC

Tim Young QC

Toby Landau QC

Wilmer Cutler Pickering Hale and Dorr LLP

We are also grateful to the attendees at events kindly hosted by the following:

Arbitration Support and Know-How (ASK) Group

COMBAR

Commodity Arbitration Club

Federation of Commodity Associations

Herbert Smith Freehills LLP

International Chamber of Commerce

Lincoln's Inn

London Court of International Arbitration

Society of Construction Arbitrators

We are grateful to the following for their written responses on the topic of a potential review of the Arbitration Act 1996, in response to our consultation on our 14th programme of law reform:

Bar Council of England and Wales

Barry Fletcher

Ben Giaretta

Bird & Bird LLP

Chartered Institute of Arbitrators

Clare Ambrose

Clifford Chance LLP

Freshfields Bruckhaus Deringer LLP

Lord Hamblen

Herbert Smith Freehills LLP

Holman Fenwick Willan LLP

John Tackaberry QC

Karen Maxwell

Klaus Reichert

Law Society of England and Wales

Linklaters LLP

Lisa Dubot

London Maritime Arbitrators Association

Michael Black QC

Michael Collett QC

Mischon de Reya LLP

Practical Law, a Thomson Reuters business

Rachael O'Grady

Raid Abu-Manneh

Rhys Taylor

Prof Stavros Brekoulakis

Stephen Lewis

Timothy Foden