Law Commission
Reforming the law

Review of the Arbitration Act 1996
Second Consultation Paper

Consultation Paper 258

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March 2023

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THE LAW COMMISSION – HOW WE CONSULT

About the Law Commission: The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law. The Law Commissioners are: The Rt Hon Lord Justice Green, Chair, Professor Sarah Green, Professor Nicholas Hopkins, Professor Penney Lewis, and Nicholas Paines KC. The Chief Executives are Stephanie Hack and Joanna Otterburn.

Topic of this consultation: Proposals to reform the Arbitration Act 1996. This consultation paper supplements a previous consultation paper published in September 2022 and available at: https://www.lawcom.gov.uk/project/review-of-the-arbitration-act-1996/.

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

Duration of the consultation: We invite responses from 27 March to 22 May 2023.

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

Alternatively, comments may be sent:

By email to arbitration@lawcommission.gov.uk

OR

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

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

Availability of materials: This second consultation paper is available on our website at https://www.lawcom.gov.uk/project/review-of-the-arbitration-act-1996/.

We are committed to providing accessible publications. If you require this consultation paper to be made available in a different format, please email arbitration@lawcommission.gov.uk or call 020 3334 0200.

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.

Consultation Principles: The Law Commission follows the Consultation Principles set out by the Cabinet Office, which provide guidance on type and scale of consultation, duration,

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We list who responded to our consultations in our reports. If you provide a confidential response your name will appear in that list. If your response is anonymous we will not include your name in the list unless you have given us permission to do so.

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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

PROJECT HISTORY

1.1 Arbitration is a form of dispute resolution. In England and Wales, arbitration is regulated by the Arbitration Act 1996.

1.2 In March 2021, the Ministry of Justice asked the Law Commission to conduct a review of the Arbitration Act 1996. The Law Commission was tasked with determining whether any amendments to the Act were needed to ensure that it remains fit for purpose and continues to promote England and Wales as a leading destination for commercial arbitration. Our terms of reference are attached at Appendix 1.

1.3 We began our review in January 2022. We received written submissions from, and had discussions with, a wide range of stakeholders. We are very grateful to everyone who shared their knowledge and experience with us.

1.4 In September 2022, we published our first consultation paper, which contains an introduction to arbitration and its legislation in Chapter 1.[1] It analysed the current law before reaching provisional conclusions and making provisional proposals for reform. Throughout the paper, we asked questions which sought the views of consultees.

1.5 The consultation period closed in December 2022. We received responses from around 118 consultees. Those consultees ranged from individual practitioners, through academics and specialist bodies, to major domestic and international firms and institutions, some representing thousands of people. Engagement has been broad, and the responses were often detailed. In Appendix 2 of this paper, we list all the people we have heard from since the publication of our first consultation paper.

1.6 We will publish responses from consultees, both to the first consultation paper and to this second consultation paper, along with our final report.

This second consultation paper

1.7 Our first consultation paper addressed a shortlist of topics within the Arbitration Act 1996. Most of those topics will not be revisited in this paper, but will be addressed in our final report, which will contain an analysis of consultees' responses together with our final recommendations for reform.

1.8 In the first consultation paper, we asked consultees whether any other topic needed to be considered, beyond the shortlisted topics we had examined. A significant number indicated that we should consider the proper law of the arbitration agreement. Having considered those responses, and discussed further with some stakeholders who made representations on this subject, we are persuaded that this is a topic which requires discussion and potentially reform. We now make proposals about this topic, and ask consultees for their views.

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1 Review of the Arbitration Act 1996 (2022) Law Commission Consultation Paper No 257.

1.9 Since we are consulting again, we are also taking the opportunity to revisit two issues which were covered in the first consultation:

(1) challenges to awards under section 67 on the basis that the tribunal lacked jurisdiction; and

(2) discrimination in arbitral appointments.

1.10 These two topics are perhaps the most controversial of the topics of potential reform. Responses from and discussions with consultees have enabled our analysis to develop and have led us to revise our proposals. We seek the views of consultees on those revised proposals, and on this new iteration of our analysis.

1.11 The responses of consultees to this second consultation paper will be taken along with responses to the first consultation to inform our final report and recommendations.

STRUCTURE OF THIS PAPER

1.12 This paper comprises three further chapters and two appendices.

(1) In Chapter 2, we discuss the proper law of the arbitration agreement.

(2) In Chapter 3, we discuss challenges to awards under section 67.

(3) In Chapter 4, we discuss discrimination.

1.13 In Appendix 1, we set out our terms of reference. In Appendix 2, we list all the people we have heard from since the publication of our first consultation paper.

NEXT STEPS

1.14 We kindly ask consultees to respond to the questions in this consultation paper by 23:59 hours on 22 May 2023. Consultees can respond using one of the methods set out on page ii above.

PROJECT TEAM

1.15 The following members of the Commercial and Common Law team have contributed to this paper: Laura Burgoyne (team manager); Nathan Tamblyn (lawyer); Richard Hine (research assistant).

Chapter 2: Proper law of the arbitration agreement

2.1 In our first consultation paper, we explained that our provisional proposals for reform focussed on a shortlist of topics. Nevertheless, at the time, we had received many other suggestions from stakeholders about possible areas of review, and we considered them all. Chapter 11 of our first consultation paper set out the principal suggestions which did not make our shortlist, along with a brief explanation why.

2.2 We asked the following consultation questions:

> Do you think that any of the suggestions discussed in Chapter 11 needs revisiting in full, and if so, why? (CQ 37)
>
> 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? (CQ 38)

2.3 Thirty-one responses to our first consultation paper asked us to reconsider the question of the proper law of an arbitration agreement, which was the subject of a Supreme Court decision in 2020 called *Enka v Chubb*.[2] The topic concerns the question of which law should govern an arbitration agreement where the parties have made no choice referrable to the arbitration agreement itself.

2.4 In short, the Supreme Court held that a choice of law to govern the main contract carries across to constitute a choice of law for the arbitration agreement as well. Consultees suggested that it would be better if the law of the arbitration agreement aligned instead with the law of the seat of the arbitration. They offered new reasons in support of reform. Accordingly, in this chapter we explore in detail the issues surrounding the proper law of an arbitration agreement.

2.5 In this chapter, we begin by discussing the current law and *Enka v Chubb*. We then discuss the position under foreign law and arbitral rules. We consider arguments for and against reform. Finally, we set out our provisional proposal, and ask whether consultees agree.

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

INTRODUCTION

2.7 Contract law guides us in resolving disputes about contracts. But where there is an international dimension to the contract, which jurisdiction's contract law will be relevant? For example, if a German company enters into a contract with a French company to build a factory in Belgium, is this contract governed by German, French, or Belgian law, or some other law altogether? The governing law is also known as the

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2 *Enka Insaat ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38, [2020] 1 WLR 4117.

proper law of the contract. The process for identifying the proper law is part of what is called the conflict of laws, or private international law.

2.8 The question of proper law has extra dimensions of complexity when it comes to arbitration agreements. First, this is because an arbitration agreement is usually a clause in a main contract (which is also called the matrix contract). It may be that the arbitration agreement and the matrix contract have different governing laws.

2.9 Second, the law of the matrix contract and arbitration agreement may or may not align with the law of the seat. The seat is the juridical place where the arbitration occurs. A physical hearing might happen anywhere, or it might be online, but the seat is where the arbitration is legally deemed to occur. The courts of the seat will be the ones to supervise the arbitral proceedings. In doing so, they will apply the curial law. The curial law is the mandatory arbitration law which the courts must apply to any arbitration seated in their jurisdiction. For an arbitration with a seat in England and Wales, the curial law includes the mandatory sections of the Arbitration Act 1996.

2.10 An arbitration agreement might expressly record its governing law. However, this is not usual. When the arbitration agreement is silent as to its governing law, it is necessary to determine what its governing law might be. This was the task which faced the court in *Enka v Chubb*.

CURRENT LAW

2.11 In this section, we discuss *Enka v Chubb* and subsequent case law. We note the reaction to *Enka v Chubb*, and explain the effect of *Enka v Chubb* in relation to section 4(5) of the Arbitration Act 1996.

Enka v Chubb

2.12 In *Enka v Chubb*,[3] a power plant in Russia was damaged by fire. Enka was a sub-contractor involved in its construction. Chubb was the insurer, and when it paid out to the owner of the power plant, Chubb became subrogated to the contract with Enka. That contract contained a clause providing for arbitration in London, so the seat of the arbitration was England and Wales. There was no express choice of law clause either for the matrix contract or for the arbitration clause. Chubb brought court proceedings in Russia on the basis that Enka and others were liable for the damage caused by the fire. Meanwhile, Enka sought an anti-suit injunction from the courts in England and Wales to restrain the Russian proceedings on the ground that they were in breach of the arbitration agreement.

2.13 Before the courts in England and Wales, the principal issue was whether the law governing the arbitration agreement aligned with the law of the matrix contract or the law of the seat.

2.14 In the Supreme Court, two judges gave dissenting judgments, but the views of all five judges were unanimous on most issues, and the court held as follows.

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3 *Enka Insaat ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38, [2020] 1 WLR 4117.

(1) If there is a choice of law, express or implied,[4] directed to the arbitration agreement itself, then that chosen law will govern the arbitration agreement,[5] unless that choice of law is contrary to public policy.[6]

(2) If there is no such choice, and if the arbitration agreement forms part of a matrix contract,[7] and if there is a choice of law, express or implied, for the matrix contract, then that chosen law will also govern the arbitration agreement.[8]

However, that chosen law "may" be displaced in the following circumstances:

(a) where the law of the seat itself provides that the arbitration agreement is governed by the law of the seat;[9]

(b) where there is a serious risk that the chosen law might render the arbitration agreement invalid,[10] or not binding on one party,[11] or (according to the majority) of reduced scope[12] – this is known as the "validation principle";

(c) where the choice of a seat in England and Wales, in combination with a reference to a local association or practice, implicitly indicates the choice of the law of England and Wales as the governing law.[13]

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4 An implied choice is as much a choice as an express choice: [2020] UKSC 38, [2020] 1 WLR 4117 at [35] by Lord Hamblen and Lord Leggatt JJSC, with whom Lord Kerr agreed, [245] by Lord Burrows JSC, with whom Lord Sales JSC agreed.

5 [2020] UKSC 38, [2020] 1 WLR 4117 at [170(2)] by Lord Hamblen and Lord Leggatt JJSC, with whom Lord Kerr agreed, [257(1), (2)] by Lord Burrows JSC, with whom Lord Sales JSC agreed, [265] by Lord Sales JSC.

6 [2020] UKSC 38, [2020] 1 WLR 4117 at [29] by Lord Hamblen and Lord Leggatt JJSC, with whom Lord Kerr agreed.

7 "A free-standing arbitration agreement entered into at a different time and under different circumstances would require a different analysis": [2020] UKSC 38, [2020] 1 WLR 4117 at [230] by Lord Burrows JSC, with whom Lord Sales JSC agreed.

8 [2020] UKSC 38, [2020] 1 WLR 4117 at [170(4)] by Lord Hamblen and Lord Leggatt JJSC, with whom Lord Kerr agreed, [257(3)] by Lord Burrows JSC, with whom Lord Sales JSC agreed, [266] to [267] by Lord Sales JSC.

9 [2020] UKSC 38, [2020] 1 WLR 4117 at [69] to [71], [170(6)] by Lord Hamblen and Lord Leggatt JJSC, with whom Lord Kerr agreed.

10 [2020] UKSC 38, [2020] 1 WLR 4117 at [170(6)] by Lord Hamblen and Lord Leggatt JJSC, with whom Lord Kerr agreed, [257(4)] by Lord Burrows JSC, with whom Lord Sales JSC agreed, [276] to [277] by Lord Sales JSC.

11 [2020] UKSC 38, [2020] 1 WLR 4117 at [103] to [104] by Lord Hamblen and Lord Leggatt JJSC, with whom Lord Kerr agreed, [257(4)] by Lord Burrows JSC, with whom Lord Sales JSC agreed, [277] by Lord Sales JSC.

12 [2020] UKSC 38, [2020] 1 WLR 4117 at [108] by Lord Hamblen and Lord Leggatt JJSC, with whom Lord Kerr agreed. The minority disagreed: the parties may well have preferred to limit arbitration to some disputes and not others – at [199] by Lord Burrows JSC, with whom Lord Sales JSC agreed, [277] by Lord Sales JSC.

13 [2020] UKSC 38, [2020] 1 WLR 4117 at [114] by Lord Hamblen and Lord Leggatt JJSC, with whom Lord Kerr agreed, [257(4)] by Lord Burrows JSC, with whom Lord Sales JSC agreed.

(3) If there is no choice of law anywhere, the arbitration agreement will be governed by the law with which it has the closest and most real connection,[14] this being:

(a) (according to the majority) the law of the seat of the arbitration[15] (but perhaps still subject to the validation principle[16]);

(b) (according to the minority) the law governing the matrix contract.[17]

2.15 On the facts of *Enka v Chubb,* the Supreme Court held that the matrix contract was governed by Russian law, as the law of the country with which the contract was most closely connected. The Supreme Court held that the arbitration agreement was governed by the law of the seat – that is, the law of England and Wales – under proposition 3(a) above.

2.16 The first proposition – that an express or implied choice of law in the arbitration agreement itself will be effective unless it is contrary to public policy – is uncontroversial. We will now look at the other propositions in more detail below.

Proposition 2: the chosen law for the matrix contract

2.17 As for principle (2) above, the court said unanimously that the usual expectation is that one law will govern all parts of the matrix contract, including its arbitration clause (at least where there is no express or implied choice for the arbitration agreement itself).[18] The court acknowledged that where a matrix contract is invalid, non-existent, or ineffective, the arbitration clause survives as it will be treated as a separable agreement.[19] However, the court did not consider this to be a sufficient reason to subject the arbitration agreement to a different governing law.[20]

2.18 It was also noted that parties might choose a neutral seat for their dispute. A neutral seat is a jurisdiction which is not associated with any of the arbitral parties. In these circumstances, the court accepted that the parties thereby also choose the neutral curial law of that seat.[21] But this choice of neutral seat (and its curial law) does not of

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14 [2020] UKSC 38, [2020] 1 WLR 4117 at [36] to [37], [170(2)] by Lord Hamblen and Lord Leggatt JJSC, with whom Lord Kerr agreed, [257(1)] by Lord Burrows JSC, with whom Lord Sales JSC agreed, [265] by Lord Sales JSC.

15 [2020] UKSC 38, [2020] 1 WLR 4117 at [170(8)] by Lord Hamblen and Lord Leggatt JJSC, with whom Lord Kerr agreed.

16 [2020] UKSC 38, [2020] 1 WLR 4117 at [146] by Lord Hamblen and Lord Leggatt JJSC, with whom Lord Kerr agreed.

17 [2020] UKSC 38, [2020] 1 WLR 4117 at [257(1), (2)] by Lord Burrows JSC, with whom Lord Sales JSC agreed, [282] to [283], [286] by Lord Sales JSC.

18 [2020] UKSC 38, [2020] 1 WLR 4117 at [39], [43] by Lord Hamblen and Lord Leggatt JJSC, with whom Lord Kerr agreed, [193(iii)] by Lord Burrows JSC, with whom Lord Sales JSC agreed, [270] by Lord Sales JSC.

19 Arbitration Act 1996, s 7.

20 [2020] UKSC 38, [2020] 1 WLR 4117 at [61] by Lord Hamblen and Lord Leggatt JJSC, with whom Lord Kerr agreed, [231] to [234] by Lord Burrows JSC, with whom Lord Sales JSC agreed, [275] by Lord Sales JSC.

21 [2020] UKSC 38, [2020] 1 WLR 4117 at [68] by Lord Hamblen and Lord Leggatt JJSC, with whom Lord Kerr agreed.

itself indicate a choice that the law of the seat will also govern the arbitration agreement,[22] unless the law of the seat says otherwise.[23]

2.19 Similarly, just because the arbitrators chosen might be English or Welsh (given that the seat of the arbitration is in England and Wales), that does not imply a choice of the law of England and Wales to govern the arbitration agreement or matrix contract.

2.20 As mentioned above, the chosen law for the matrix contract might not be applied to the arbitration agreement in the following circumstances.

2.21 **Where the law of the seat itself provides that the arbitration agreement is governed by the law of the seat.** In our view, this only applies to foreign law. If the Arbitration Act 1996 required, as regards an arbitration seated here, that the arbitration agreement be governed by the law of England and Wales, that statutory rule would oust the common law approach in *Enka v Chubb*. In other words, we would get to the end result, not by applying the common law rule referring us back to the Act, but by applying the Act directly.

2.22 **Where there is a serious risk that the chosen law might render the arbitration agreement invalid, or not binding on one party, or (according to the majority) of reduced scope.** Where this "validation principle" applies, this raises the question of which law replaces the chosen law. The examples given by the majority all resulted in the law of England and Wales being identified as the proper law.[24] The minority suggested that the proper law might be the law of the seat,[25] or another law besides.[26]

2.23 In justifying the validation principle, the court said that "it is a well-established principle of contractual interpretation in English law … that an interpretation which upholds the validity of a transaction is to be preferred to one which would render it invalid".[27] This was said to be because "parties could not reasonably have intended a significant clause in their contract … to be invalid".[28]

2.24 **Where the combination of (i) a choice of a seat in England and Wales, and (ii) a reference to a local association or practice, together might implicitly indicate**

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22 [2020] UKSC 38, [2020] 1 WLR 4117 at [273], [287] by Lord Sales JSC.

23 [2020] UKSC 38, [2020] 1 WLR 4117 at [69] to [82] by Lord Hamblen and Lord Leggatt JJSC, with whom Lord Kerr agreed.

24 [2020] UKSC 38, [2020] 1 WLR 4117 at [95] to [105] by Lord Hamblen and Lord Leggatt JJSC, with whom Lord Kerr agreed.

25 Lord Sales JSC thought this the "obvious conclusion": [2020] UKSC 38, [2020] 1 WLR 4117 at [277].

26 [2020] UKSC 38, [2020] 1 WLR 4117 at [257(4)] by Lord Burrows JSC, with whom Lord Sales JSC agreed.

27 [2020] UKSC 38, [2020] 1 WLR 4117 at [95] by Lord Hamblen and Lord Leggatt JJSC, with whom Lord Kerr agreed, [198] by Lord Burrows JSC, with whom Lord Sales JSC agreed.

28 [2020] UKSC 38, [2020] 1 WLR 4117 at [106] by Lord Hamblen and Lord Leggatt JJSC, with whom Lord Kerr agreed. Note, however, that some clauses can be rendered invalid by legislation like the Consumer Rights Act 2015. This applies also to arbitration clauses: *Soleymani v Nifty Gateway LLC* [2022] EWCA Civ 1297.

the choice of the law of England and Wales as the governing law. The court cited two cases in justification of this principle.[29]

2.25 The first was *Egon Oldendorff v Libera Corp*.[30] In that case, the parties had agreed arbitration "in London in accordance with English law", and for the third arbitrator to be appointed by the London Maritime Arbitrators Association (LMAA). The court held that the matrix contract was governed by English law; the law governing the arbitration agreement was not in issue. Mr Justice Clarke said:[31]

> … the arbitration clause here is in my judgment a strong indication of the parties' intention to choose English law as the applicable law as well as the curial law. … In short, having agreed English arbitration for the determination in London of disputes arising out of a well known English language form of charter-party which contains standard clauses with well known meanings in English law, it is in my judgment to be inferred that the parties intended that law to apply. Having agreed a "neutral" forum the reasonable inference is that they intended that forum to apply a "neutral" law, namely English law…

2.26 The second case cited was *Habas v VSC*.[32] In that case, Mr Justice Hamblen, having cited *Egon Oldendorff*, said that such factors might imply a choice of law, not just for the matrix contract, but also for the arbitration agreement.[33]

2.27 In all this it is notable that the LMAA terms themselves state explicitly that, absent any agreement to the contrary, the law of the arbitration agreement is the law of England and Wales.[34]

Reaction to *Enka v Chubb*

2.28 Some authors endorse the decision in *Enka v Chubb*,[35] while others criticise the substantive approach taken, and argue that it does not provide sufficient clarity or certainty.[36] Indeed, some suggest that greater clarity would be achieved if the choice of law rules for arbitration agreements were codified as a statutory provision.[37]

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29 [2020] UKSC 38, [2020] 1 WLR 4117 at [114] by Lord Hamblen and Lord Leggatt JJSC, with whom Lord Kerr agreed.

30 [1996] 1 Lloyd's Rep 380 (Com Ct)

31 [1996] 1 Lloyd's Rep 380, 390.

32 *Habas Sinai Ve Tibbi Gazlar Istihsal Endustrisi AS v VSC Steel Co Ltd* [2013] EWHC 4071 (Comm), [2014] 1 Lloyd's Rep 479.

33 [2013] EWHC 4071 (Comm), [2014] 1 Lloyd's Rep 479 at [102].

34 LMAA Terms 2021, art 6.

35 *Dicey, Morris and Collins on the Conflict of Laws* (16th ed 2022) para 16-016; H Lai and J Stubbs, *Manual of Construction Agreements* para 108.

36 G Born, *International Commercial Arbitration* (3rd ed 2020) para 4.04[A](2)(j)(ii); J Koepp and D Turner, "A Massive Fire and a Mass of Confusion: Enka v. Chubb and the Need for a Fresh Approach to the Choice of Law Governing the Arbitration Agreement" (2021) 38(3) *Journal of International Arbitration* 377.

37 W Day, "Applicable law and arbitration agreements" (2021) 80(2) *Cambridge Law Journal* 238; M Campbell, "How to determine the law governing an arbitration agreement: direction from the UK Supreme Court"

Kabab-Ji

2.29 In *Kabab-Ji*,[38] the Supreme Court endorsed *Enka v Chubb*. The court held that an express choice of law to govern the matrix contract also governed the arbitration agreement as an implied choice.[39]

2.30 As explained above, the validation principle provides that the choice of law for the matrix contract might not carry across to the arbitration agreement if that choice of law would render the arbitration agreement invalid. In *Kabab-Ji*, the court said that the validation principle presupposes that there is a concluded matrix agreement and arbitration clause. It applies when the question is whether an existing arbitration agreement is valid; it does not apply where the question is whether an arbitration agreement has been made at all, or who is party to it.[40] This is a development of the principle espoused in *Enka v Chubb*.

2.31 A similar analysis applies to the principle of separability. In broad terms, the principle of separability allows an arbitration clause to survive the invalidity of the matrix contract,[41] so that the tribunal still has jurisdiction to rule on the invalidity of the matrix contract. In *The Newcastle Express*,[42] the Court of Appeal said that separability only applies where the arbitration agreement exists; it does not apply where the question is whether an arbitration agreement was concluded at all.[43] This is consistent with the approach to the validation principle taken in *Kabab-Ji*.

Section 4(5)

2.32 The Arbitration Act 1996 contains provisions which are mandatory, and provisions which are non-mandatory. The non-mandatory provisions are default rules which apply unless the parties agree otherwise.

2.33 The choice of a foreign law to govern the arbitration agreement can be an "agreement otherwise". This is the effect of section 4(5) of the Act, which provides:

> The choice of a law other than the law of England and Wales or Northern Ireland as the applicable law in respect of a matter provided for by a non-mandatory provision of this Part is equivalent to an agreement making provision about that matter.

(2021) 24(1) *International Arbitration Law Review* 28; J Koepp and D Turner, "A Massive Fire and a Mass of Confusion: Enka v. Chubb and the Need for a Fresh Approach to the Choice of Law Governing the Arbitration Agreement" (2021) 38(3) *Journal of International Arbitration* 377.

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

39 [2021] UKSC 48, [2022] 1 All ER (Comm) 773 at [39] by Lord Hamblen and Lord Leggatt JJSC, with whom Lord Hodge DPSC, Lord Lloyd-Jones and Lord Sales JJSC agreed.

40 [2021] UKSC 48, [2022] 1 All ER (Comm) 773 at [51] to [52].

41 Arbitration Act 1996, s 7.

42 *DHL Project & Chartering Ltd v Gemini Ocean Shipping Co Ltd, The Newcastle Express* [2022] EWCA Civ 1555.

43 [2022] EWCA Civ 1555 at [80(5)] by Males LJ.

For this purpose an applicable law determined in accordance with the parties' agreement, or which is objectively determined in the absence of any express or implied choice, shall be treated as chosen by the parties.

2.34 The operation of section 4(5) can produce some complexity. 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.[44] Some guidance can be found in *Enka v Chubb* concerning which provisions of the Act are substantive and which procedural.[45]

2.35 This potential complexity might be a reason for reforming the rule regarding which law governs an arbitration agreement. If an arbitration is seated in England and Wales, and if the law of the arbitration agreement were to be the law of England and Wales, rather than a foreign law, then the whole of the Act would apply. There would be no need to attempt to categorise some provisions of the Act as substantive and some as procedural.

2.36 To be clear, our view is that section 4(5) does not need reforming, for the reasons set out in our first consultation paper.[46] But the way in which section 4(5) operates in light of *Enka v Chubb* remains a possible reason for reform, not of section 4(5), but of the law in *Enka v Chubb*.

FOREIGN LAW

2.37 In *Enka v Chubb*, the majority said that its approach to the proper law of the arbitration agreement was consistent with the conflict of laws rules found in the New York Convention,[47] and a weight of foreign law.[48] In *Kabab-Ji*, the court confirmed its view that its approach was consistent with the New York Convention,[49] but otherwise acknowledged that "there is nothing approaching consensus" in the law of other jurisdictions as to the question of the proper law of the arbitration agreement.[50]

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44 DAC, *Supplementary Report on the Arbitration Act 1996* (1997) paras 9 and 12; *Enka v Chubb* [2020] UKSC 38, [2020] 1 WLR 4117 at [93].

45 Sections 12 to 13, 30, 49, 58 and 66 to 68 are procedural, while section 7 concerns arbitration agreements; other procedural matters may include the power to remove or replace an arbitrator, to enforce or set aside an arbitral award, and to grant injunctions to support the arbitration including anti-suit injunctions: *Enka v Chubb* [2020] UKSC 38, [2020] 1 WLR 4117 at [81], [89], [92], [193(vi)], [249]. See too the commentary in: *Russell on Arbitration* (24th ed 2015) paras 2-122 and 2-131; *Davidson: Arbitration* (2nd ed 2012) paras 9.06 and 9.08.

46 Paras 11.37 to 11.42.

47 [2020] UKSC 38, [2020] 1 WLR 4117 at [125] to [141] by Lord Hamblen and Lord Leggatt JJSC, with whom Lord Kerr agreed. But Lord Burrows JSC, with whom Lord Sales JSC agreed, thought the New York Convention point was neutral rather than supportive: [250] to [253]. Lord Sales JSC was more critical of the argument still: [289] to [291].

48 [2020] UKSC 38, [2020] 1 WLR 4117 at [55] to [58] by Lord Hamblen and Lord Leggatt JJSC, with whom Lord Kerr agreed.

49 [2021] UKSC 48, [2022] 1 All ER (Comm) 773 at [26] to [36].

50 [2021] UKSC 48, [2022] 1 All ER (Comm) 773 at [32].

2.38 An approach similar to *Enka v Chubb* has been adopted in Singapore,[51] and *Enka v Chubb* itself seems to be regarded without much controversy in Australia,[52] and Tonga,[53] but perhaps with some caution in Hong Kong.[54]

2.39 By contrast, an approach which favours the law of the seat as the appropriate law to govern the arbitration agreement can be found in France,[55] and Sweden.[56] In Switzerland[57] and the Netherlands,[58] the law adopts a "validation" approach, that is, the arbitration agreement will be treated as valid if it would be valid under the law of the seat *or* the law of the matrix agreement *or* any chosen law.[59]

2.40 Some consultees suggested that we should adopt the position found in Scotland. Section 6 of the Arbitration (Scotland) Act 2010 provides:

> Where –
>
> (a) the parties to an arbitration agreement agree that an arbitration under that agreement is to be seated in Scotland, but
>
> (b) the arbitration agreement does not specify the law which is to govern it,
>
> then, unless the parties otherwise agree, the arbitration agreement is to be governed by Scots law.

2.41 Prior to *Enka v Chubb*, authors had assumed that, where there is no choice of law specifically directed to an arbitration agreement, the effect of section 6 would be to apply Scots law (as the law of the seat).[60] Indeed, the explanatory notes to the Arbitration (Scotland) Act 2010 provide that Scots law will govern the arbitration agreement, unless the parties "explicitly" state that another law should govern, with the arbitration agreement considered separately from the matrix contract.[61]

2.42 In *Enka v Chubb* itself, the court was more guarded. It said that an "inference" *could* be drawn that, by choosing Scotland as the seat of an arbitration, the parties were

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51 *BNA v BNB* [2019] SGCA 84, [2019] SGCA 84.

52 *Mineralogy Pty Ltd v Western Australia* [2021] HCA 30, (2021) 393 ALR 551 at [163]; *Hub Street Equipment Pty Ltd v Energy City Qatar Holding Co* [2021] FCAFC 110, (2021) 396 ALR 1 at [45].

53 *Vunipola v Tonga Rugby Union Inc* [2021] TOSC 141 at [88].

54 *Capital Wealth Holdings Ltd v* 南通嘉禾科技投资开发有限公司 [2020] HKCFI 3025 at [21].

55 Cour de Cassation decision no 20-20.260 of 28 September 2022 – the French decision in *Kabab-Ji*.

56 Swedish Arbitration Act (SFS 1999:116), s 48.

57 Swiss Federal Act on Private International Law, art 178(2).

58 Dutch Civil Code, art 10:166.

59 The difference of approach in France was noted in *Kabab-Ji* [2021] UKSC 48, [2022] 2 All ER 911 at [88]; the difference of approach in Sweden and Scotland was noted in *Enka v Chubb* [2020] UKSC 38, [2020] 1 WLR 4117 at [70] to [71].

60 Davidson, *Arbitration* (2nd ed 2012) para 9.02; Beaumont and McEleavy, *Anton's Private International Law* (3rd ed 2011) para 11.09.

61 Explanatory Notes to the Arbitration (Scotland) Act 2010, para 29, available online: <https://www.legislation.gov.uk/asp/2010/1/notes>.

impliedly agreeing that Scots law would govern the arbitration agreement, through the application of section 6.[62]

2.43 We are more guarded still. We question whether the approach in Scotland is different from *Enka v Chubb* after all. Section 6 provides a default rule, in effect, that the law of the seat governs the arbitration agreement. But this is only "unless the parties otherwise agree". We think that this phrase is potentially wide enough to include the implied choice of law to govern an arbitration agreement which, in light of *Enka v Chubb* and *Kabab-Ji*, follows an express or implied choice of law to govern the matrix contract.

2.44 For these reasons, we do not propose to adopt the same language as in Scotland. It may well be that, if the court is ever called upon to interpret section 6, the court would hold that section 6 provides for the law of the arbitration agreement to be Scots law unless the parties agree otherwise *in the arbitration agreement itself*. But in the absence of those latter words, we think that there is at least a risk that the approach in *Enka v Chubb* precludes the default rule in section 6 from applying. Some consultees also acknowledge that risk.

ARBITRAL RULES

2.45 Some institutional arbitral rules have a model arbitration clause which includes an express choice of law to govern the arbitration agreement,[63] or which comes with a recommended additional provision specifying such a governing law.[64] Some rules state expressly that the arbitration agreement is governed by the law of England and Wales,[65] or the law of the seat.[66]

2.46 Some institutional arbitral rules do not address the law of the arbitration agreement. This includes the arbitration rules of the International Chamber of Commerce. Both *Enka v Chubb* and *Kabab-Ji* concerned arbitrations under those rules.

2.47 To the extent that arbitral rules provide a governing law "unless the parties agree otherwise", they potentially face the same possible risk as does the Scottish legislation of being trumped by the implied choice of *Enka v Chubb*, as some consultees acknowledged.[67]

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62 [2020] UKSC 38, [2020] 1 WLR 4117 at [70] to [71] by Lord Hamblen and Lord Leggatt JJSC, with whom Lord Kerr agreed.

63 AMINZ Rules 2021.

64 CIArb Rules 2015; SCC Arbitration Rules 2017.

65 LMAA Terms 2021, r 6. The UKJT Digital Dispute Resolution Rules v 1.0 (2021), r 16, states that "disputes" shall be resolved in accordance with the law of England and Wales. This might be wide enough to include disputes about the arbitration agreement.

66 LCIA Arbitration Rules 2020, r 16.4.

67 Some consultees acknowledge the risk, but think that ultimately the arbitral rules would trump.

CONSULTEES' VIEWS

2.48 As noted above, thirty-one responses to our first consultation paper asked us to reconsider the question of the proper law of an arbitration agreement.

2.49 One consultee suggested that we might codify the decision in *Enka v Chubb*, to make it more accessible to users than having to wade through the very lengthy judgments in that case. One consultee suggested that we might codify the approach of the minority in *Enka v Chubb*.

2.50 Either way, our summary above of the decision in *Enka v Chubb* shows how complex any resulting rule might be. Its application in any given case would also leave room for argument. Indeed, it is notable that the Supreme Court itself was divided on whether proposition (2) or (3) applied on the facts of the case.

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

Problems identified with *Enka v Chubb*

2.52 The decision in *Enka v Chubb* would result in many more arbitration agreements being governed by foreign law. This is simply because many international contracts, despite providing for an arbitration to be seated in England and Wales, have a foreign choice of law clause in the matrix contract. This may lead to an increased need for parties to present expert evidence on how that foreign law governs the arbitration agreement. While tribunals and courts in England and Wales are familiar with ruling on foreign law, nevertheless this might increase the time and cost of proceedings.

2.53 The applicability of foreign law would also oust the law of England and Wales on a number of important topics.

Separability

2.54 First, section 7 on separability would be disapplied, through the operation of section 4(5) – unless section 7 were made mandatory. It might also be the case that the foreign law also has a principal of separability. Separability is a pragmatic principle of importance, as discussed in Chapter 10 of our first consultation paper. We explained why with the following example.

2.55 Suppose that two parties enter into a matrix 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 matrix contract is void, and if that extends to all clauses in the matrix 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 matrix contract, and the arbitral award persists to resolve the dispute.

2.56 The importance of the principle of separability has been recognised by the House of Lords.[68] If the relevant foreign law did not have a similar principle, then the regular disapplication of section 7 might be a cause for concern.

Arbitrability

2.57 Second, the law of England and Wales is generous when it comes to arbitrability.[69] In other words, our law tends to accept that more types of dispute can be arbitrated. Foreign law might allow fewer types of dispute to be arbitrated. The consequence would be as follows.

2.58 There are many reasons why parties might agree to seat their arbitration in England and Wales. All we can say with certainty is that they want to pursue arbitration, and to do so in England and Wales. If foreign law governs the arbitration agreement, and stipulates that this dispute is not arbitrable, then the parties cannot arbitrate. Instead, they will probably need to litigate in the courts of that foreign law. The parties thereby lose both the ability to arbitrate, and the place where they wished their dispute to be resolved.

Scope

2.59 Third, the law of England and Wales is generous when it comes to the scope of an arbitration agreement. In other words, our law tends to presume that the parties wanted all aspects of their dispute to be settled through one arbitration, rather than having different aspects resolved through different processes.[70] If foreign law takes a narrower view of scope, then once again it may be that the parties lose both the ability to arbitrate (all aspects of their dispute), and the siting of that dispute resolution process in England and Wales.

Confidentiality

2.60 Fourth, confidentiality can be a term of the arbitration agreement implied by the law of England and Wales, as discussed in Chapter 2 of our first consultation paper. If instead a foreign law applies to the arbitration agreement, that might create uncertainty about the extent to which the arbitral proceedings are confidential.

Added complexity

2.61 Fifth, as noted above, the approach in *Enka v Chubb* increases the likelihood that a foreign law will govern the arbitration agreement. In turn, this triggers section 4(5) and the potential extra complexity of having to decide to what extent each non-mandatory section of the Act is substantive, and so disapplied, or procedural, and so still applicable.

A different approach?

2.62 Largely for these reasons, the majority of consultees who addressed the issue of governing law called for an approach different from *Enka v Chubb*. Although different

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68 *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40, [2007] 4 All ER 951.

69 *Russell on Arbitration* (24th ed 2015) paras 2-080 to 2-094; *Merkin and Flannery on the Arbitration Act 1996* (6th ed 2020) §§ 6.1.18, 81.1.

70 *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40, [2007] 4 All ER 951.

consultees used different language, a consistent theme is clearly apparent. The majority of consultees were generally in favour of a rule to the effect that the law of the arbitration agreement is the law of the seat, unless the parties expressly agree otherwise in the arbitration agreement itself.[71]

Arguments against reform

2.63 One consultee predicted that other consultees might ask us to reconsider this issue and sought to argue against reform. Their principal arguments are set out below. It may be that other consultees also object, but did not respond because we did not initially propose reform on this topic.

2.64 The arguments (so far) against reform can be shortly stated. This does not diminish their salience.

2.65 First, parties may have an expectation that the law they have chosen to govern their contract governs all the terms of their contract, including the arbitration clause. This was also the view of the Supreme Court in *Enka v Chubb*. If the arbitration agreement is governed by a different law, that might defeat the expectations of the parties.

2.66 Second, if the law of the matrix contract and the law of the arbitration clause do not align, that can create problems. For example, it might lead to someone being held to be a party to the arbitration clause, under its governing law, and yet not a party to the matrix contract, under its different governing law. Different laws can take different approaches to the question of who is party to an agreement.[72]

2.67 Third, to the extent that the matrix contract is governed by foreign law, evidence of that foreign law will be before the tribunal or court anyway. The fact that the arbitration clause might need evidence of that same foreign law will therefore add little extra cost or delay.

2.68 Fourth, the supposed complexities around section 4(5) are surmountable. To the extent that any inquiry at all will need to be made, as to whether any given section of the Act is disapplied by the choice of foreign law, guidance has already been provided by the Supreme Court in *Enka v Chubb*.

2.69 A further argument against reform might be put as follows. As noted above, the law of England and Wales is generous when it comes to questions of arbitrability and scope. Foreign law might be more restrictive. However, there could be sound public policy reasons why that foreign law is more restrictive. We would not want our arbitration law to be viewed as something analogous to money laundering, as a means of circumventing foreign public law duties.

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71 Thirty-one responses discussed reforming the law around *Enka v Chubb*. Twenty-two responses preferred a rule in favour of the law of the seat. Two preferred the majority approach in *Enka v Chubb*, and one preferred the minority approach. Three suggested three different approaches, and three simply said that the issue needed to be revisited.

72 Notoriously, in *Dallah Real Estate & Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2010] UKSC 46, [2011] 1 AC 763, the Supreme Court, purporting to apply French law, held that the arbitral respondent was not a party to the arbitration agreement; whereas the French Court of Appeal later held that it was a party. We discuss *Dallah* in detail in the next chapter.

2.70 Having voiced that latter concern, we do think that there may be an answer to it, as follows.

2.71 There is still a limit to what is arbitrable under the law of England and Wales.[73] For example, any contract, including an arbitration agreement, will be impeached to the extent that it falls foul of the doctrine of illegality. Traditional examples of contracts which fall foul of the doctrine of illegality include a contract to defraud the tax authorities over the value of a property,[74] or to promote corruption in public life by selling a civic honour,[75] or to stifle a criminal prosecution.[76] If arbitration were chosen specifically to conceal such behaviour, an arbitration clause might similarly be impeached. In one case, the court refused to enforce an arbitral award which required a party to share the profits of a venture to smuggle carpets illegally out of Iran.[77] All of which is to say, even though the law of England and Wales takes a wider view of arbitrability, it still has a public policy baseline.

2.72 Moreover, to the extent that an arbitral award emanating from England and Wales is to be enforced abroad under the New York Convention, foreign courts can refuse recognition and enforcement where the dispute is not arbitrable under their own law, or offends their own public policy.[78] Thus, it may be that arbitration in England and Wales does not circumvent foreign rules on arbitrability and public policy when it comes to enforcement abroad.

2.73 A final argument against reform is simply that the Supreme Court has recently ruled on the proper law of an arbitration agreement, in *Enka v Chubb*. Its view that the chosen law of the matrix contract carries across to the arbitration agreement was a unanimous view. We are aware that any proposal which seeks to overturn the unanimous view of a recent Supreme Court decision needs to be approached with caution. We note, however, that Lord Hamblen and Lord Leggatt, who gave judgment in *Enka v Chubb*, have indicated their support for possible reform here.

PROVISIONAL PROPOSAL

2.74 Overall, although the arguments against reform are well made, nevertheless, we provisionally conclude that the arguments in favour of reform carry the day.

2.75 A default rule in favour of the law of the seat would see more arbitration agreements governed by the law of England and Wales, when those arbitrations are also seated here. This would ensure the applicability of the doctrine of separability, along with its practical utility. It would give effect to the more generous rules on arbitrability and scope which the courts have seen fit to develop. It would remove a layer of uncertainty surrounding the effects of section 4(5). More than that, it would remove uncertainty over which law governs an arbitration agreement. We think that the ruling in *Enka v*

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73 Arbitration Act 1996, ss 68(2)(g), 81.

74 *Bigos v Bousted* [1951] 1 All ER 92.

75 *Parkinson v College of Ambulance Ltd* [1925] 2 KB 1.

76 *Mutual Finance Ltd v John Wetton & Sons Ltd* [1937] 2 KB 389.

77 *Soleimany v Soleimany* [1999] QB 785 (CA).

78 New York Convention, art V.2.

Chubb is complex; a simple default rule removes much of the opportunity for argument and satellite litigation.

2.76 For these reasons, helpfully developed by consultees in their responses and discussions with us, we provisionally propose that a new rule be introduced into the 1996 Act to the effect that the law of the arbitration agreement is the law of the seat, unless the parties expressly agree otherwise in the arbitration agreement itself.

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

Consultation Question 1.

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

Chapter 3: Challenging jurisdiction under section 67

OVERVIEW

3.1 Under section 67 of the Arbitration Act 1996, a party can make an application to court, challenging an award by an arbitral tribunal on the basis that the tribunal lacked substantive jurisdiction. Under the current law, a challenge before the court comprises a full rehearing, rather than an appeal.

3.2 In this chapter, we discuss whether a challenge under section 67 should be by way of an appeal or a rehearing.

3.3 Section 67 concerns arbitral awards where the seat of the arbitration is in England and Wales. As for foreign arbitral awards, section 103 includes similar provisions for refusing their recognition and enforcement also on the basis that the tribunal lacked jurisdiction. Thus, in this chapter, we also discuss whether any change to section 67 would necessitate a corresponding change to section 103.

3.4 The focus of our concern is on the following situation. A party has participated in the arbitral proceedings, and has objected to the tribunal that the tribunal lacks jurisdiction. The tribunal has ruled on its jurisdiction. The arbitral party then challenges that ruling before the court under section 67. The question is to what extent that challenge before the court should be a full rehearing, potentially giving the party a second bite of the cherry.

3.5 In our first consultation paper, we provisionally proposed that, in this situation, any subsequent challenge under section 67 should be by way of an appeal and not a rehearing.

3.6 In light of the responses to our first consultation paper, our position has evolved. Rather than use the language of appeal or rehearing, instead we particularise what we propose should be the limits of that challenge:

(1) the court should allow the challenge where the decision of the tribunal on its jurisdiction was wrong;

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

(3) evidence should not be reheard, save exceptionally in the interests of justice.

3.7 In our view, this is compatible with the current language of section 67. We also think that it is consistent with the case law, despite some views to the contrary. We propose that these limitations are best addressed through rules of court, rather than being enshrined in the Act. We do not think that any change is necessary to section 103. In this chapter, we explain why.

3.8 We are reconsulting on this topic because, in response to our first consultation paper, consultees expressed strong views on both sides of the debate. This has enabled our analysis to move forward. We ask for the views of consultees on this iteration of our analysis, and on our revised proposals.

3.9 We turn first to consider the arguments around section 67. At the end of the chapter, we give our views on section 103 but ultimately do not propose any changes to it.

SECTION 67: APPEAL OR REHEARING?

Our position in the first consultation paper

3.10 The "substantive jurisdiction" of an arbitral tribunal is determined by the following: whether there is a valid arbitration agreement; whether the arbitral tribunal is properly constituted; and what matters have been submitted to arbitration in accordance with the arbitration agreement.[79]

3.11 A party to arbitral proceedings can object to the tribunal that the tribunal lacks jurisdiction to hear the dispute. In this situation, the tribunal may rule on its own jurisdiction, by virtue of section 30, unless otherwise agreed by the parties. A party can then challenge that ruling before the court, under section 67.

3.12 In Chapter 8 of our first consultation paper, we proposed that such an application under section 67 should take the form of an appeal from the tribunal's decision, rather than a full rehearing. The court would then be limited to a review of the tribunal's decision. 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 considered justified on the evidence which was before the tribunal. In this way, the application under section 67 would mirror an appeal in court proceedings.[80]

3.13 We made this proposal for two reasons. First, a full rehearing has the potential to cause delay and increase costs through repetition. Second, at its most extreme, the hearing before the arbitral tribunal risks becoming a dress rehearsal which gives the losing party the advantage of practice in advance of the court hearing.

3.14 After the publication of our first consultation paper, the matter was put this way in the case of *The Newcastle Express*:[81]

> This has led some commentators to suggest that the present approach is unsatisfactory. To the extent that it results in two fully contested hearings on the question of jurisdiction, the first before the arbitrators and the second before the court, there is some force in that suggestion. In general, a party who takes part in a challenge to jurisdiction before the arbitrators can reasonably be expected to deploy

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79 Arbitration Act 1996, s 82, which refers to s 30. See too s 72(1).

80 Civil Procedure Rules, r 52.21.

81 *DHL Project & Chartering Ltd v Gemini Ocean Shipping Co Ltd, The Newcastle Express* [2022] EWCA Civ 1555 at [16] by Males LJ.

its full case and, if it loses after a fair procedure, has no inherent right to a second bite at the cherry.

3.15 We made the following provisional proposal, and asked consultees whether they agreed (CQ 22):

> Where a party has participated in arbitral proceedings, and has objected to the jurisdiction of the arbitral tribunal, and the tribunal has ruled on its jurisdiction in an award, then any subsequent challenge under section 67 of the Arbitration Act 1996 should be by way of an appeal and not a rehearing.

3.16 To repeat, we are here concerned with the situation where a party challenging the award has participated in the arbitral proceedings. Where they have not participated in the arbitral proceedings, then any challenge before the court will be their first challenge. There is then no concern about the party having a second bite of the cherry. We are not proposing any limitation in that situation.[82]

Consultees' views

3.17 Consultees were divided, expressing strong views on both sides of the debate.[83]

3.18 For example, Bryan Cave Leighton Paisner LLP said:

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

3.19 Clifford Chance LLP said:

> We agree with the Commission's view that it is not fair to pursue a rehearing before the court which ignores what has gone on before the tribunal. In our experience, the current approach of a rehearing compares unfavourably with a number of other major seats and – on balance – is a source of dissatisfaction amongst commercial users of London arbitration and makes London a less attractive seat. We agree that any review should be limited to the record before the tribunal but that new evidence can be allowed in exceptional circumstances.

3.20 In contrast, Pinsent Masons LLP said:

> Jurisdiction is therefore a binary question: a tribunal either has it or it does not, and the consequence if the latter is found to be true is that the basis of the entire process

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82 We discussed the options open to a non-participating party in our first consultation paper at paras 8.16 to 8.18.

83 There were 83 responses to CQ 22: 56 agreed with our proposal; 25 disagreed; 2 expressed other views.

> and any award rendered by the tribunal will be illusory… It is therefore appropriate that, for such a fundamental issue, the court should have the ability to rehear the evidence unrestricted by the evidence that was placed before the Tribunal, the Tribunal's controls on the evidence that was presented, or its findings of fact.

3.21 Brick Court Chambers said:

> [A] *de novo* review of the tribunal's jurisdiction is justified as a matter of principle. It is an essential procedural safeguard, which is necessary to ensure that the parties have in fact consented to arbitration (and to prevent the tribunal from ascribing jurisdiction to itself or, as it is often said, "pulling itself up by its own bootstraps"). This is particularly so given that a jurisdictional challenge may turn on questions of fact as well as questions of law. Because the arbitral tribunal cannot be the final arbiter of its own jurisdiction, it follows that both the tribunal's findings of fact and its holdings of law in relation to jurisdiction must be open to challenge before the Court. The Court could not discharge that function if it were to be confined by statute to carrying out an "appellate review" of the decision of the tribunal, rather than undertaking a full rehearing.

Our response to consultees' views: an outline

3.22 The opinions shared by consultees have led us to revise our proposals. Consultees criticised our preference for the language of appeal; an appeal, they said, could encompass a rehearing, so the distinction between the two was blurred. We accept this point, and so we now focus instead on particularising the practical limits to any challenge under section 67. Also, we now propose that these limits should be set out in rules of court, rather than enshrined in the Act. We think this is a "softer" mode of reform, as explained below, and so represents a compromise in light of the strongly held but opposing views of consultees. We have reached these new proposals through the next iteration of our analysis. We ask for consultees' views on our revised proposals and new analysis. We set out that new analysis in the following sections. By way of providing an outline guide, we say as follows.

3.23 We begin by revisiting the cases of *Dallah* and *Azov*. We explain why, in our view, the significance of *Dallah* has been exaggerated, and why we think that neither case need be seen as inconsistent with restricting the nature of a challenge under section 67.

3.24 Then we explain why we are not persuaded by the argument that the court's case management powers are sufficient to address any concerns about fairness or waste when it comes to challenges under section 67. We also contest the argument that our proposals are inconsistent with the idea of "competence-competence".

3.25 Next we take the suggestion that reform should address, not section 67, but other sections of the Act which are also concerned with questions of the tribunal's jurisdiction. We are not persuaded by this suggestion; we seek to explain the legislative tensions in the Act which these other sections as a whole attempt to balance.

3.26 Finally, we consider four further arguments against reform, before turning to discuss why we think that reform is still appropriate, but that it should be through rules of court.

Dallah revisited

3.27 The case of *Dallah*[84] is sometimes taken as stipulating categorically that any application under section 67 is by way of a rehearing. We think that its significance has been exaggerated.

3.28 By way of introduction, the New York Convention provides for the recognition and enforcement of foreign arbitral awards. Article V.1(a) allows for enforcement to be resisted on the basis that the arbitration was not valid. This is given effect in section 103(2)(b) of the Arbitration Act 1996.

3.29 In *Dallah*, the claimant sought to enforce a French-seated arbitration award. The defendant resisted enforcement under section 103(2)(b), on the basis that the award was invalid: the defendant argued that it was not party to the arbitration agreement. The Supreme Court held that it could review the validity of the arbitration agreement by way of a full rehearing. We make the following points.

3.30 First, *Dallah* was concerned with the operation of section 103. The Supreme Court held that scrutiny of an arbitral award under section 103, in that case, would be by way of a full rehearing. But the Supreme Court also accepted that the standard of review under section 103 might vary according to the circumstances. They said, for example, if the award had been challenged before the courts of the seat, that might preclude a full rehearing before the courts of enforcement:[85]

> … in some cases a determination by the court of the seat may give rise to an issue estoppel or other preclusive effect in the court in which enforcement is sought.

3.31 Similarly, in *Kei v Hua She Asset Management (Shanghai) Co Ltd*,[86] the court said that an application under section 103 might be held to be an abuse of process if it sought to raise a challenge which could and should have been made before the supervisory court.[87]

3.32 Second, *Dallah* was not concerned with section 67. Nevertheless, the Supreme Court commented on section 67 given its relationship with section 103, and suggested that a hearing under section 67 would be "a full judicial determination on evidence".[88] The Court said there would be "an independent investigation by the court" such that "findings of fact made by the arbitrators and their view of the law can in no sense bind the court".[89] In other words, there would be a full rehearing under section 67. Because the case did not concern section 67, these comments are not part of the binding decision.

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84 *Dallah Real Estate & Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2010] UKSC 46, [2011] 1 AC 763.

85 [2010] UKSC 46, [2011] 1 AC 763 at [98] by Lord Collins.

86 [2022] EWHC 662 (Comm), [2022] 2 Lloyd's Rep 329.

87 [2022] EWHC 662 (Comm), [2022] 2 Lloyd's Rep 329 at [48] by Julia Dias QC.

88 [2010] UKSC 46, [2011] 1 AC 763 at [26] by Lord Mance. See too at [96] by Lord Collins.

89 [2010] UKSC 46, [2011] 1 AC 763 at [159] to [160] by Lord Saville.

3.33 Third, notwithstanding this, the Supreme Court said that an arbitral tribunal could still be the final arbiter of its own jurisdiction in some circumstances, for example where the parties have agreed to this.[90]

3.34 Fourth, in *Dallah*, the arbitral respondent had not participated in the arbitral proceedings. In such circumstances, at least under section 67, we agree that any challenge before the court to the jurisdiction of the tribunal might be by way of a full hearing (not an appeal). Our proposal is concerned with the different situation where a party has participated in the arbitral proceedings and has challenged the tribunal's jurisdiction directly.

3.35 Fifth, the court said that "the tribunal's own view of its jurisdiction has no legal or evidential value",[91] but that the tribunal's award can be considered by the court if "helpful".[92] This seems to us to risk being contradictory: something cannot be helpful if it has no value. Nor can it be a matter of pure discretion, with the court giving regard to the arbitral award only when it wants to.

3.36 Sixth, *Dallah* made clear that a party who objected to the jurisdiction of the tribunal did not have to participate in the arbitral proceedings or even challenge any award before the courts of the seat. It could instead simply resist enforcement before the courts where enforcement was sought.[93]

3.37 In similar vein, nor is it necessary for a party, who is participating in the arbitral proceedings, but who objects to the jurisdiction of the tribunal, to require the tribunal to rule on their jurisdiction. Section 30 empowers, but does not require, a tribunal to rule on its own jurisdiction.[94] So for example, in the arbitral proceedings, the parties might ask the tribunal to assume that it has jurisdiction, while holding over any objection to be decided later by the court under section 67.

3.38 Finally, as noted, *Dallah* was not concerned with section 67, but the Supreme Court did say that a challenge under section 67 was a full rehearing. In doing so, they endorsed the decision of Mr Justice Rix in *Azov Shipping Co v Baltic Shipping Co*.[95] We now turn to reconsider that decision.

Azov revisited

3.39 In *Azov*, the arbitral respondent participated in the arbitration proceedings and contended that it was not party to the arbitration agreement. The matter was fully investigated by the arbitrator, who ruled that the arbitral respondent was a party. Upon that party's subsequent challenge under section 67, the court gave directions to allow oral evidence and cross-examination.

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90 [2010] UKSC 46, [2011] 1 AC 763 at [24] by Lord Mance, and at [90] by Lord Collins.

91 [2010] UKSC 46, [2011] 1 AC 763 at [30] by Lord Mance.

92 [2010] UKSC 46, [2011] 1 AC 763 at [31] by Lord Mance, and at [160] by Lord Saville.

93 [2010] UKSC 46, [2011] 1 AC 763 at [23], [28] by Lord Mance, and at [98], [103] by Lord Collins.

94 *Russell on Arbitration* (24th ed 2015) para 7-010, citing *Excalibur Ventures LLC v Texas Keystone Inc* [2011] EWHC 1624 (Comm), [2012] 1 All ER (Comm) 933 – see [94], [98] to [99] by Gloster J.

95 [1999] 1 All ER 476.

3.40 It was submitted in that case that a party wanting a full hearing before the court ought to engage section 72 rather than section 67. (Under section 72, a party who does not participate in the arbitral proceedings can apply to court for a declaration that the tribunal lacks jurisdiction.) The judge said that he saw force in that submission. He also thought that section 32 might have been used in this case. (Section 32 allows a preliminary application to the court for the court to determine the tribunal's jurisdiction, but it requires either the agreement of the arbitral parties or the permission of the tribunal.) But the judge concluded that, "in at any rate this case", he should permit the challenge under section 67 to be accompanied by oral evidence.[96] He continued:[97]

> In many cases, and perhaps in the ordinary and normal case of such a challenge, where, for instance, there is simply an issue as to the width of an arbitration clause and no issue as to whether a party is bound to the relevant contract in the first place, the arbitrator's view may be accepted. If it is not, a challenge to the court is likely to be a limited affair raising, essentially, a point of construction on the clause and thus no problem arises. Where, however, there are substantial issues of fact as to whether a party has made the relevant agreement in the first place, then it seems to me that, even if there has already been a full hearing before the arbitrators the court, upon a challenge under s 67, should not be placed in a worse position than the arbitrator for the purpose of determining that challenge.

3.41 This raises two points. First, where the challenge is limited to a point of construction on the arbitration clause, there will likely be no witness evidence. In such cases, whether the challenge is an appeal or a review or a rehearing, the process is likely to be the same.

3.42 Second, the judge said that a full rehearing was necessary where the question was "whether a party has made the relevant agreement in the first place". Such was the issue in *Azov*. This takes on more significance in light of the recent decision in *The Newcastle Express*.[98]

3.43 The decision in *The Newcastle Express* suggests that, if the question is whether the matrix agreement containing the arbitration clause was ever concluded, that might only be an issue which can be safely resolved by the court, and not the tribunal. This is because, in *The Newcastle Express*, the court held that the principle of separability does not apply to the question of whether an arbitration agreement was ever concluded. Thus, if a tribunal finds that the matrix contract, and its arbitration clause, were never agreed, that finding deprives the tribunal of jurisdiction, and renders the arbitral award a nullity. Only the court can avoid that vicious circle. In such cases, taking a cue from *Azov*, an early application under section 72, or perhaps better yet an application under section 32, might be the only safe route to take.

3.44 Finally, and significantly, the background trend since *Azov* suggests a reduced willingness by the courts to allow oral evidence in a challenge under section 67. In *Azov*, the judge referred to the then Rules of the Supreme Court, which expressly

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96 [1999] 1 All ER 476, 479.

97 [1999] 1 All ER 476, 479.

98 *DHL Project & Chartering Ltd v Gemini Ocean Shipping Co Ltd, The Newcastle Express* [2022] EWCA Civ 1555.

allowed the court, in an arbitration claim, to give directions for oral evidence and cross-examination.[99] This is not repeated in the current Civil Procedure Rules. We also note below, when discussing the court's case management powers, that the Commercial Court Guide takes what might be called a more controlling rather than permissive approach to applications under section 67.[100]

3.45 For these reasons, we think that neither *Dallah* nor *Azov*, properly considered, is inconsistent with the idea of restricting the nature of a hearing under section 67.

Case management powers

3.46 Some consultees suggested that, if there are concerns about the amount of evidence which a party seeks to put before the court on a section 67 rehearing, the court itself can sensibly limit that evidence through its case management powers. We are not persuaded that this answer is sufficient.

3.47 Certainly the court does have case management powers. The Commercial Court Guide provides that an application under section 67 is only appropriate if there are serious grounds to support it.[101] The court may decide to deal with the application without a hearing, especially where the court considers the application to have no real prospect of success.[102] A party who insists on an oral hearing, but then loses anyway, might receive an adverse costs order on an indemnity basis.[103]

3.48 In *Electrosteel Castings Ltd v Scan-Trans Shipping & Chartering Sdn Bhd*,[104] Mr Justice Gross said:[105]

> 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.

3.49 In *The Kalisti*,[106] 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 further said:[107]

> 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.

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99 [1999] 1 All ER 476, 478.

100 Commercial Court Guide (11th ed 2022) paras O8.4, O8.6 to O8.8.

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

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

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

104 [2002] EWHC 1993 (Comm), [2002] 2 All ER (Comm) 1064.

105 [2002] EWHC 1993 (Comm), [2002] 2 All ER (Comm) 1064 at [23].

106 *Central Trading & Exports Limited v Fioralba Shipping Co, The Kalisti* [2014] EWHC 2397 (Comm), [2015] 1 All ER (Comm) 580. *The Kalisti* was referenced by Males LJ in *DHL Project & Chartering Ltd v Gemini Ocean Shipping Co Ltd, The Newcastle Express* [2022] EWCA Civ 1555 at [16].

107 [2014] EWHC 2397 (Comm), [2015] 1 All ER (Comm) 580 at [41].

3.50 We note also that section 70 allows the court to require security for costs, or payment into court, pending an application under section 67.

3.51 However, the difficulty with relying on case management powers is as follows. If a challenge under section 67 is a full rehearing, then the parties should be free to introduce whatever evidence they wish. Of course, a court can refuse to receive evidence which it thinks will be forensically unhelpful or irrelevant, but this is true for all hearings – it is not a position bespoke to arbitration claims which were preceded by a tribunal hearing. True enough, a court might be sceptical of late evidence, but a ready answer to why such evidence was not introduced before the tribunal is simply that, the court hearing being afresh, the party knew it had a second chance more industriously to find pertinent evidence.

3.52 *Russell on Arbitration* puts it this way:[108]

> …generally speaking, the court will not normally exclude evidence which is relevant and admissible. As to the nature of the control which the court will exercise, this will be guided by ordinary case management principles. It is unlikely that the court can exclude evidence simply because to do causes some prejudice to the other side.

3.53 In other words, it is difficult for the court to label a challenge under section 67 as a full rehearing, and thereby consider the matter anew, as if argued for the first time, while also limiting evidence or criticising a party by reference to what happened in a previous hearing. All the more so when that previous hearing resulted in an award supposedly of no legal or evidential value.

Competence-competence

3.54 Some consultees suggested that our proposal undermines the principle of competence-competence. In contrast, we think that our proposal is consistent with the principle, and if anything, gives more body to it, and here we explain why.

What is competence-competence?

3.55 Section 67 allows the court to review the jurisdiction of the arbitral tribunal. The other side of the coin is section 30. This latter section is headed “competence of tribunal to rule on its own jurisdiction”. This is often paraphrased as competence to rule on its own competence, a concept usually abbreviated to “competence-competence”.[109]

3.56 Why is a tribunal given competence-competence?

3.57 In *Christopher Brown Ltd*, Mr Justice Devlin said that arbitrators were entitled to consider whether they had jurisdiction:[110]

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108 (24th ed, 2015) para 8-071.

109 *Redfern & Hunter: Law and Practice of International Commercial Arbitration* (6th ed, 2015) para 5.105.

110 *Christopher Brown Ltd v Genossenschaft Oesterreichischer Waldbesitzer Holzwirt-Schaftsbetriebe Registrierte Genossenschaft mit Beschrankter Haftung* [1954] 1 QB 8, 12 to 13.

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

3.58 The Departmental Advisory Committee (DAC) drafted the Bill which became the Arbitration Act 1996. In their report on the Bill, they cited *Christopher Brown Ltd*, and gave the further explanation:[111]

> The great advantage of this doctrine is that it avoids delays and difficulties when a question is raised as to the jurisdiction of the tribunal. 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, but to deprive a tribunal of a power (subject to Court review) to rule on jurisdiction would mean that a recalcitrant party could delay valid arbitration proceedings indefinitely by making spurious challenges to its jurisdiction.

3.59 This suggests that competence-competence is primarily directed at avoiding delay in starting arbitral proceedings. Some consultees indicated the benefits which might flow from this. They said that, when parties are obliged to address their dispute through the arbitral process, this can lead to a settlement agreement. Also, having gone through arbitral proceedings, the parties might be prepared (enthusiastically or reluctantly) to abide by the outcome, rather than pursue it further through court challenges.

3.60 There are yet other views on competence-competence. For example, the late Professor Gaillard exemplifies an approach which stresses both the positive and negative aspects of competence-competence.[112] It is not simply that arbitrators can decide their own jurisdiction (positive competence-competence), but that they should be allowed to do so, and to do so first, before the court does (negative competence-competence). This acknowledges a measure of deference to the tribunal.

3.61 We suggest that a measure of deference to the tribunal can be justified. After all, arbitrators must be impartial.[113] They must adopt procedures to resolve the dispute fairly.[114] If not, an arbitrator can be removed by the court.[115] And a serious irregularity which causes substantial injustice permits an award to be challenged.[116] If instead, an impartial arbitrator, after a fair process, makes factual findings, that might well be a reason for deference. All the more so, perhaps, if the arbitrator is chosen by the parties or has conspicuous expertise.

3.62 Further, Professor Park says that competence-competence is not necessarily just a choice of "who goes first". He identifies other options,[117] including the following.

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111 *Report on the Arbitration Bill* (1996) paras [137] to [138].

112 E Gaillard, *Legal theory of international arbitration* (2010).

113 Arbitration Act 1996, s 33.

114 Arbitration Act 1996, s 33.

115 Arbitration Act 1996, s 24.

116 Arbitration Act 1996, s 68.

117 W W Park, *Arbitration of International Business Disputes* (2nd ed, 2012) ch II-A-5.

(1) "Out of fairness, a rapid and summary mechanism should exist to permit courts to halt proceedings when the arbitration clause is manifestly void or clearly against public policy."[118]

(2) If the parties themselves agree that a tribunal can conclusively determine its own jurisdiction, then a court might uphold that agreement and refuse to review the tribunal's decision.

3.63 As examples, and in broad terms, option (1) is reflected in French law, and option (2) is reflected in US federal law.[119] Option (2) was also acknowledged in *Dallah* as potentially available in England and Wales.[120]

Our proposal and competence-competence

3.64 To the extent that *Dallah* purports to accord no legal or evidential value to arbitral awards, it represents a bare or minimalist attitude to competence-competence. Our proposal would give competence-competence some substance. As one consultee, Professor Alex Mills, said in his response, it would give competence-competence a deferential element. This in turn gives a reason in principle why a tribunal might be the first to rule on its jurisdiction.

3.65 At any rate, we do not consider that our proposal is inconsistent with competence-competence, nor does it undermine it, as some consultees suggested. Competence-competence includes the idea that the tribunal should be able to rule on its own jurisdiction, and perhaps also before a court does. Our proposal does not preclude the tribunal's ability to rule on its jurisdiction, which is anyway enshrined in section 30. Nor does it preclude the tribunal's ability to rule before the court does – quite the opposite; section 67 presupposes that the tribunal has ruled before the court does. Rather, our proposal simply says that where a tribunal rules on its own jurisdiction before a court does, there is reason for some deference to be shown to that ruling and the process which led to it.

Legislative tensions

3.66 Some consultees suggested that reform should address, not section 67, but other sections of the Act which are also concerned with questions of the tribunal's jurisdiction. Those others are sections 9, 32 and 72, each of which we explain below.

3.67 By way of introduction, we note the following tension. On the one hand, there is the impetus to progress arbitration, in favour of the arbitral claimant, on the basis that the arbitration turns out to be well founded. On the other hand, there is the impetus to stop the arbitration, in support of the arbitral respondent, on the basis that the tribunal turns out to lack jurisdiction. Whether the arbitral claimant or the arbitral respondent is

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118 W W Park, *Arbitration of International Business Disputes* (2nd ed, 2012) p 293.

119 W W Park, *Arbitration of International Business Disputes* (2nd ed, 2012) ch II-A-5; G Born, *International arbitration: law and practice* (3rd ed, 2021) § 2.05(B).

120 [2010] UKSC 46, [2011] 1 AC 763 at [24] by Lord Mance, and at [90] by Lord Collins.

correct will only be known in hindsight. All that legislation can do in the meantime is seek to strike a balance.[121]

3.68 Legislative tension is not solely the preserve of the Arbitration Act 1996. It can also be found in the UNCITRAL Model Law. Indeed, the debates leading to the adoption of the UNICTRAL Model Law lay bare those tensions.[122] Thus we shall turn briefly to the UNICTRAL Model Law as an illustrative introduction. Then we discuss how similar tensions can be traced into the Arbitration Act 1996, and how sections 9, 32 and 72 seek to balance them.

UNCITRAL Model Law

3.69 In the discussions preceding the adoption by UNCITRAL of its Model Law, Lord Wilberforce, as observer for the Chartered Institute of Arbitrators, said two things. First, that review by the court at an early stage was desirable, more so than continuing the arbitration proceedings in full, only for the court to revisit the question of jurisdiction at the end. Second, that arbitrators are more disposed to find in favour of their own jurisdiction if they know that the court will review their decision, rather than decline jurisdiction and thereby bring arbitration to an end for sure.[123]

3.70 Ultimately, the UNCITRAL Model Law is itself a compromise. Article 16 provides:

> (1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. …
>
> (2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. …
>
> (3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court … to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

3.71 The UNCITRAL secretariat explained (the compromise in) article 16(3) as follows:[124]

> The competence of the arbitral tribunal to rule on its own jurisdiction (i.e. on the foundation, content and extent of its mandate and power) is, of course, subject to court control. Where the arbitral tribunal rules as a preliminary question that it has jurisdiction, article 16 (3) allows for immediate court control in order to avoid waste of time and money. However, three procedural safeguards are added to reduce the

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121 See too: *Golden Ocean Group Ltd v Humpuss Intermoda Transportasi Tbk Ltd (The Barito)* [2013] EWHC 1240 (Comm), [2013] 2 All ER (Comm) 1025 at [59(7)(b)] by Popplewell J.

122 Travaux préparatoires, 315th and 316th meetings: <https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/travaux>

123 316th meeting, para 24.

124 Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006, para 26.

risk and effect of dilatory tactics: short time-period for resort to court (30 days), court decision not appealable, and discretion of the arbitral tribunal to continue the proceedings and make an award while the matter is pending before the court. In those cases where the arbitral tribunal decides to combine its decision on jurisdiction with an award on the merits, judicial review on the question of jurisdiction is available in setting aside proceedings under article 34 or in enforcement proceedings under article 36.

Tensions in the Arbitration Act 1996

3.72 The Arbitration Act 1996 is subject to the same legislative tensions, and makes similar compromises to the UNCITRAL Model Law. This can be seen in section 67 itself. If the ruling being challenged is a preliminary award on jurisdiction, the tribunal may continue with the arbitral proceedings while the application to court is still pending.[125] Before the application can be made, the applicant must first exhaust any available arbitral process of appeal or review[126] (unless the objecting party has not participated in the arbitral proceedings).[127] The application must usually be brought within 28 days.[128] And an appeal from the decision of the first instance court is limited to the extent that it requires the permission of the first instance court.[129]

3.73 The legislative tensions are not only within section 67. They also appear in, and seek to be balanced across, other provisions. We take sections 9, 32 and 72 in turn.

Section 9: Stay of legal proceedings

3.74 Under section 9, the court can rule whether the arbitration agreement is null and void, inoperative, or incapable of being performed. But this is only in the context of an arbitral respondent having brought court proceedings, which the arbitral claimant seeks to stay.

3.75 One consultee suggested limiting section 9 so that the court will only consider whether an arbitration agreement is void if the party resisting the stay can show, on a prima facie basis,[130] that there is a very strong probability that the agreement is void. Some authors make a similar suggestion, using the language of good arguable case.[131]

3.76 It is open to the case law to move in that direction.[132] Currently, however, when a party seeks a stay, the weight of case law indicates that they must prove, on the

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125 Arbitration Act 1996, s 67(2).

126 Arbitration Act 1996, s 70(2).

127 Arbitration Act 1996, s 72(2).

128 Arbitration Act 1996, s 70(3).

129 Arbitration Act 1996, s 67(4).

130 This is a Latin phrase which indicates that an issue is sufficiently supported, for the time being, on the face of the evidence or arguments put before the court.

131 *Merkin and Flannery on the Arbitration Act 1996* (6th ed, 2020) §§ 9.7.1 to 9.7.2.

132 For example, see: *Lombard North Central plc v GATX Corp* [2012] EWHC 1067 (Comm), [2012] 2 All ER (Comm) 1119 at [23] by Andrew Smith J.

balance of probabilities, that there is an applicable arbitration agreement.[133] The court may be able to decide that on the papers, but if there is a genuine dispute of fact, the court might have to order a trial of the issue.[134] However, the court can also order a stay under its inherent jurisdiction, if good sense and litigation management make it desirable for the arbitrator to consider the whole matter first.[135]

3.77 Meanwhile, the party resisting the stay must show, on the balance of probabilities, that the arbitration agreement is void. If proof that the arbitration agreement is void requires a trial, and the inquiry would involve findings of fact which impact on the substantive rights and obligations of the parties in issue, again the court might order a stay and remit the matter to the tribunal in the first instance.[136]

3.78 If the court remits the matter to the tribunal, without making any decision itself, then an arbitral party can still argue jurisdiction before the tribunal, and challenge an award under section 67.[137]

3.79 In summary, the current position under section 9 is admittedly complex. This is because it represents an interaction between the wording of section 9 itself, and use of the court's inherent jurisdiction. It is an example of an attempt to find a compromise between, on the one hand, the court considering the question of jurisdiction for itself, and up front, and on the other hand, ceding the first decision to the tribunal.

Section 32: Determination of preliminary point of jurisdiction

3.80 Under section 32, the court can determine any question as to the substantive jurisdiction of the tribunal. But this is only where the arbitral parties agree, or the tribunal and court give permission. The tribunal may continue with the arbitral

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133 This seems implicit in the analysis in *Birse Construction Ltd v St David Ltd* [1999] BLR 194, reversed on the facts at (2000) 70 Con LR 10, and in *Al-Naimi (t/a Buildmaster Construction Services) v Islamic Press Services Ltd* (2000) 70 Con LR 21. *Birse* was further endorsed, for example, in *Fiona Trust & Holding Corp v Privalov* [2007] EWCA Civ 20, [2007] 1 All ER (Comm) 891 at [37] by Longmore LJ, affirmed at [2007] UKHL 40, [2007] 4 All ER 951. The need to prove on the balance of probabilities was stated explicitly in: *Golden Ocean Group Ltd v Humpuss Intermoda Transportasi Tbk Ltd (The Barito)* [2013] EWHC 1240 (Comm), [2013] 2 All ER (Comm) 1025 at [59] by Popplewell J; *Associated British Ports v Tata Steel UK Ltd* [2017] EWHC 694 (Ch), [2018] 1 All ER (Comm) 170 at [20] by Rose J; *Joint Stock Co Aeroflot Russian Airlines v Berezovsky* [2013] EWCA Civ 784, [2013] 2 Lloyd's Rep 242 at [73] by Aikens LJ. The latter case has been endorsed in: *Premier Cruises Ltd v DLA Piper Rus Ltd* [2021] EWHC 151 (Comm), [2021] 1 Lloyd's Rep 511 at [41] by David Edwards QC; *Republic of Mozambique v Credit Suisse Int* [2021] EWCA Civ 329, [2022] 1 All ER (Comm) 235 at [62] by Carr LJ.

134 *Birse Construction Ltd v St David Ltd* (2000) 70 Con LR 10, at 15 to 16 by Aldous LJ; *Al-Naimi (t/a Buildmaster Construction Services) v Islamic Press Services Ltd* (2000) 70 Con LR 21, at 26 by Waller LJ.

135 *Al-Naimi (t/a Buildmaster Construction Services) v Islamic Press Services Ltd* (2000) 70 Con LR 21; *Golden Ocean Group Ltd v Humpuss Intermoda Transportasi Tbk Ltd (The Barito)* [2013] EWHC 1240 (Comm), [2013] 2 All ER (Comm) 1025 at [59] by Popplewell J. On the court's inherent jurisdiction, see generally: *Merkin and Flannery on the Arbitration Act 1996* (6th ed, 2020) § 9.18; *Russell on Arbitration* (24th ed, 2015) para 7-041.

136 *A v B* [2006] EWHC 2006 (Comm), [2007] 1 All ER (Comm) 591 at [137] by Colman J; *Golden Ocean Group Ltd v Humpuss Intermoda Transportasi Tbk Ltd (The Barito)* [2013] EWHC 1240 (Comm), [2013] 2 All ER (Comm) 1025 at [54] by Popplewell J; *Joint Stock Co Aeroflot Russian Airlines v Berezovsky* [2013] EWCA Civ 784, [2013] 2 Lloyd's Rep 242 at [80] by Aikens LJ.

137 *Joint Stock Co Aeroflot Russian Airlines v Berezovsky* [2013] EWCA Civ 784, [2013] 2 Lloyd's Rep 242 at [79] by Aikens LJ.

proceedings while the application to court is still pending, unless the parties agree otherwise. And an appeal from the decision of the first instance court is limited to the extent that it requires the permission of the first instance court.

3.81 Some consultees have suggested that an application for a preliminary determination under section 32 should be available as of right. Overall, the responses we received did not suggest widespread support for this approach. On balance, we do not recommend it. It tips the scales fully in favour of the arbitral respondent, and thereby makes it too easy for a less sincere party to engage in tactics which delay the start of arbitral proceedings.[138] It perhaps risks making England and Wales a less attractive seat for arbitration, on the basis that arbitration may become too slow to start, simply because it builds in, structurally, a likelihood of delay, in too many cases, caused by pending court applications.[139]

Section 72: Saving for rights of person who takes no part in proceedings

3.82 Under section 72(1), the court may issue a declaration or injunction in favour of a party asserting that the tribunal has no substantive jurisdiction. But this is only where that party takes no part in the arbitral proceedings.

3.83 One consultee suggested repealing section 72(1). But a party cannot be forced to participate in an arbitration whose jurisdiction they refute, as has been acknowledged by the DAC,[140] and by the Supreme Court in *Dallah*.[141] So repealing section 72(1) would deny such a party any chance of challenging the arbitral proceedings prior to an award.

3.84 However, we acknowledge what several consultees told us, in criticism of the reasoning in our first consultation paper, that simply awaiting an award without participating is a high-risk strategy. In other words, the existence of section 72(1) does not mean that it will always be appropriate for a party to boycott the arbitral proceedings and then challenge an award on the basis that the tribunal lacked jurisdiction. These consultees said that, after all, the argument that the tribunal lacked jurisdiction might be only one of a number of cogent arguments in a party's defence; parties should not have to boycott arbitral proceedings and thereby sacrifice all other arguments. Nevertheless, in our view this still does not lead to the position that a challenge under section 67 must necessarily be a full rehearing.

3.85 Ultimately, we think that there is no uniquely correct solution to balancing the legislative tensions which are inevitably present in the Arbitration Act 1996. However, we think that, on the analysis above, sections 9, 32 and 72 individually and cumulatively strike a balance which is defensible, and which does not call for legislative reform.

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138 This was the position historically, which drew criticism, and led to the new regime in the Arbitration Act 1996: *LG Caltex Gas Co Ltd v China National Petroleum Corp* [2001] EWCA Civ 788, [2001] 1 WLR 1892 at [12].

139 The current lead time for a one-day application in the Commercial Court is about 5 months, and a two-day trial about 11 months: <https://www.gov.uk/guidance/commercial-court-hearing-and-trial-dates>

140 *Report on the Arbitration Bill* (1996) para 295.

141 [2010] UKSC 46, [2011] 1 AC 763 at [23] by Lord Mance.

Section 67 revisited

3.86 We have argued that the cases of *Dallah* and *Azov* need not be seen as inconsistent with restricting the nature of a challenge under section 67. We have explained why we are not persuaded that the court's case management powers are sufficient to address our concerns. We set out why we think that our proposal does not undermine the idea of competence-competence. We discussed how reform to other sections of the Act instead of section 67 might upset a defensible balancing between legislative tensions.

3.87 Having discussed those counter-arguments, we can now move forward to lay out the positive case in support of our revised proposal, as follows.

3.88 To start at the top: the complaint is that an application under section 67 is a full rehearing. This leads to delay and cost through duplication. Some consultees suggested that this problem is more theoretical than real. However, other consultees, such as Audley Sheppard KC, offered evidence that it does arise. The Chartered Institute of Arbitrators said that, although section 67 rehearings may be uncommon, when they occur the burden on the court and the parties is "immense".

3.89 The duplication arises because the tribunal goes first, and then, having gone first, the tribunal is given no deference.

3.90 One way to address this is to allow the court to rule first on jurisdiction. Already it can do so, under the three sections we previously discussed. There are restrictions on when those sections can be invoked, and it may well be that, overall, the tendency under the Act is to prefer the tribunal to rule first.[142] At any rate, we are not persuaded to upset the balance of compromise which is currently reflected in the Act. We do not think that the court should always be able to rule first on the tribunal's jurisdiction, because this tips the balance fully in favour of the arbitral respondent.

3.91 If allowing the court to rule first is not a solution to the problem of section 67 rehearings, then the other approach is to accord the tribunal some deference.

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

3.93 We think that the answer to this argument is again competence-competence (the idea, discussed above, that a tribunal can rule on whether it has jurisdiction). In other words, even if it is decided that a party did not agree to arbitration, competence-competence says that it is proper for the tribunal to be the one making that decision in the first instance.

3.94 Competence-competence is a principle which is recognised internationally. It can be found in article 16 of the UNCITRAL Model Law. It is enshrined in section 30 of the

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142 "…it is contemplated by the Act that it will, in general, be right for the arbitrators to be the first tribunal to consider whether they have jurisdiction to determine the dispute": *Fiona Trust and Holding Corp v Privalov* [2007] EWCA Civ 20, [2007] 1 All ER (Comm) 891 at [34]; on appeal at [2007] UKHL 40, [2007] 4 All ER 951.

Arbitration Act 1996. We do not recommend repeal of section 30, and no consultee has suggested it.

3.95 In practice, if a tribunal rules that it has no jurisdiction, no doubt the arbitral respondent would be happy to adopt that ruling. The arbitral respondent will only complain to the court where the tribunal finds jurisdiction. If the court agrees that the tribunal has jurisdiction, then it turns out that the tribunal should have been ruling in the first place after all. The arbitral respondent's complaint is misjudged. So the crunch point is only where the tribunal rules that it has jurisdiction, and the court disagrees – in other words, where the tribunal gets it wrong.

3.96 This analysis does not cut both ways. Where a tribunal rules that it has no jurisdiction, the arbitral claimant is (maybe) entitled to challenge that under section 67 as well. But this challenge is also simply on the basis that the tribunal got it wrong. The theoretical objection, that the tribunal should never have been ruling in the first place, does not arise; the arbitral claimant was always happy for the tribunal to rule.

3.97 Perhaps this explains why, under the UNCITRAL Model Law,[143] and some foreign jurisdictions,[144] there can be no challenge by an arbitral claimant to a tribunal rejecting jurisdiction.

3.98 In English law, the arbitral claimant can challenge under section 67(1)(a), in respect of a preliminary award on jurisdiction, where the tribunal rejects jurisdiction. But under section 67(1)(b), in respect of awards which also deal with the merits, these can only be challenged if the tribunal upholds jurisdiction. So said the Court of Appeal in *Caltex*,[145] although this is questioned by some authors.[146]

3.99 At any rate, all this suggests that it can be appropriate to limit still further the arbitral *claimant's* ability to object to the jurisdictional ruling of the tribunal.

3.100 If the essential complaint, even of the arbitral respondent, is that the tribunal got it wrong, that is compatible with something less than a full rehearing before the court.

3.101 In our first consultation paper, we proposed that a section 67 challenge might be by way of an appeal. Some consultees criticised this language. After all, in court proceedings, an appeal can proceed either by way of a review, or by way of a rehearing, as the Civil Procedure Rules make clear.[147] We accept this point.

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143 Under article 16(3), a preliminary award as to jurisdiction can be challenged only if the award upholds jurisdiction. Any other award can be challenged under article 34, but only to set it aside, or under article 36, but only to resist recognition and enforcement.

144 Arbitration Ordinance (Cap 609) (Hong Kong), s 34(4); Federal Law No 6 of 2018 on Arbitration (UAE), art 19(2); Dutch Code of Civil Procedure, Book Four, Arbitration, art 1052; Swedish Arbitration Act 1999, s 2; Arbitration Act 2001 (Singapore), s 21(9).

145 *LG Caltex Gas Co Ltd v China National Petroleum Corp* [2001] EWCA Civ 788, [2001] 1 WLR 1892 at [71]. It is interesting to note that s 73(2), concerned with the loss of right to object, relates solely to positive jurisdiction rulings, not negative rulings.

146 *Merkin and Flannery on the Arbitration Act 1996* (6th ed, 2020) § 67.8.

147 CPR r 51.21.

3.102 As to the difference between a review and a rehearing, Lord Justice May has said:[148]

> In considering the nature of an appeal, certain questions intrinsically arise. Will the appeal court start all over again as if the lower court had never made a decision? Will the appeal court hear the evidence again? What weight is to be given to the decision of the lower court? Will the appeal court admit fresh evidence and, if so, upon what principles? To what extent and upon what principles will the appeal court interfere with the decision of the lower court? These and related questions are not answered simply by labelling the appeal process as a review or a rehearing.

3.103 Therefore, on reflection, we think it better not to focus on the label of appeal or review or rehearing, but instead to identify practical constraints to a challenge under section 67. There are four such practical constraints, and we take them in turn below. Their elaboration here is the first way in which our proposal has developed since our first consultation paper.

3.104 First, we think that new arguments should not usually be raised at the court hearing. Under section 73, a failure to object promptly that the tribunal lacks jurisdiction means a loss of the right to object later – unless the party did not know at the time, or could not with reasonable diligence have discovered, the grounds for objection. This should preclude an applicant under section 67 from raising before the court new grounds of objection which it could have raised before the tribunal.[149]

3.105 Second, we think that new evidence should not usually be raised at the court hearing. In court proceedings, in an appeal, the court might admit new evidence under the principles in *Ladd v Marshall*.[150] That case says that new evidence might be adduced on appeal where: the evidence could not have been obtained with reasonable diligence for use at the trial; it would probably have an important influence on the result of the case (though it need not be decisive); and the evidence must be apparently credible. Similar rules have been held to apply when new evidence is sought to be introduced in the context of a challenge under section 68.[151] All this further aligns with section 73, at least to the exclusion of new evidence (like new arguments) which should have been raised before the tribunal.

3.106 Some consultees said that, because a tribunal can decide all evidential matters (subject to the right of the parties to agree any matter),[152] the tribunal might have excluded evidence which a court might nevertheless feel the need to consider. If so,

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148 *EI Du Pont De Nemours & Co v ST Dupont* [2003] EWCA Civ 1368, [2006] 1 WLR 2793 at [85]; applied in *McFaddens Solicitors v Chandrasekaran* [2007] EWCA 220 at [19] by Wilson LJ, and most recently in *Lewis v Wandsworth Borough Council* [2020] EWHC 3205 (QB) at [14] by Stewart J.

149 Similarly, in court proceedings, an appeal court will be cautious about allowing new arguments not raised before the court of first instance. For example, see: *Singh v Dass* [2019] EWCA Civ 360 at [16] to [18] by Haddon-Cave LJ.

150 [1954] 1 WLR 1489 (CA).

151 *DDT Trucks of North America Ltd v DDT Holdings Ltd* [2007] EWHC 1542 (Comm), [2007] 2 Lloyd's Rep 213 at [22] to [23] by Cooke J.

152 Arbitration Act 1996, s 34.

we think that that could fall within the *Ladd v Marshall* principles, and new evidence could be allowed.

3.107 Third, we think that oral evidence should not ordinarily be reheard by the court, unless perhaps exceptionally in the interests of justice, by analogy with the Civil Procedure Rules.[153] But even then, it should be rarer still for an arbitral claimant successfully to request oral evidence, since they never objected in the first place to the tribunal making evidential findings.

3.108 Fourth, we think that the court should give deference to the decision of the tribunal. Which is to say, the decision of the tribunal should be accorded some legal and evidential value. What precisely that entails might vary according to the circumstances of the case – as is anyway true in appeals in court proceedings.[154] But it might be expected, for example, at least to include the usual reluctance to interfere with a finding of fact based on the credibility or reliability of the oral evidence which was evaluated by the tribunal.[155] Put another way, we think that the court should not be deciding the issue itself afresh. Instead, it should be asking whether the tribunal's ruling on jurisdiction was wrong.

Four further arguments

3.109 Consultees raised other arguments against the proposal in our first consultation paper; we consider four of them below.

3.110 A first concern was that, when enforcement of an award from England and Wales is sought abroad, any section 67 challenge, if less than a full rehearing, might fail to establish an issue estoppel.[156] This would mean that the matter could be re-examined by the foreign court.

3.111 This scenario assumes that the tribunal ruled that it had jurisdiction, and that the court in England and Wales upheld that ruling (thus resulting in an award to be enforced abroad).

3.112 Whether a foreign court considers that an issue estoppel arises depends on that foreign law. As regards the law of England and Wales, an appellate decision, upholding a first instance decision and dismissing an appeal, can create an estoppel.[157] We think that that an issue estoppel could similarly arise here, where the court would be upholding the decision of the tribunal, and rejecting the claim that the tribunal's decision on jurisdiction was wrong.

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153 CPR r 52.21.

154 For example, see: *EI Du Pont De Nemours & Co v ST Dupont* [2003] EWCA Civ 1368, [2006] 1 WLR 2793 at [94] by May LJ.

155 For judicial acknowledgment of that reluctance, see: Mance LJ in *Todd v Adam* [2002] EWCA Civ 509, [2002] 2 All ER (Comm) 97 at [129]; endorsed by Clarke LJ in *Assicurazioni Generali SpA v Arab Insurance Group* [2002] EWCA Civ 1642, [2003] 1 WLR 577 at [17]; in turn endorsed by Lord Mance in *Datec Electronics Holdings Ltd v United Parcels Services Ltd* [2007] UKHL 23, [2007] 1 WLR 1325 at [46].

156 This was also assumed "without deciding" in *Gol Linhas Aereas SA v Matlinpatterson Global Opportunities Partners (Cayman) II LP* [2022] UKPC 21, [2022] 2 Lloyd's Rep 169 at [42].

157 *Spencer Bower and Handley: Res Judicata* (5th ed 2019) para 2.33.

3.113 Further, to the extent that *Dallah* requires that there be a rehearing before enforcement of a foreign award in England and Wales, we cannot object to foreign courts acting likewise.

3.114 A second concern was that the proposal in our first consultation paper applies when a party has participated in the arbitral proceedings, but what counts as participation is unclear. However, case law has already addressed what counts as participation, for example under section 72,[158] and under section 73.[159]

3.115 A third concern was that, in investment treaty cases, the court will have to determine jurisdiction to see whether state immunity applies. In our view, if that is so, still it should not detract from the idea that ordinarily there should be no new arguments or evidence.

3.116 A fourth concern was that our proposal is out of step with all leading arbitration jurisdictions, putting England and Wales at a disadvantage.

3.117 However, some consultees, like Louis Flannery KC, contested the extent to which other jurisdictions adopt the same approach as England and Wales. There is a consensus, for example, that Switzerland adopts a different approach. Then again, another consultee, Adam Samuel, criticised the Swiss approach. We considered the approach of foreign jurisdictions in our first consultation paper.[160] Ultimately, while international comparison is useful, it cannot be decisive.

The manner of reform

3.118 To recap, we think that, where an objection has been made to the tribunal that it lacks jurisdiction, and the tribunal has ruled on its jurisdiction, then any subsequent challenge under section 67, by a party who has participated in the arbitral proceedings, should not be in the form of a full rehearing. Ordinarily, there should be no new arguments, no new evidence, and no rehearing of evidence (especially at the request of the arbitral claimant). We think that some measure of deference should be given to the tribunal's award; the question should be whether the tribunal's ruling was wrong.

3.119 Does this approach need implementation, and if so how? The DAC said that section 30 was subject to court "review".[161] The UNCITRAL Secretariat, as we saw above, spoke in terms of court "control". Section 30 says that a tribunal's ruling on its jurisdiction can be "challenged". Section 67 also talks in terms of "challenging" an award, or seeking an order declaring an award to be of no effect. All of this language is consistent with our suggested approach.

3.120 Despite its perception, we do not think that our approach is inconsistent with *Dallah*. *Dallah* was not a decision on section 67. It was a case in which a party had not

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158 *Merkin and Flannery on the Arbitration Act 1996* (6th ed 2020) § 72.2.1; *Russell on Arbitration* (24th ed 2015) para 7-156.

159 *Merkin and Flannery on the Arbitration Act 1996* (6th ed 2020) § 73.3.

160 Paras 8.25 to 8.28.

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

participated in the arbitral proceedings, where we agree that the court might well hold a full hearing. It was concerned with section 103, and even then, the court accepted that there might not be a full hearing under that section either, if an estoppel arose as a consequence of a party having previously challenged the award before the courts of the seat.

3.121 It seems to us that the options are as follows.

3.122 First, we might propose reform of the Act to reflect our approach explicitly. We are reluctant to go down this route if the language of the Act is potentially consistent with our approach already.

3.123 Second, we might propose that the Act be left as it is, and allow the case law to develop, preferably in line with our approach, and technically unencumbered by *Dallah*. However, this approach is probably unrealistic; there is a weight of first instance decisions which cite *Dallah* to hold that section 67 involves a full rehearing.[162]

3.124 Third, we could propose that our approach be adopted in rules of court. This is our preferred approach. This is the second way in which our proposals have developed since the first consultation paper.

3.125 The restrictions we are proposing are largely procedural and fit naturally as the sort of prescriptions contained within court rules. We are also aware of the strong views of consultees on both sides of this issue. We have heard how reform could negatively impact the market, alternatively how no reform could negatively impact the market. Factually, it has not been possible for us to verify which prediction is more likely. As a matter of principle, we think that our proposals are merited. Meanwhile, their implementation through court rules is, in our view, a compromise as a "softer" type of reform. It might allow these proposals to be piloted and amended (whether tightened or relaxed) should that prove necessary.

3.126 Although we think that our proposal is consistent with *Dallah*, we do not wish there to be any doubt about the propriety of court rules implementing our proposal. Thus, we additionally propose that the Act be amended to confer the power to make rules of court concerning any challenge under section 67. This would give legislative authority such that rules of court would be valid even if they were thought to depart from existing case law.

3.127 Accordingly, we make the following provisional proposals. We ask consultees for their views on them.

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[162] For example: *Kyrgyz Republic v Stand Energy Corp* [2017] EWHC 2539 (Comm), [2018] 1 Lloyd's Rep 66; *GPF GP Sarl v Republic of Poland* [2018] EWHC 409 (Comm), [2018] 1 Lloyd's Rep 410. See too: *LLC Agronefteprodukt v Ameropa AG* [2021] EWHC 3474 (Comm), [2022] 1 Lloyd's Rep 388 at [30] by Sir William Blair; *Gol Linhas Aereas SA v Matlinpatterson Global Opportunities Partners (Cayman) II LP* [2022] UKPC 21, [2022] 2 Lloyd's Rep 169 at [42].

Consultation Question 2.

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

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

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

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

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

Do you agree?

Consultation Question 3.

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

CONSISTENCY WITH SECTION 103

Introduction

3.130 Some consultees objected to our proposals for section 67 in our first consultation paper on the basis that they would create an inconsistency with section 103. In this section, we explain why we do not agree with those objections.

3.131 We do not seek consultees' further views on this point. Ordinarily, our final conclusions would be included only in our final report. However, we include this topic in this second consultation paper to inform consultees of how we think that this topic has been resolved. Our preference is that, when consultees respond to our second consultation paper, they will engage with our new analysis and proposals. We respectfully suggest that this topic does not need revisiting.

Our position in the first consultation paper

3.132 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.

3.133 In Chapter 8 of our first consultation paper, we thought that any change to section 67 would not require a matching change to section 103. We said that this is because section 67 is a domestic regime; it is concerned with challenges to awards from tribunals seated in England and Wales. In contrast, the New York Convention is concerned with international enforcement: the enforcement abroad of out-going awards from England and Wales; and the enforcement in England and Wales of in-coming foreign awards (the province of section 103).

3.134 We reached the following provisional conclusion, and asked consultees whether they agreed (CQ 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.

Consultees' views

3.135 Some consultees suggested that any reform to section 67 should be replicated in section 103 for consistency. However, a majority of consultees agreed with us that no reform was needed to section 103.[163]

3.136 Consultees tended to agree with the reasons in our first consultation paper. They said that enforcement of foreign awards, and challenges to domestic awards, were two different regimes. They noted that section 103 enshrines the New York Convention, which in turn is aligned with the UNCITRAL Model Law, but that the Act does not adopt the UNCITRAL Model Law, and already departs from the language of section 103 when it comes to domestic challenges under section 68. They said that it was legitimate to make the domestic regime more attractive, by reform to section 67. And that the lack of such nuance in section 103 could also be justified, since it was a simpler approach to deal with the wider variety of contexts attendant upon foreign arbitral awards.

3.137 We note above how *Dallah* itself acknowledged that a challenge under section 103 might not be a full rehearing if it involved an estoppel created by a similar challenge having taken place before the foreign court of the seat of the arbitration. One consultee went further and said that an enforcing court should not consider a challenge to the jurisdiction of the tribunal when the same issue is before the courts of the seat, for fear of conflicting decisions (as resulted in *Dallah* between the English and French courts).

Conclusion

3.138 In line with our original views, and the views of a majority of consultees, we continue to think that no reform is needed in respect of section 103, even though we propose reform in respect of section 67.

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[163] There were 57 responses to CQ 24: 43 agreed; 14 disagreed.

Chapter 4: Discrimination

INTRODUCTION

4.1 In Chapter 4 of our first consultation paper, we discussed discrimination in the appointment of arbitrators. We provisionally proposed that a term be unenforceable which requires an arbitrator to be appointed by reference to a protected characteristic, unless that requirement can be justified as a proportionate means of achieving a legitimate aim. We retain that provisional proposal.

4.2 We are re-consulting on discrimination because, in light of consultee responses, we have identified new topics of potential reform. We wish to hear consultees' views on these new topics, and on the most recent iteration of our analysis.

4.3 We now ask consultees for their views on:

(1) whether discrimination should be generally prohibited in an arbitration context;

(2) what the remedies for discrimination might be; and

(3) whether a standing exception be made such that it is always permissible to require an arbitrator to have a nationality different from the arbitral parties.

OUR POSITION IN THE FIRST CONSULTATION PAPER

4.4 Put simply, we said that there are moral and economic reasons why discrimination is unacceptable. Despite some laudable initiatives within the arbitration community, we noted that there is still a lack of diversity in arbitrator appointments.

4.5 We considered the case of *Hashwani v Jivraj*.[164] 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.

4.6 The questions for the court were: first, whether employment law rules on discrimination applied to arbitrator appointments; and if so, second, whether being Ismaili was a genuine occupational requirement for the appointment, thereby being an admissible exception to the rule against discrimination.

4.7 The Supreme Court held that employment law rules did not apply to arbitrator appointments. As for the second question, in the Court of Appeal,[165] the court said that it was clearly not "necessary" for the discharge of the arbitrator's functions that the arbitrator be Ismaili. In the Supreme Court,[166] Lord Clarke said that the proper

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164 [2011] UKSC 40, [2011] 1 WLR 1872.

165 [2010] EWCA Civ 712, [2011] 1 All ER 50 at [29].

166 [2011] UKSC 40, [2011] 1 WLR 1872 at [70].

approach was whether the discriminatory requirement was "legitimate and justified", rather than strictly necessary.

4.8 In light of those differences in approach, we asked the following consultation question (CQ 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 Supreme Court)?

4.9 We then went on to make the following provisional proposal, and asked if consultees agreed (CQ 7):

(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.

4.10 We said that this proposal does not prescribe whom to appoint, nor does it provide an additional basis on which to challenge an arbitrator or an award. Instead, we said that it would free parties or institutions to make appointments without being constrained to comply with a discriminatory requirement that the arbitrator have a particular characteristic.

4.11 We said that this proposal would capture terms which were directly discriminatory, but not clauses which were indirectly discriminatory. We gave the following example. An arbitration clause which specified that the arbitrators must be men would be directly discriminatory, and captured by our proposal. An arbitration clause which specified that the arbitrators must be chartered philanthropists would not be captured by our proposal, even if the members of the Chartered Institute of Philanthropists were mostly men.

4.12 We also discussed the compatibility of our proposal with the New York Convention, as follows.

4.13 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 … was not in accordance with the agreement of the parties". Thus, if a discriminatory term was unenforceable, allowing an arbitral party to appoint an arbitrator with characteristics other than those specified in the arbitration agreement, the concern is whether that might allow the other party to resist enforcement of the award abroad.

4.14 We suggested that the risk of successful challenge under the New York Convention is probably more theoretical than practical. In summary, we said that the Arbitration Act 1996 already has provisions which can lead to a change in the agreed composition of the arbitral tribunal. We also noted that, even under article V of the New York Convention, the court retains a discretion whether to enforce anyway. Still further, the UNCITRAL Model Law suggests that enforcement may still be appropriate where the reason for any discrepancy in the composition of the tribunal is because of the application of the mandatory law of the seat, which would be the case if our proposal became mandatory law under the 1996 Act. For the full detail of our arguments, we refer the reader to our first consultation paper.[167]

CONSULTEES' VIEWS

4.15 In response to CQ 6, and the question whether any justification of a discriminatory requirement should be more or less generous, a large majority of consultee responses preferred the broader approach of the Supreme Court, rather than the narrower approach of the Court of Appeal.[168] That is, consultees tended to think that a discriminatory requirement need not be strictly necessary, provided that it is legitimate and justified.

4.16 In response to CQ 7, the Chartered Institute of Arbitrators said:

> It has become clear in recent years that arbitration as an industry has remained insulated from the positive societal moves towards diversity and inclusion at all levels. Arbitrators still tend to be overwhelmingly male and, in the international context, Caucasian males from the northern hemisphere, whether as a result of conscious or unconscious bias. This creates significant ethical and legal questions as to whether a legislative Act that is known to allow (or at least, does not actively oppose) practices that have a discriminatory effect can be perceived as fully legitimate. There is no doubt that creating a legal obligation against active discrimination on the basis of protected characteristics is the moral thing to do …

4.17 There were 82 responses to CQ 7. Forty-six agreed with our proposal; 21 disagreed; 15 made comments but were non-committal in terms of the proposal. We discuss in the next section below the principal points made by consultees.

DISCUSSION

4.18 We are grateful to consultees for their detailed discussions on this topic. Some consultees were critical of our proposal. Some were supportive but nevertheless made suggestions for improvement. There are 13 principal points to discuss here.

Discriminatory appointments

4.19 First, some consultees said that the problem was not so much discriminatory terms in arbitration agreements, but appointments which were discriminatory (even when there

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[167] Paras 4.24 to 4.35.

[168] There were 52 responses to CQ 6; 40 favoured the approach of the Supreme Court; 12 favoured the approach of the Court of Appeal.

were no terms restricting appointments). Some said that discrimination could also continue beyond the appointment of arbitrators.

4.20 For example, Clare Ambrose said:

> There is evidence of discrimination on appointment and participants are equally likely to discriminate within the arbitral process, for example on procedural measures, participation within the tribunal or the representation of parties. To send an important signal about diversity and equality, any reform should not be limited to the criteria for appointment but should apply more generally to the conduct of arbitration.

4.21 The simplest approach here might be to prohibit discrimination generally in an arbitration context. This possibility is the first new development upon our original proposal. The key issue, in our view, is what the remedies should be.

4.22 For example, if an arbitrator acts in a way which is discriminatory, we think that they might already be liable to removal under section 24 of the Arbitration Act 1996. After all, an arbitrator who acts in a discriminatory way is probably not fulfilling their duty under section 33 to be fair and impartial. Further, a failure to be fair could constitute a serious irregularity, meaning that any resulting award could be challenged under section 68.

4.23 For other remedies, we might take our cue from the Equality Act 2010. That provides that where discrimination happens in a work context, it is the employment tribunal which has jurisdiction to hear any complaint.[169] The remedies include a declaration of the complainant's rights, compensation, and a recommendation of how the respondent should act.[170]

4.24 At the end of this chapter, we ask consultees what they consider the remedies should be.

Neutral nationality

4.25 Second, in our first consultation paper, we proposed that a term be unenforceable which requires an arbitrator to be appointed by reference to a protected characteristic, unless that requirement can be justified as a proportionate means of achieving a legitimate aim. This language – proportionate means of achieving a legitimate aim – was also drawn from the Equality Act 2010.[171]

4.26 In response, some consultees said that it should be allowed to require the arbitrator to have a nationality different from the parties. On reflection, we agree. This possibility is the second new development upon our original proposal.

4.27 By way of precedent, the UNCITRAL Model Law provides, in article 11(1), that "no person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties". This suggests that the parties might

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169 Equality Act 2010, s 120.

170 Equality Act 2010, s 124.

171 Equality Act 2010, sch 9, para 1.

legitimately agree that the arbitrator should have a particular nationality. Article 11(5) then says that, when a court appoints an arbitrator, it "shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties". Several institutional arbitration rules similarly presume that an arbitrator should have a neutral nationality.[172]

4.28 One consultee put it this way in conversation with us. If England were playing Germany at football, would we be content with a German referee? We think that the nationality of the referee should not matter if they are impartial, but we acknowledge that the appearance of impartiality also matters. Having a referee with a neutral nationality would preclude many objections.

4.29 Consultees raised a number of further points. Usually, our responses to consultees appear only in our final report, but we include our current thinking here, in case it assists consultees in answering the new consultation questions posed in this chapter.

Indirect discrimination

4.30 Third (to continue the numbering), there is the matter of indirect discrimination. In our first consultation paper, we suggested that our proposal would be restricted to direct rather than indirect discrimination. However, some consultees doubted that our proposal as worded would indeed be limited to direct discrimination. At least one consultee welcomed the fact that our proposal might extend to indirect discrimination.

4.31 Some consultees said that the lack of diversity in arbitral appointments may be due to the lack of diversity in those organisations through which arbitrations occur. In other instances, they said, it might be due to lack of diversity in a sector of commerce from which experienced arbitrators are required to be drawn.

4.32 We acknowledge that such problems need to be addressed. But until they are addressed, prohibiting indirect discrimination could have the effect of outlawing major sectors of arbitral activity. Thus, in our view, it might regrettably be appropriate that any legislative reform should be limited to prohibiting only direct discrimination.

Impact on business

4.33 Fourth, some consultees seemed to intimate that prohibiting discrimination might reduce business for arbitration in England and Wales.

4.34 We think that it would only reduce business for those who benefit from discrimination. We add that our first consultation paper also referenced a report which set out the economic benefits that flow from diversity in arbitral appointments.[173]

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[172] ICC Arbitration Rules 2021, arts 13(5), 13(6); LCIA Arbitration Rules 2020, art 6.1. See too: ICSID Convention, arts 38, 39. CIArb Arbitration Rules 2015, art 6(5), reflects the language of art 11(5) of the UNCITRAL Model Law.

[173] *ICCA Report of the Cross-Institutional Task Force on Gender Diversity in Arbitral Appointments and Proceedings* (2020) § 2.1.

Party autonomy

4.35 Fifth, it was said that party autonomy in the choice of arbitrators should not be restricted.

4.36 We think that party autonomy cannot be a trump card in this context. It would otherwise permit any morally objectionable behaviour which the parties wanted to engage in. The Arbitration Act 1996 recognises the importance of party autonomy, but subject to "such safeguards as are necessary in the public interest".[174] We think that it is in the public interest to end unjustified discrimination.

Education not legislation

4.37 Sixth, it was said that the better approach, rather than legislating, is to educate parties to make non-discriminatory choices.

4.38 We think that education cannot be the sole answer to all morally objectionable behaviour which goes against the public interest. We also think that the suggestion rings hollow when some institutions or sectors have failed to advance diversity despite decades of changing cultural values.

Consumer choice

4.39 Seventh, it was said that discrimination law generally does not apply to consumer choices, and so should not apply to the choice of an arbitrator.

4.40 We think that choosing an arbitrator is closer to choosing a barrister, which is governed by the Equality Act 2010.[175] At any rate, the significant difference is this: a discriminatory consumer does not – unlike an arbitral party – have their choice enforced by the court and backed by the coercive powers of the state.

Does discrimination invalidate the whole arbitration clause?

4.41 Eighth, it was asked, if a discriminatory agreement is unenforceable, does that impeach the whole arbitration agreement, or just the discriminatory terms?

4.42 We think that the common law rules on severance would apply here. Thus, the usual position would be that only the offending words are struck down, so long as what remains does not need to be modified, and does not become a contract of a radically different character.[176]

4.43 However, by way of follow-up, some consultees questioned whether it would be fair to hold parties to arbitration at all, if they could not get their choice of arbitrator. Other consultees said that the remaining arbitration clause should be enforceable after all.

4.44 We acknowledge that there is room for debate here. Nevertheless, we think that, if parties choose to discriminate, when the Act prohibits discrimination, the parties could fairly be expected to live with the consequences. It is no defence for a party to say that they did not know the law. If that means being bound to arbitrate before a different

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174 Arbitration Act 1996, s 1(b).

175 Equality Act 2010, s 47(6).

176 *Chitty on Contracts* (34 th ed) ch 18 § 8; *Tillman v Egon Zehnder Ltd* [2019] UKSC 32, [2020] AC 154.

arbitrator, so be it. And in the end, the parties will still be getting a fair dispute resolution process before an impartial arbitrator.

4.45 Put another way, where a discriminatory requirement in the appointment of an arbitrator is not justified, it is because the requirement is in broad terms not relevant to determining the case. Thus, a party's decision to be bound by arbitration should not be affected, because removing the discrimination should not relevantly affect the arbitral process or outcome.

Faith-based arbitrations

4.46 Ninth, some consultees raised the concern that the proposal in our first consultation paper would render awards made by faith-based tribunals unenforceable or would make faith-based tribunals impossible.

4.47 For example, the London Beth Din said:

> "We are concerned that under the Discrimination proposals in the Law Commission Review (1.31 to 1.38) we may be precluded from holding such arbitrations, or the awards would be rendered unenforceable in English law, because the Dayanim, being both Jewish and male, exhibit two protected characteristics under the Equality Act 2010."

4.48 We do not think that our proposals would preclude faith-based arbitrations.[177] Rather, any term which restricted arbitrators to Jewish men, for example, would be enforceable if that discriminatory restriction could be justified. Nor would our proposal render arbitral awards unenforceable; that is not a remedy we propose.

4.49 A term requiring an arbitrator to hold a particular faith might be justifiable. This was the view of the Supreme Court in the case of *Hashwani v Jivraj*. We do not intend to upset the analysis of the Supreme Court in that case. Another example, where faith-based arbitration could be justified, might be the requirement to refer to arbitration before rabbis a dispute about the constitutional rules of a synagogue.[178]

Age discrimination

4.50 Tenth, questions were raised about age discrimination. For example, some clauses might require the arbitrator to have a certain number of years' experience. That will necessarily require the arbitrator to have a minimum age.

4.51 We do not propose to address age discrimination expressly. We can see that parties may wish to appoint an arbitrator with more rather than less knowledge or understanding. The difficulty is striking a balance which does not restrict future arbitrators from learning their craft. For example, every surgeon must operate for the first time, and a rule which required otherwise would soon see the extinction of surgeons. Nevertheless, we accept that an arbitration clause requiring an arbitrator to

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177 For further discussion of faith-based arbitration, see: R Sandberg and others, "Britain's religious tribunals: 'joint governance' in practice" (2012) 33(2) *Oxford Journal of Legal Studies* 263.

178 For example, see: *Mond & Mond v Berger* [2004] VSC 45.

have certain qualifications or experience is capable of being justified, and to this extent is therefore already catered for by our original proposal.

Positive discrimination

4.52 Eleventh, a question was raised about positive discrimination. The ICC International Court of Arbitration, for example, referenced a practice of parties agreeing to appoint a woman arbitrator to a tribunal if the other two arbitrators on the tribunal were men.

4.53 We suggest that there is a difference between positive action, for example encouraging applications from under-represented groups, and positive discrimination, such as treating applicants from under-represented groups more favourably in a job interview. Positive action may be lawful, while positive discrimination usually falls foul of anti-discrimination laws.[179] That said, the Equality Act 2010 does permit some types of positive treatment.[180] We do not propose going further than the Equality Act 2010.

The New York Convention

4.54 Twelfth, some consultees said that they still had concerns about enforcement under the New York Convention. We identified those concerns above in paragraphs 4.12 to 4.14.

4.55 Some consultees made the following point: if a party is worried that invoking our proposal would hamper enforcement under the New York Convention, then they could choose not to invoke our proposed reform.

4.56 For example, X brings arbitral proceedings against Y. Naturally, X wants an award enforceable abroad. Y makes a discriminatory appointment. X has a choice. On the one hand, they might contest the discrimination, and end up with a tribunal composition different from that originally agreed, with possible consequences for enforcement under the New York Convention. On the other hand, if they are genuinely worried about enforcement abroad, then X can abide by Y's appointment. After all, even under that appointment the arbitrator must still be fair and impartial.

Cross-referencing the Equality Act 2010

4.57 Thirteenth, and finally, it was objected that our proposal required a user to cross-reference another statute, namely the Equality Act 2010. And there were various criticisms of the language of our proposal, which language was drawn from that Act.

4.58 Specific objections included the following. It was questioned whether, in our original proposal, it was necessary to provide that an arbitrator's appointment should not be challengeable on the basis of the arbitrator's protected characteristic(s), given that we also proposed that any agreement as to the arbitrator's protected characteristic(s) should be unenforceable. The definition of "protected characteristics" in the Equality Act 2010 was said to be out of date. The phrase "proportionate means of achieving a legitimate aim" was said to be too vague. It was questioned whether there could be any other legitimate aim than the fair resolution of disputes by an impartial tribunal

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179 *Smith & Wood's Employment Law* (15th ed 2021) § 4.2.8.

180 Equality Act 2010, ss 158, 159.

without unnecessary delay or expense, given that arbitration was the context.[181] It was questioned whether limiting any justification to the context of "that" arbitration was too narrow. This is particularly so, it was said, if an arbitration clause specifies certain requirements of an arbitrator in advance, when it will not be known until a dispute has arisen precisely what "that" dispute will involve. It was suggested that the term "invalid" be used instead of "unenforceable" to align with the New York Convention.

4.59 We have some sympathy with the suggestion that the Arbitration Act 1996 might contain something simple and bespoke on this topic. However, discrimination is wider than arbitration. It is a topic addressed more generally in the Equality Act 2010. The language of that Act has been chosen by the legislature, with further commentary in the case law. If we are seeking the same goals as the Equality Act 2010 – such as the prohibition of direct discrimination – then we ought to signal that by using the same language.

SUMMARY AND QUESTIONS

4.60 We retain from our first consultation paper the proposal that a term be unenforceable which requires an arbitrator to be appointed by reference to a protected characteristic, unless that requirement can be justified as a proportionate means of achieving a legitimate aim.

4.61 We now propose that it should always be deemed justified to require the appointment of an arbitrator who has a different nationality from the arbitral parties. This is a common practice internationally which assists in the appearance of impartiality. To be clear, we are not proposing that an arbitrator must always have a different nationality from the parties, only that it is justified to require this. We ask consultees whether they agree with this proposal.

Consultation Question 4.

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

4.63 Next, we acknowledge the point made by some consultees that the bigger problem is discriminatory appointments rather than discriminatory terms. It may be best to address this head on by prohibiting discrimination generally in an arbitration context. We ask consultees whether they agree.

[181] See: Arbitration Act 1996, s 1(a).

Consultation Question 5.

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

4.65 If discrimination is generally prohibited, this raises the question of what the remedies should be. We noted above how, if an arbitrator were to act in a discriminatory manner, there are already remedies available, such as removal of the arbitrator under section 24 of the Arbitration Act 1996, and challenge to an award for serious irregularity under section 68.

4.66 We also noted above how other remedies are provided in the Equality Act 2010: the employment tribunal has jurisdiction to hear any complaint, and the remedies include a declaration of the complainant's rights, compensation, and a recommendation of how the respondent should act.

4.67 We ask consultees what remedies they think should be available for discrimination in the context of arbitration.

Consultation Question 6.

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

Chapter 5: Consultation Questions

Consultation Question 1.

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

Paragraph 2.78

Consultation Question 2.

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

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

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

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

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

Do you agree?

Paragraph 3.128

Consultation Question 3.

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

Paragraph 3.129

Consultation Question 4.

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

Paragraph 4.62

Consultation Question 5.

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

Paragraph 4.64

Consultation Question 6.

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

Paragraph 4.68

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: List of consultees

Following the publication of our first consultation paper –

We gratefully received responses from the following consultees. We will publish these responses along with our final report.

Edward Album

Allen & Overy LLP

Clare Ambrose

Arbitration Committee of the City of London Law Society

Association of Consumer Support Organisations (ACSO)

Quentin Bargate, on behalf of Bargate Murray Ltd (Solicitors)

Imran Benson

Daniel Bovensiepen

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

British Coffee Association

British Insurance Law Association

Bryan Cave Leighton Paisner LLP

Andrew Burr

Mark Campbell

Guido Carducci

Central Association of Agricultural Valuers

Centre of Construction Law & Dispute Resolution, The Dickson Poon School of Law, King's College London

Yui Kei Chan

Chartered Institute of Arbitrators

Prof Graham Frank Chase

Cyril Chern

Claimspace Limited

James Clanchy

Cleary Gottlieb Steen & Hamilton LLP

Clifford Chance LLP

Commercial Bar Association (Combar)

Rhodri Davies KC

Lisa Dubot, Raid Abu-Manneh, and Rachael O'Grady

Stuart Dutson

Federation of Commodity Associations: GAFTA, Global Pulses Confederation, Federation of Cocoa Commerce, FOSFA, The Rubber Trade Association of Europe, The Sugar Association of London, The Refined Sugar Association

Guy Fetherstonhaugh KC and Martin Dray, on behalf of Falcon Chambers

Fieldfisher LLP

Louis Flannery KC

Sir Julian Flaux, Mrs Justice O'Farrell DBE, Mr Justice Foxton, and Mr Justice Henshaw, on behalf of the judges of the Business & Property Courts

FOSFA International (the Federation of Oils, Seeds and Fats Associations)

Robert Gay

Matthew Gearing KC, Jacomijn van Haersolte-van Hof, Paula Hodges KC for the London Court of International Arbitration

General Council of the Bar of England and Wales

Ben Giaretta

Gowling WLG (UK) LLP

Grain and Feed Trade Association (GAFTA)

Greenberg Traurig LLP

Jan Grimshaw

Dr Uglješa Grušić

John Habergham

Lord Hamblen and Lord Leggatt

Geoffrey M Beresford Hartwell

Haynes and Boone CDG, LLP

Hilary Heilbron KC

Herbert Smith Freehills LLP

Andrew Holden, James Bradford, James Kane, for the Chancery Bar Association

Holman Fenwick Willan LLP

Dayan Yehonoson D Hool, on behalf of the Beth Din of the Federation of Synagogues

Dr Sara Hourani

Michael Howard KC

ICC International Court of Arbitration

ICC UK Arbitration & ADR Committee

Institute of Family Law Arbitrators

Emmanuel Thomas Mathai Kandamchira

Anthony Kennedy

Paul Key KC

Michael Kotrly

Martin Y C Kwan

Toby Landau KC

Louise Lanzkron and Nick Peacock

Dr Stephanie Law, Prof Andrea Lista, Dr Michail Risvas, Ece Selim Yetkin and Dr Johanna Hjalmarsson, of the University of Southampton Law School

Law Society of England and Wales

Michael Lever, on behalf of The Rent Review Specialist

Linklaters LLP

Lloyd's Market Association

London Beth Din

London Maritime Arbitrators Association

Dr Paul MacMahon

Dr Aygun Mammadzada

Joseph Michael Matthews, also on behalf of Joseph M Matthews PA

Alex McIntosh and Chris Ward

Prof Alex Mills

Ethan Naish

Charles Oliver

Orrick, Herrington & Sutcliffe (UK) LLP

Ben Patten KC on behalf of Technology and Construction Bar Association (TECBAR)

Dr Manuel Penades

Pinsent Masons LLP

Rowan Planterose

Property Bar Association

Nigel Puddicombe

John Pugh-Smith

Thomas Raphael KC

Reed Smith LLP

Klaus Reichert SC

Dr Michael Reynolds

Royal Institution of Chartered Surveyors

Ian Salisbury

Adam Samuel

David Scorey KC, on behalf of ARIAS (UK), the Insurance and Reinsurance Arbitration Society

Audley Sheppard KC

Aditya Singh

Skadden, Arps, Slate, Meagher & Flom (UK) LLP

Matthew Skinner and Garreth Wong of Shearman & Sterling LLP

Spotlight on Corruption

Sugar Association of London, and the Refined Sugar Association

John Tackaberry KC, and on behalf of 39 Essex Chambers, and the Society of Construction Law, and the Society of Construction Arbitrators

Simon Tolson

Travers Smith LLP

University of Aberdeen School of Law

Gilberto José Vaz, on behalf of Gilberto José Vaz Advogados

Glenda Vencatachellum

Rebecca Warder

Allan W Wood

Timothy Young KC

We also received two anonymous responses.

We heard from consultees at events kindly hosted by the following:

All Party Parliamentary Group on ADR

Ankura Consulting Group LLC

Arbitration Support and Know-How (ASK) Group

Brick Court Chambers

British Institute of International and Comparative Law / Debevoise & Plimpton LLP

Bryan Cave Leighton Paisner LLP

Chartered Institute of Arbitrators

Mr Justice Foxton and members of HM Judiciary

International Arbitration Club

International Chamber of Commerce

London Shipping Law Centre

Society of Construction Arbitrators

Université Paris-Panthéon-Assas

We had discussions or correspondence with the following:

Freshfields Bruckhaus Deringer LLP

Jacob Grierson

Baron Hoffmann

Prof Julian Lew KC

London Beth Din

London Maritime Arbitrators Association

Poonam Melwani KC

Salim Moollan KC

Prof Russell Sandberg

Slaughter and May

Swithun Still

Melanie Willems

Withers LLP

Antony Woodhouse

We have read with interest the following articles and commentary written about our first consultation paper:

"Law Commission Releases Preliminary Findings on EAA 1996" (2022) *CIArb News*

"Law Commission consults on arbitration reforms" (2022) *Construction Law*

"Reforming the Arbitration Act 1996" (2022) *New Law Journal*[182]

"New reforms to ensure UK retains position as leader in international arbitration" (2022) *Politics Home*[183]

Ambrose, C, "Review of the Arbitration Act 1996: Responses to the Law Commission Consultation Paper" (2022) 88(4) *Arbitration* 494

Ames, J, "Lawyers back arbitration act update to boost City" (2022) *The Times*

Baldwin, A, "Law agency says arbitration can't always be confidential" (2022) *Law 360*

Ballantyne, J, "Reforms proposed for England's 1996 Act" (2022) *Global Arbitration Review*

Bell, G, E Crowther and C Richards, "Arbitration Act – consultation launched on proposed reforms" (2022) *Mondaq*

Berard, M, and B Barrat, "Law Commission of England and Wales proposes refresh rather than overhaul of Arbitration Act 1996" (2022) *The International Law Office*

Brekoulakis, S, "Review of the Arbitration Act 1996: Responses to the Law Commission Consultation Paper" (2022) 88(4) *Arbitration* 475

Chong, P, J Carter, E Thomas and B Fletcher, "The Law Commission's review of the Arbitration Act 1996 – polishing 'a gold standard'?" (2022) *Lexology*

Drummond, I, "Law Commission consultation provides opportunity to shape future practice" (2022) *Lexology*

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Hilborne, N, “Law Commission seeks ban on discrimination in appointing arbitrators” (2022) *Legal Futures*[187]

Hodges, P, C Tevendale, C Parker KC, A Cannon, E Kantor and V Naish, “Fine-tuning the English Arbitration Act: reactions to the Law Commission’s consultation paper” (2022) *Lexology*

Horvath-Franco, D, and D Reed, “Consultation on changes to the 1996 Arbitration Act: what you need to know” (2022) *The Global Legal Post*[188]

Hyde, J, “Lawyers pleased with proposals to ‘evolve’ arbitration rules” (2022) *The Law Society Gazette*[189]

Leonard, E, and A Ehtash, “The future of arbitration in construction” (2022) *The Construction Index*[190]

Malek, A, C Harris, P Bonner Hughes, “Review of the Arbitration Act 1996: Responses to the Law Commission Consultation Paper” (2022) 88(4) *Arbitration* 516

Miles, J, D Newbound, P Rosher and B Rutkowski, “A short guide to the Law Commission of England and Wales’ consultation on the Arbitration Act 1996” (2023) *Lexology*

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Woods, L, and B Lindsay, “The Law Commission’s proposed revisions to the Arbitration Act 1996” (2022) *Lexology*

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