



**Law
Commission**
Reforming the law

Review of the Arbitration Act 1996

Summary of final report



INTRODUCTION

The Law Commission

- 1.1 The Law Commission is the statutory independent body created by the Law Commissions Act 1965 to keep the law of England and Wales under review and to recommend reform where it is needed.

About arbitration

- 1.2 Arbitration is a form of dispute resolution. If two or more parties have a dispute, which they cannot resolve themselves, instead of going to court, they might appoint a third person as an arbitrator to resolve the dispute for them. They might appoint a panel of arbitrators to act as an arbitral tribunal.
- 1.3 Arbitration happens in a wide range of settings, both domestic and international, from family law and rent reviews, through commodity trades and shipping, to international commercial contracts and investor claims against states. In England and Wales, arbitration is regulated by the Arbitration Act 1996.

Procedural history of this review

- 1.4 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. We began our review in January 2022.
- 1.5 We published two consultation papers. These analysed the current law, reached provisional conclusions, and made provisional proposals for reform on a shortlist of topics. Throughout each paper, we asked questions which sought the views of consultees.
- 1.6 We published our first consultation paper in September 2022, and our second consultation paper in March 2023. We received responses from consultees who ranged from individual practitioners, through academics and specialist bodies, to major domestic and international firms and institutions, some representing thousands of people. We have published those responses.
- 1.7 We have now published our final report. It contains our final conclusions and recommendations. It is accompanied by a draft Bill which contains proposed amendments to the Arbitration Act to give effect to our recommendations. This paper summarises the contents of our final report. All of the publications referred to above can be read in full at:

<https://www.lawcom.gov.uk/project/review-of-the-arbitration-act-1996/>

Topics of review

- 1.8 Our final report discusses the following topics:
 - (1) confidentiality in arbitration proceedings;
 - (2) arbitrator independence and disclosure;

- (3) discrimination in arbitration proceedings;
- (4) arbitrator immunity;
- (5) summary disposal of disputes which obviously lack merit;
- (6) court powers under section 44 of the Act in support of arbitral proceedings;
- (7) emergency arbitrators;
- (8) challenges to an arbitral award under section 67 on the basis that the tribunal lacked jurisdiction;
- (9) appeals on a point of law; and
- (10) the governing law of the arbitration agreement.

1.9 Our approach to these topics is summarised in this paper.

1.10 Our final report also considers a number of topics of minor reform concerning: section 7 (separability of arbitration agreement); appeals under section 9 (stay of legal proceedings); section 32 (determination of preliminary point of jurisdiction) and section 45 (determination of preliminary point of law); the compatibility of the Act with modern technology; section 39 (power to make provisional awards); when time runs under section 70 (challenge or appeal: supplementary provisions); and sections 85 to 88 (domestic arbitration agreements).

1.11 We received many other suggestions for reform from consultees. We considered them all, but only took forward those topics listed above for full review and consultation. An initial list of other suggestions can be found in Chapter 11 of our first consultation paper. A further list can be found in Appendix 3 of our final report.

Summary of recommendations

1.12 By way of a broad overview, we recommend the following major initiatives:

- (1) codification of the statutory duty of disclosure;
- (2) strengthening of arbitrator immunity around resignation and applications for removal;
- (3) introduction of a power to make an arbitral award on a summary basis;
- (4) an improved framework for challenges to awards under section 67 on the basis that the tribunal lacked jurisdiction;
- (5) a new rule on the governing law of an arbitration agreement; and
- (6) clarification of court powers in support of arbitral proceedings, and in support of emergency arbitrators.

1.13 This paper summarises each of our principal topics of review in turn. Further detail can be found in the full report.

- 1.14 We also recommend the following minor corrections: making appeals available from an application to stay legal proceedings; simplifying preliminary applications to court on jurisdiction and points of law; clarifying time limits for challenging awards; and repealing unused provisions on domestic arbitration agreements. For reasons of space, these minor reforms are not further discussed in this paper. Readers are referred to Chapter 11 of our final report.

Next steps

- 1.15 We present our recommendations for reform, and draft Bill, to government. It is for government to decide whether to implement some or any of our recommendations and to decide whether the Bill should be introduced into parliament.

CONFIDENTIALITY

- 1.16 In broad terms, confidentiality is about the “secrecy” of information, and who has access to it, and for what purposes.
- 1.17 A duty of confidentiality can arise in arbitral proceedings in various ways, including in contract, tort, and equity. Arbitral rules often have bespoke provisions on confidentiality, and arbitral tribunals can make rulings on confidentiality. In these ways, a duty of confidentiality might attach, for example, to things said in an arbitral hearing, or documents produced to support a claim, or to the contents of the arbitral award. Confidentiality would then restrict who could repeat those things, and to whom, and why.
- 1.18 The Arbitration Act 1996 does not have any provisions on confidentiality. We considered whether a statutory rule on confidentiality should be introduced, potentially in the form of a default rule of confidentiality, with a list of exceptions. We ultimately concluded that it should not. We do not therefore recommend any reform on this point. This conclusion was supported by the majority of consultees. Our principal reasons are as follows.
- 1.19 Confidentiality is important to many users of arbitration. If parties agree that their arbitration is confidential, that already will provide the maximum protection available under the law of England and Wales (without need for statutory intervention).
- 1.20 We do not think that the Act should provide a default rule of confidentiality. We do not think that one size fits all: different default rules can apply in different arbitral contexts. For example, in some types of arbitration, the default already favours transparency, such as investor-state arbitrations. Elsewhere, there is a trend towards transparency, at least in some respects, such as the publication of awards. And there is further debate to be had in other contexts, for example with disputes concerning some public procurement contracts, about the extent to which hearings should be open to public scrutiny.
- 1.21 We note that arbitral rules reveal a wide variety of approaches to confidentiality, and that foreign legislation does not speak with one voice. Meanwhile, the law of England and Wales does recognise that confidentiality can attach to arbitral proceedings – but this can arise in a number of ways, each of which has its own body of rules. We do not think that a singular statutory rule would sufficiently reflect this variety.

- 1.22 Also, any rule would necessarily be subject to exceptions. The case law has identified a list of exceptions, such as where there is consent to disclosure, or where the interests of justice require it. That list is not exhaustive, and the law is still developing. This does not lend itself to statutory codification.
- 1.23 Overall, we do not think that a statutory rule on confidentiality would be sufficiently comprehensive, nuanced or future-proof. We think that the current approach works well, and that the development of the law of confidentiality is better left to the courts, alongside the bespoke practices of arbitral rules.

ARBITRATOR INDEPENDENCE AND DISCLOSURE

- 1.24 In broad terms, impartiality is the idea that arbitrators are neutral as between the arbitrating parties, and independence is the idea that arbitrators have no connection to the arbitrating parties or to the dispute. Disclosure is the idea that arbitrators should reveal what connections they do have, if those connections might go to the question of impartiality and independence.
- 1.25 Section 33 of the Arbitration Act 1996 already contains an express duty of impartiality. Section 24 provides that an arbitrator can be removed by the court if there are justifiable doubts as to their impartiality. We considered whether arbitrators should also be subject to statutory duties of independence and disclosure.

Independence

- 1.26 We do not recommend any reform to stipulate a statutory duty of independence. The majority of consultees agreed with this conclusion. Our principal reasons are as follows.
- 1.27 We think that, if the arbitrator is impartial, and is seen to be impartial, it should not matter whether they have a connection to the parties before them. Of course, some connections are so close that there is at least the risk of unconscious or apparent bias. But other connections might be so trivial or tenuous that no-one could reasonably consider the arbitrator's impartiality to be in question. What matters is not the connection but its effect on impartiality and apparent bias.
- 1.28 We think that complete independence may be impossible to achieve, given the limited number of arbitrators with expertise in certain sectors, and the inevitable encounters with others as those professionals develop their experience over the years. We note that some arbitration clauses explicitly require extensive expertise in a particular sector, particularly in maritime, commodity, insurance or sports arbitration.
- 1.29 More generally, arbitrators with desirable experience will inevitably have encountered other professionals and actors in their field. Perfect independence is not possible. Again, what matters is that arbitrators are open about relevant connections, and that parties are reassured that their tribunal is impartial.

Disclosure

- 1.30 We recommend codifying the common law, which provides that arbitrators have a continuing duty to disclose any circumstances which might reasonably give rise to

justifiable doubts as to their impartiality. This was supported by the majority of consultees. Our principal reasons are as follows.

- 1.31 We consider it beyond doubt that, as a matter of common law, there is a continuing duty on arbitrators to disclose any circumstances which might reasonably give rise to justifiable doubts as to their impartiality. This was the test formulated by the Supreme Court in *Halliburton v Chubb* in 2020.
- 1.32 The Supreme Court said that this duty was necessary in the public interest to uphold the integrity of arbitration as a system of dispute resolution. We agree. An arbitrator's readiness to disclose any connections they might have is itself a demonstration of their impartiality.
- 1.33 We think it appropriate that such an important duty be recognised in the Arbitration Act 1996. This would be in line with international best practice. A concise statutory rule is more accessible to users of the law than the current case law. Separating out the duty of disclosure from the duty of impartiality allows the duty of disclosure to extend to pre-appointment discussions.
- 1.34 We do not think that codification will remove the flexibility offered by the common law. Our recommendation only pertains to codifying the general principle, which itself is certain. We do not otherwise seek to prescribe what needs to be disclosed. Such details will vary from case to case, and can be developed through case law, or addressed in arbitral rules.
- 1.35 For example, *Halliburton v Chubb* only dealt with a requirement to disclose the fact of overlapping appointments, and even then the court noted that, in some sectors like maritime, sports, commodity, and reinsurance, it might well be established custom and practice that overlapping appointments do not need to be disclosed.

State of knowledge

- 1.36 We further recommend that an arbitrator should be under a duty to disclose any circumstances of which they are aware or ought reasonably to be aware. Our principal reasons are as follows.
- 1.37 Case law has left unresolved the question of whether an arbitrator's duty of disclosure is based only upon their actual knowledge or also upon what they ought reasonably to know. Having reviewed the matter and consulted upon it, we think it appropriate for us to resolve this question to produce certainty and clarity in the law.
- 1.38 We recommend that the duty of disclosure should be based on what the arbitrator ought reasonably to know. This standard of reasonableness aligns with the usual standard expected of similar professionals. It is a higher standard than actual knowledge, which is appropriate given the importance of disclosure to maintaining (the appearance of) impartiality in arbitrators.
- 1.39 What an arbitrator ought reasonably to know will vary from case to case. Sometimes it might be necessary for the arbitrator to make reasonable inquiries, but sometimes this will not be necessary. Put simply, what an arbitrator ought reasonably to know will vary from case to case, and no doubt from sector to sector.

1.40 We think that our recommendation strikes the right balance between resolving the matter at the level of principle, while couching it in terms of sufficient generality that there is room for the courts, or arbitral rules, to adopt nuanced requirements in different situations.

DISCRIMINATION

1.41 In the 2011 case of *Hashwani v Jivraj*, the Supreme Court held that discrimination law then in force did not apply to the appointment of arbitrators, because arbitrators are not employees of the arbitral parties, nor in a subordinate position to the arbitral parties.

1.42 We have considered whether the Arbitration Act should prohibit discrimination in the appointment of arbitrators. We also considered whether discrimination should be generally prohibited in the context of arbitration, and if so, what the remedies should be where discrimination occurs. Ultimately, however, we do not recommend any reform in this context. Our principal reasons are as follows.

1.43 In our first consultation paper, we proposed that discriminatory terms for the appointment of arbitrators in an arbitration agreement should be unenforceable. In response, some consultees said that there should be an exception for an established practice which sometimes requires an arbitrator to have a neutral nationality different from the parties (to secure the appearance of impartiality).

1.44 Further in response, some consultees said that discriminatory terms in arbitration agreements were a rarity, so that our proposal would have little impact on increasing diversity of arbitral appointments. We accept this argument. They said that any proposal for reform needed to encompass discrimination in arbitration proceedings more generally.

1.45 In light of those responses, in our second consultation paper, we proposed an exception for terms which required an arbitrator to have a neutral nationality. We also asked whether discrimination in arbitration should be prohibited in general, and if so, what the remedies might be.

1.46 In response, other consultees questioned the desirability or practicality of an exception for neutral nationalities. They said that such a rule might give the impression that a non-neutral nationality is not impartial, which could be problematic for domestic arbitrations, and for international arbitrations with a small pool of specialist arbitrators with a limited range of nationalities. They also said that there could be satellite litigation about what falls within the exception, that is, whether nationality should be determined by passport or residence or some other affiliation.

1.47 The majority of consultees said that existing remedies were sufficient. Many said that they were against a general prohibition of discrimination, not in principle, but for the negative practical consequences which might result. Their key concern was to avoid giving disingenuous parties the opportunity cynically to leverage a law prohibiting discrimination to avoid their obligations under a sound arbitral award.

1.48 Our review has revealed that the law is already concerned with discrimination in arbitration proceedings in several important ways already. For example, in terms of

discrimination by arbitrators, they are under a duty to act fairly and impartially. In our view, that means acting without discrimination. If there are justifiable doubts as to an arbitrator's impartiality, they can be removed. If an arbitrator adopts processes which are unfair, causing substantial injustice, then any resulting award can be challenged for serious irregularity.

- 1.49 Beyond discrimination by arbitrators, various prohibitions on discrimination imposed by the Equality Act 2010 may apply to arbitral institutions. This could include the following contexts: who can become a member; what facilities are offered to members (like being nominated for arbitral appointments); and what services are offered to the public (like making arbitral appointments).
- 1.50 Further, a term of a contract – including an arbitration agreement – is unenforceable in so far as it promotes treatment that is prohibited by the Equality Act, or seeks to derogate from the Act. And to the extent that barristers and solicitors in England and Wales are involved in arbitration, they are prohibited from discriminating, not least by their professional codes of conduct, breach of which can lead to disciplinary consequences.
- 1.51 Those are the ways in which the law is already concerned with discrimination in arbitration proceedings. We recognise that there is still a gap in that there is no prohibition of discrimination by the parties in whom they appoint. However, having considered consultee concerns, we have reluctantly concluded that it could cause more problems than it solves were we to recommend legislating so as to prohibit discrimination by the parties in the appointment of arbitrators. This is for a number of reasons, including the following.
- 1.52 If an arbitrator were appointed on a discriminatory basis, other overlooked arbitrators are unlikely to complain: they are unlikely to know, and are unlikely to prove that but for the discrimination they might probably have been appointed instead. Might the other arbitral party complain? The appointed arbitrator might otherwise be conspicuously impartial and competent to decide the dispute, in which case they could not be removed for bias, and it seems wrong to set aside an arbitral award which is otherwise sound.
- 1.53 We do not wish to create the risk that a disingenuous arbitral party might challenge an appointment, or challenge an award, on the basis that the appointment was discriminatory, only so as to delay the arbitration, or avoid an adverse award. That arbitral party would be invoking discrimination, not out of genuine concern to improve the diversity of arbitral appointments, but to hamper the arbitration itself.
- 1.54 Even if the appointed arbitrator were replaced, they might be replaced by someone with the same protected characteristic. For example, if the arbitrator initially appointed was a man, his replacement will not necessarily be a woman; a non-discriminatory appointment could result in another man. It is better that a man is appointed after a fair procedure rather than a discriminatory one, but it diminishes the impact of any reform if the end result is no improvement in the diversity of arbitral appointments.
- 1.55 We think that it does no good to introduce a well-meaning law to improve arbitration, by prohibiting discrimination in the appointment of arbitrators by private parties, which has the effect of worsening arbitration, by encouraging satellite litigation or challenges

to awards. It diminishes the moral force of anti-discrimination campaigning if discrimination can be used as a cover for disingenuous complaint by arbitral parties seeking to avoid arbitration or an adverse award. Worse still would be any reform to the Arbitration Act that risks creating a regime which conflicts with the Equality Act, without even achieving a guarantee of more diverse appointments.

- 1.56 We do not recommend any further legislation within the Arbitration Act to prohibit discrimination, because we think that this will not improve diversity of arbitral appointments, but could well lead to unwarranted satellite litigation and challenges to awards.

ARBITRATOR IMMUNITY

- 1.57 Ordinarily, if a person has contracted to perform a task, that person can incur liability for breaching the contract, for example, by not performing all of that task, or by performing it with less than reasonable care. Arbitrator immunity reflects the idea that an arbitrator should nevertheless not incur liability if their performance as an arbitrator is alleged to be below standard.
- 1.58 Arbitrator immunity is important for two reasons. First, it supports an arbitrator to make robust and impartial decisions without fear that a party will express their disappointment by suing the arbitrator. Second, it supports the finality of the dispute resolution process by preventing a party who is disappointed with losing the arbitration from bringing further proceedings against the arbitrator.
- 1.59 Section 29 of the Arbitration Act 1996 provides that an arbitrator is not liable for anything done or omitted in the discharge or purported discharge of their functions as arbitrator unless the act or omission is shown to have been in bad faith.
- 1.60 There are still ways of dealing with a recalcitrant arbitrator. For example, the parties can revoke the arbitrator's authority, or apply to court to remove the arbitrator. In both cases, the arbitrator may lose their entitlement to fees and expenses.
- 1.61 Despite section 29, immunity can be lost in two overlapping ways. First, if an arbitrator resigns, they risk incurring liability. Second, if an arbitrator does not resign, a party might apply to court for the arbitrator's removal. A line of case law suggests that an arbitrator can incur liability for the costs of that application. We discuss resignation and removal in turn.

Resignation

- 1.62 The immunity in section 29 does not extend to any liability incurred by reason of an arbitrator's resignation. This could include liability to the arbitral parties for losses such as extra legal fees incurred as a result of appointing a replacement arbitrator who might also need to revisit any earlier arbitral processes.
- 1.63 An arbitrator who resigns can apply to court, for the grant of relief from any liability, and for an order in respect of their fees and expenses. The court may do so if satisfied that the resignation was reasonable. There is no case law on when a resignation is reasonable. It may be unreasonable to resign simply because one party has avowed a loss of faith in the arbitrator.

- 1.64 We recommend that the law should be reformed to provide that an arbitrator incurs no liability for resignation unless the resignation is shown to be unreasonable. This is supported by the majority of consultees. Our principal reasons are as follows.
- 1.65 On the one hand, incurring liability for resignation may deter appropriate resignation. An example might be the need to comply with sanctions following the outbreak of war. The arbitrator can apply to court for immunity, but that incurs cost, and the London courts might not be accessible to non-lawyer or international arbitrators. On the other hand, inappropriate resignations should be discouraged because of the delay and cost they can cause to the arbitral parties.
- 1.66 We think that it strikes the right balance to have liability for resignations, but only if the resignation is unreasonable, and with the burden of showing unreasonableness on a complainant. We do not propose a list of when resignation might be unreasonable; we think that this will vary according to the circumstances.

Removal

- 1.67 Arbitral parties can revoke the authority of an arbitrator. If one party refuses to revoke an arbitrator's authority, the other party can apply to court under section 24 of the 1996 Act for the court to remove an arbitrator, for example on the ground that there are justifiable doubts as to the arbitrator's impartiality. The arbitrator is joined as a party to that application. A line of cases suggests that the arbitrator might incur personal liability for the costs of that application.
- 1.68 We recommend that an arbitrator should not incur costs liability in respect of an application for their removal under section 24 unless the arbitrator has acted in bad faith. This is supported by the majority of consultees. Our principal reasons are as follows.
- 1.69 We think that liability for costs is contrary to the intention of the Act: when an arbitrator is removed, the Act talks about the arbitrator's entitlement to fees, but says nothing about further liability. We also think that it risks encouraging collateral challenges to remove arbitrators, by parties disappointed with an arbitrator's ruling. It risks undermining the neutrality of an arbitrator who is cowed into complying with a party's demands for fear that a contrary stance might lead to court and personal liability for costs. Those costs can be significant, and we have heard from consultees that insurance against this risk is not necessarily always available.
- 1.70 We think that immunity provisions in the Act should align wherever possible. The limit of immunity under section 29 is bad faith; the limit of immunity for resignation is unreasonableness. We think that the better analogy here is with immunity under section 29 rather than with resignation. Resignation is of course concerned with an arbitrator ceasing to act. An application under section 24 presupposes that the arbitrator has not resigned but is willing to continue to act. For these reasons, we think that immunity for costs liability under section 24 should be lost if the arbitrator has acted in bad faith.

SUMMARY DISPOSAL

- 1.71 In court proceedings, the court may decide a claim or issue without a trial. This is called summary judgment. The court may give summary judgment on an issue when it considers that a party has no real prospect of succeeding on that issue, and there is no other compelling reason why the issue should be disposed of at a trial. This saves time and costs. Such summary disposal avoids invoking every procedural step otherwise available in a dispute process, when a full procedure simply would not improve a party's weak prospects of success on an issue.
- 1.72 The Arbitration Act 1996 does not contain explicit provisions allowing for summary disposal in the context of arbitration. Nevertheless, arbitrators probably have an implicit power to use summary disposal. After all, section 33 provides that arbitrators are under a duty to adopt procedures which avoid unnecessary delay and expense. And it is for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter.
- 1.73 However, arbitrators are also under a duty to give each party a reasonable opportunity to put their case (section 33). If arbitrators fail to do so, their award can be challenged before the courts in England and Wales. Recognition and enforcement of the award can also be refused by foreign courts. We heard from stakeholders that this can lead to "due process paranoia", discouraging arbitrators from using summary disposal.
- 1.74 We recommend that the Arbitration Act 1996 should provide that, subject to the agreement of the parties, an arbitral tribunal may, on the application of a party, issue an award on a summary basis. We recommend that the procedure to be adopted should be a matter for the tribunal, having consulted with the parties. And we recommend that a tribunal may make an award in relation to an issue on a summary basis only where it considers that a party has no real prospect of succeeding on that issue. The majority of consultees agreed with these proposals. Our principal reasons are as follows.
- 1.75 Summary disposal has the potential to resolve some disputes more efficiently. We think that, if the Act expressly provides for summary disposal, this might reassure arbitrators, and foreign courts asked to enforce arbitral awards made in England and Wales, as to the propriety of its use, while providing a framework to ensure that the process for summary disposal is fair.
- 1.76 We think that a power of summary disposal should be subject to the contrary agreement of the parties, to preserve party autonomy. Similarly, we think that summary disposal should be available only on the application of a party (rather than at an arbitrator's instigation).
- 1.77 We note that it can be good practice generally for a tribunal to consult with the parties on *any* procedure it adopts. But we think that it is especially relevant, in the particular context of summary disposal, that the tribunal consults with the parties, to ensure that the parties feel that they have had a reasonable opportunity to put their case. This is all the more important when summary disposal can involve expedited procedures.
- 1.78 Fairness is achieved by the combination of adopting a suitable procedure to determine any application for summary disposal, and by setting a suitable threshold for any

summary disposal. A respondent to an application for summary disposal might have an abbreviated opportunity for argument, but they are not arguing their case as if the application were a truncated trial; rather, they are arguing that their case has enough merit to proceed to a fuller consideration. The threshold for summary disposal should be set at a level which acknowledges the early stage of proceedings and the potentially abbreviated nature of the evidence and arguments so far.

- 1.79 The parties are free to agree a threshold for summary disposal (or to disapply the tribunal's power to issue an award at all on a summary basis). We are concerned with setting a default position. In which case, we think it defensible that the Act, which would be applied by domestic courts, adopts a threshold for summary disposal carefully developed in domestic law. Thus we prefer the threshold "no real prospect of success", which has long been used fairly and successfully by the courts of England and Wales.
- 1.80 It is worth emphasising that, just because an arbitral party has applied for summary disposal, it does not mean that the arbitrator must accede to that request. Summary disposal should be used for the fair and efficient resolution of disputes. It should not become an additional interim procedural step invoked disingenuously, for example, by one party in order to delay the other party's progression to trial.

COURT POWERS IN SUPPORT OF ARBITRAL PROCEEDINGS

- 1.81 Section 44 provides that the court has power to make orders in support of arbitral proceedings. The matters which the court can make orders about are listed in section 44(2): taking of witness evidence, preservation of evidence, orders relating to relevant property, sale of goods, interim injunctions, and the appointment of a receiver. If a party wishes to apply to the court under section 44, the party must satisfy the further requirements of sections 44(3) to (5).
- 1.82 In our report, we discuss various issues relating to section 44.

Third parties

- 1.83 Orders under section 44 can be made against parties to arbitral proceedings. However, there is currently uncertainty as to whether court orders under section 44 can be made against third parties (that is, those not party to the main proceedings). If such orders can be made against third parties, it appears that third parties have a curtailed right of appeal.
- 1.84 In our view, section 44 works as follows. For the matters listed in section 44(2) – for example, interim injunctions – whatever a court can do in domestic legal proceedings, it can do for domestic arbitral proceedings, and for foreign arbitral proceedings unless inappropriate. This is the combined effect of:
- (1) section 2, which defines the scope of the Act, that is, how the provisions of the Act apply to those arbitrations seated in England and Wales and to those seated abroad; and
 - (2) section 44(1), which takes the law as it stands in domestic legal proceedings, for the matters listed in section 44(2), and applies it to arbitral proceedings.

- 1.85 In domestic legal proceedings, each of the matters listed in section 44(2) has its own body of case law. That case law often allows an order to be made against a third party – but each body of case law will have its own requirements to be met before an order can be made against a third party. It is not a case of one size fits all.
- 1.86 Section 44(1) imports the law as it stands in domestic legal proceedings. It does not create a new regime bespoke to arbitration. Nor does it insist that one size fits all. This means that orders under section 44 can be made against third parties – as long as the circumstances satisfy the requirements set down in the body of case law for the relevant matter.
- 1.87 Because of conflicting views in the case law, and continuing uncertainty, we recommend amending section 44 to confirm explicitly that orders thereunder can be made against third parties (as explained above). This is supported by the majority of consultees.

Rights of appeal

- 1.88 Section 44(7) limits the right of appeal against decisions under section 44. It requires the permission of the court appealed from. In contrast to the usual position in court proceedings, it does not also allow permission to be sought instead from the court appealed to.
- 1.89 We think that such a restricted right of appeal might be appropriate where it is the arbitral parties who are seeking to appeal. This would return matters more quickly from the courts back to arbitration – which is where the arbitral parties agreed to resolve their disputes. However, where an order is made against a third party, we think that it might be unfair to cut down their usual rights of appeal, when they never agreed to limit dispute resolution to arbitration.
- 1.90 Accordingly, we recommend that the requirement for the court's consent to an appeal of a decision made under section 44 should not apply to third parties, who should have the usual rights of appeal. This too has the support of the majority of consultees.

Section 44(2)(a)

- 1.91 We also consider section 44(2)(a), which concerns the taking of the evidence of witnesses. We discuss whether the focus of this section should be clarified by legislative amendment to confirm that it relates to the taking of the evidence of witnesses by deposition only, thereby clearing up an apparent overlap with section 43. However, we do not recommend any reform, on the basis that the current drafting does not appear to be causing problems in practice, and amendment could risk negative consequences.

Section 44(5)

- 1.92 Section 44(5) provides that the court shall act only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively.
- 1.93 In our first consultation paper, we identified two potential issues with section 44(5). First, there was a perception, following the case of *Gerald Metals v Timis*, that section 44(5) precluded an arbitral party applying to court under section 44 where emergency

arbitrator provisions were available. Second, we questioned whether section 44(5) was redundant, in light of the requirements already set out in sections 44(3) and (4).

- 1.94 We conclude that *Gerald Metals* does not necessarily preclude an arbitral party applying to court under section 44, even where emergency arbitrator provisions are available. Rather, *Gerald Metals* acknowledges that even an emergency arbitrator might not be able to act effectively, thus fulfilling the requirements of section 44(5) in the usual way. We give the following examples: the timescale for the appointment of an emergency arbitrator might be too slow; or the arbitral party might need an order which binds third parties; or the order of an emergency arbitrator might have been ignored. There is nothing in the language of section 44(5) to say otherwise, and accordingly we see no grounds for amendment.
- 1.95 As for whether section 44(5) is redundant in light of the further requirements of section 44(3) and (4), the majority of consultees thought not. They tended to say that section 44(5) defined the relationship between the court and the tribunal, policing the line between the court supporting arbitral proceedings, which is acceptable, and the court interfering with or usurping the role of the tribunal, which would not be proper.
- 1.96 We accept the majority view of consultees on this point. We acknowledge that, whether or not section 44(5) adds significantly to the practical requirements of sections 44(3) to (4), it has value as a statement of principle that court intervention in arbitral proceedings should be less rather than more. Therefore, we do not recommend its repeal.

EMERGENCY ARBITRATORS

- 1.97 Institutional arbitral rules sometimes provide a regime for the appointment of emergency arbitrators. An emergency arbitrator is appointed on an interim basis, pending the constitution of the full arbitral tribunal, to make orders on urgent matters, for example for the preservation of evidence. Once constituted, the full tribunal can usually review the orders of the emergency arbitrator.
- 1.98 We considered three questions in relation to emergency arbitrators.
- 1.99 First, should the Act provide for a scheme of emergency arbitrators to be administered by the court? We do not recommend any such reform. We think that administering such a scheme would involve a level of direct management in the arbitral process not suited to the courts. We think that emergency arbitration is appropriate only where the parties have agreed rules for its administration. Most consultees agreed.
- 1.100 Second, should the Act apply generally to emergency arbitrators, so that reference to arbitrator or tribunal would include emergency arbitrator? We do not recommend any such reform. Again, the majority of consultees agreed. We think that various sections of the Act would not be suited to such a reading. As to whether some sections might be chosen selectively to apply to emergency arbitrators, there was no consensus among consultees about which sections might be chosen. Rather, we think it sufficient that emergency arbitrators be regulated by the rules for their administration agreed by the parties. Decisions by emergency arbitrators can be reviewed by the full tribunal once constituted – and the full tribunal are themselves governed by the provisions of the Act.

- 1.101 Third, should the Act support court enforcement of the orders of emergency arbitrators? We think that it should, and most consultees agreed. We considered two possible options for reform.
- 1.102 One option was a scheme whereby an emergency arbitrator might make an order which, if ignored, could lead to the emergency arbitrator making a peremptory order, which if still ignored might be enforced by the court. This would replicate the scheme already available for normal arbitrators.
- 1.103 The other option was to allow matters to be addressed under section 44. Under section 44(3), if the matter is urgent, and necessary for the preservation of evidence or assets, then an applicant can already apply to the court for an order. No reform is needed here; if an emergency arbitrator's order is ignored, that might well make the matter urgent. If the matter is not urgent, then the applicant can seek an order from the court under section 44(4), which currently requires the permission of the tribunal or the agreement of the other parties. We considered whether to amend section 44(4) to allow permission to be given by an emergency arbitrator as well. We said that an emergency arbitrator might be inclined to give permission precisely where their orders have been ignored.
- 1.104 Consultees were roughly split evenly between these two options. On reflection, we recommend that both of our proposed options be made available. After all, normal arbitrators have both pathways open to them. And this would give almost all consultees their preferred choice of pathway. We do not see any disadvantages in this approach.

SECTION 67 (CHALLENGING THE AWARD: SUBSTANTIVE JURISDICTION)

The current scheme

- 1.105 The substantive jurisdiction of an arbitral tribunal refers to 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.
- 1.106 If a party to arbitral proceedings disputes the jurisdiction of the tribunal, they can ask the court to determine the matter, under section 32 of the Arbitration Act 1996. But this requires the agreement of the other parties, or the permission of the tribunal. Alternatively, a person may seek a declaration or injunction from the court under section 72(1), but only if they take no part in the arbitral proceedings.
- 1.107 A party can also object to the tribunal that it lacks jurisdiction. Unless otherwise agreed by the parties, the tribunal has competence to rule on its own jurisdiction, under section 30. This is usually called competence to rule on its own competence, which is abbreviated to competence-competence.
- 1.108 In response to an objection, a tribunal can rule in an award dealing solely with jurisdiction, or it can deal with jurisdiction as part of an award which also deals with the merits of the dispute. Either way, the ruling of the tribunal can be challenged before the court under section 67, on the basis that the tribunal did not have jurisdiction.

1.109 Where a party takes part in arbitral proceedings, and objects that the tribunal lacks substantive jurisdiction, they must make that objection promptly. Otherwise, under section 73(1), they lose the right to object. This is unless they show that they did not know, and could not with reasonable diligence have discovered, the grounds for the objection.

Review or rehearing

1.110 In *Dallah v Government of Pakistan*, the Supreme Court said that any challenge before the court under section 67 is by way of a full rehearing. This is so, even if there was a full hearing on the matter before the tribunal.

1.111 We recommend that legislation confer the power to make rules of court to implement the following. 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 taken part in the arbitral proceedings we recommend that: the court will not entertain any new grounds of objection, or any new evidence, unless it could not with reasonable diligence have been put before the tribunal; and evidence will not be reheard, save in the interests of justice. Our principal reasons for this recommendation are as follows.

1.112 Consultees expressed strong views both for and against reform. Some consultees reported that there were opposing views within their own organisations. Nevertheless, there has been consistent support in favour of reform, by a two-thirds majority responding to our first consultation paper, and a three-quarters majority responding to our second consultation paper.

1.113 We think that a full rehearing has the potential to cause delay and increase costs through repetition. We also think that it raises a basic question of fairness. It allows a party to raise a jurisdiction challenge before the tribunal, and obtain an award which, if adverse, will usually set out the deficiencies in the evidence and argument. In light of that award, the losing party can seek to obtain new evidence, and develop their arguments, for another hearing before the court. At its most extreme, the hearing before the arbitral tribunal becomes a dress rehearsal; the arbitral award (by effect, not design) becomes a form of “coaching” for the losing party.

1.114 We think that our recommendation is consistent with the principle of competence-competence, and indeed gives it some substance. Our recommendation recognises, not simply that a tribunal might rule on its jurisdiction, and before a court does, but that there are reasons for allowing it to do so which entail a measure of practical regard to that ruling (that is, the arbitral ruling merits some consideration by the court). Specifically, the ruling is empowered by section 30 of the Act, and it is made after a fair process by impartial arbitrators chosen by the parties.

1.115 When it comes to challenging jurisdiction, there is a tension. On the one hand, one party says that they never agreed to arbitration, and so the tribunal’s ruling should have no weight. On the other hand, the other party says that they did agree to arbitration, and so the tribunal’s ruling should be final and binding. A full rehearing tilts the scales fully in favour of the first party. Our recommendation seeks a compromise: the court has the final say, but the hearing before the tribunal should be accorded

some weight – in particular, by requiring the objecting party to deploy its full evidence and arguments from the outset.

- 1.116 We recommend that reform here be effected through rules of court, rather than through legislation. Again, the majority of consultees agreed with this approach. We make this recommendation because we think that the language of the Act does not need amendment; it is already compatible with our approach, even if the court in *Dallah* went down a different interpretative route.
- 1.117 Also, we think that the proposed restrictions are largely procedural and a natural fit for the sort of prescriptions contained within court rules. Any party making an arbitration application to court must already consult and comply with rules of court. Also, the implementation of our recommendation through court rules is, in our view, a compromise as a “softer” type of reform, which might allow these changes to be amended (whether tightened or relaxed) should that prove necessary following sufficient experience of their implementation.

Consistency with section 103

- 1.118 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 which include that the arbitral tribunal lacked jurisdiction.
- 1.119 We do not think that any reform is needed in respect of section 103, even though we propose reform in respect of section 67. This conclusion is supported by the majority of consultees.
- 1.120 Our reasons are as follows. Section 103 gives effect to the New York Convention, and is concerned with challenges to foreign awards, whereas section 67 is concerned with challenges to awards seated in England and Wales. They are two different regimes. It is acceptable to make it arguably more attractive to seat arbitrations in England and Wales because our regime for challenging awards seated here is fairer or more efficient than the regime under the New York Convention. Indeed, our Act already departs from the language of the New York Convention when it comes to challenges to domestic awards. A broader approach to section 103 can also be justified to deal with the wider variety of contexts attendant upon in-coming foreign arbitral awards.

Consistency with section 32

- 1.121 Section 32 provides that a party can apply to the court for the court to make a preliminary determination as to the jurisdiction of the arbitral tribunal.
- 1.122 In our first consultation paper, we said that section 32 can be invoked by a party before the tribunal has ruled on its jurisdiction. To that extent, it presents a quick route to a definitive court decision. It also means that the hearing before the court will be the first hearing; there will be no concerns about unfair or wasteful repetition.
- 1.123 However, we suggested that there is some uncertainty over whether section 32 can be invoked after the tribunal has ruled on its jurisdiction. If there are objections about section 67 being a full rehearing, there is an obvious argument that those objections should apply equally to any second hearing under section 32.

- 1.124 Some consultees suggested that section 32 should only be available where the tribunal has not ruled on its jurisdiction, or that this is already the position on a better reading of the current law.
- 1.125 We are persuaded that section 32 should not allow a court hearing to follow a ruling by the tribunal after a contested hearing before the tribunal. If a tribunal has issued an award which rules on its jurisdiction, the proper route to challenge jurisdiction is via section 67. We see no need for an alternative or additional route via section 32. Rather, we think that the better role for section 32 is allowing direct access to the court, for the court to rule first on jurisdiction as a preliminary point. Thus, there would be two pathways: the tribunal can rule first, and then be challenged under section 67; or the court can rule directly under section 32.
- 1.126 This may be the position already on a better reading of the current law, but to put the matter beyond doubt we recommend that the Act be amended to confirm that section 32 is available only as an alternative to the tribunal ruling on its jurisdiction.

Remedies under section 67

- 1.127 We recommend that section 67 of the Arbitration Act 1996 be amended to provide the remedies of: declaring the award to be of no effect, in whole or in part; and remitting the award to the tribunal, in whole or in part, for reconsideration. We also recommend the proviso that the court must not exercise its power to set aside or to declare an award to be of no effect, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration.
- 1.128 Our reasons are as follows. Such reform would align the remedies available under section 67 with those available under section 68 (challenging an award for serious irregularity) and section 69 (appealing an award on a point of law). These additional remedies could be useful under section 67, just as they are useful under sections 68 and 69. Our recommended reform would give effect to the assumptions in the case law and literature about the current availability of such remedies under section 67. It would prevent any argument that different wording was deliberately chosen to procure different approaches across sections 67 to 69, when there is nothing in the reports which accompany the Arbitration Act 1996 to suggest as much. This recommendation has the support of the majority of consultees.

Costs

- 1.129 We recommend that the Arbitration Act 1996 be amended to provide explicitly that an arbitral tribunal is able to make an award of costs in consequence of a ruling by the tribunal or by the court that the tribunal has no substantive jurisdiction.
- 1.130 We think that this is probably the position already, but to put the matter beyond doubt we recommend a legislative change to make it explicit. We think it fair that a party who wrongly initiates arbitral proceedings ought to bear the cost. Most consultees agreed.

APPEAL ON A POINT OF LAW

- 1.131 Under section 69 of the Arbitration Act 1996, a party can appeal an arbitral award to the court on a point of law. This requires either the agreement of all the arbitral parties, or the permission of the court. The court will only give permission if, among

other things, the decision of the tribunal is obviously wrong, or is open to serious doubt on a question of general public importance.

- 1.132 Section 69 is currently “opt-out”: the parties can agree that an appeal should be unavailable. For example, some arbitral rules do opt out; others do not exclude an appeal, or are explicit about the availability of an appeal on a point of law.
- 1.133 We considered suggestions that section 69 might be repealed, to preclude any appeal on a point of law, or instead amended to allow more appeals than at present. We do not recommend any reform to section 69. Our principal reasons are as follows.
- 1.134 We think that section 69 is a defensible compromise between promoting the finality of arbitral awards (by limiting appeals) and correcting blatant errors of law. Section 69 is opt-out, and we do not wish to unsettle the preferred relationship with section 69 that has been struck by arbitral rules and arbitration clauses. We are not persuaded that there is any necessity for reform; most consultees were also against reform. Among those who did favour reform, there was no consensus on what shape that reform should take. We are not persuaded that there is a different approach to appealing a point of law which is obviously better than that currently adopted by section 69.

GOVERNING LAW

- 1.135 An arbitration agreement is often a clause in a main contract (also called the matrix contract). When a contract has an international dimension, it is necessary to identify which country’s laws apply to the contract. This is called the governing law. The governing law of an arbitration agreement is not necessarily the same as the governing law of the matrix contract. Both might also be different from the law of the seat; the seat is the place where the arbitration is deemed to occur as a matter of law (even if hearings take place elsewhere or online).
- 1.136 The governing law of a contract will supply the substantive contract law rules which guide us in resolving disputes about that contract (such as what the contract means, or who is party to it). The law of the seat, among other things, will determine how an arbitral award can be challenged before the courts at the seat.
- 1.137 The current law is set out in the decision of the Supreme Court in *Enka v Chubb*. That case provides that the law governing the arbitration agreement will be the law chosen by the parties. In the absence of any choice specific to the arbitration agreement, then a choice of law to govern the matrix contract will be implied to govern the arbitration agreement as well – unless, for example, this might render the arbitration agreement invalid, in which case another law might be deemed to govern (the validation principle). If there is no choice of governing law at all, then the arbitration agreement will be governed by the law with which it is most closely associated, which is usually the law of the seat.
- 1.138 Consultees said that the law in *Enka v Chubb* is complex and unpredictable. We note that the Supreme Court itself was divided both on the law and how to apply the law to the facts of the case before it. The current law risks being an opportunity for satellite argument, which in turn is productive of unnecessary cost and delay.

- 1.139 We think that the effect of *Enka v Chubb* would be that many arbitration agreements would be governed by foreign law. This is because arbitration agreements do not always specify a governing law, but matrix contracts do often specify a foreign governing law.
- 1.140 The law of England and Wales is supportive of arbitration. Foreign law might not be as supportive, particularly on questions of: arbitrability (whether this dispute can be resolved through arbitration); scope (whether this dispute falls within the arbitration agreement); and separability (whether the arbitration clause survives any invalidity of the matrix contract, enabling arbitration to resolve disputes about such invalidity). There is a risk that foreign law rules on these issues might preclude the arbitration from happening at all. We think that an express choice of arbitration should not be negated by the workings of an implied choice of foreign governing law.
- 1.141 Further, if a foreign law governs the arbitration agreement, then, by virtue of section 4(5) of the Arbitration Act 1996, this will disapply the non-mandatory provisions of the Act. At least, it will disapply the non-mandatory provisions which are concerned with substantive matters – but not those concerned with procedural matters. Classifying statutory provisions as either substantive or procedural can produce some extra complexity and cost.
- 1.142 We recommend that a new rule be added to the Arbitration Act 1996 to provide that the law which governs the arbitration agreement is:
- (1) the law that the parties expressly agree applies to the arbitration agreement; or
 - (2) where no such agreement is made, the law of the seat of the arbitration in question.

Agreement between the parties that a particular law applies to the matrix contract does not constitute express agreement that that law also applies to the arbitration agreement. This approach is supported by the majority of consultees. Our principal reasons are as follows.

- 1.143 A default rule in favour of the law of the seat would have the virtues of simplicity and certainty. It 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 our courts have seen fit to develop. It would remove a layer of uncertainty surrounding the effects of section 4(5).
- 1.144 A new default rule would preserve party autonomy in the choice to arbitrate, without that express choice being undermined by an implied choice of foreign governing law with potentially less generous provisions on arbitrability, scope, and separability. It would avoid satellite arguments about the position taken by a foreign arbitration law on arbitrability, scope, and separability, and any need to overcome deficiencies by applying a validation principle of uncertain scope. It would also preserve party autonomy in the ability of the parties to override the default rule by making an express choice of law to govern the arbitration agreement.

1.145 Under our recommendation, 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. In this way, it could provide certainty across a range of circumstances.