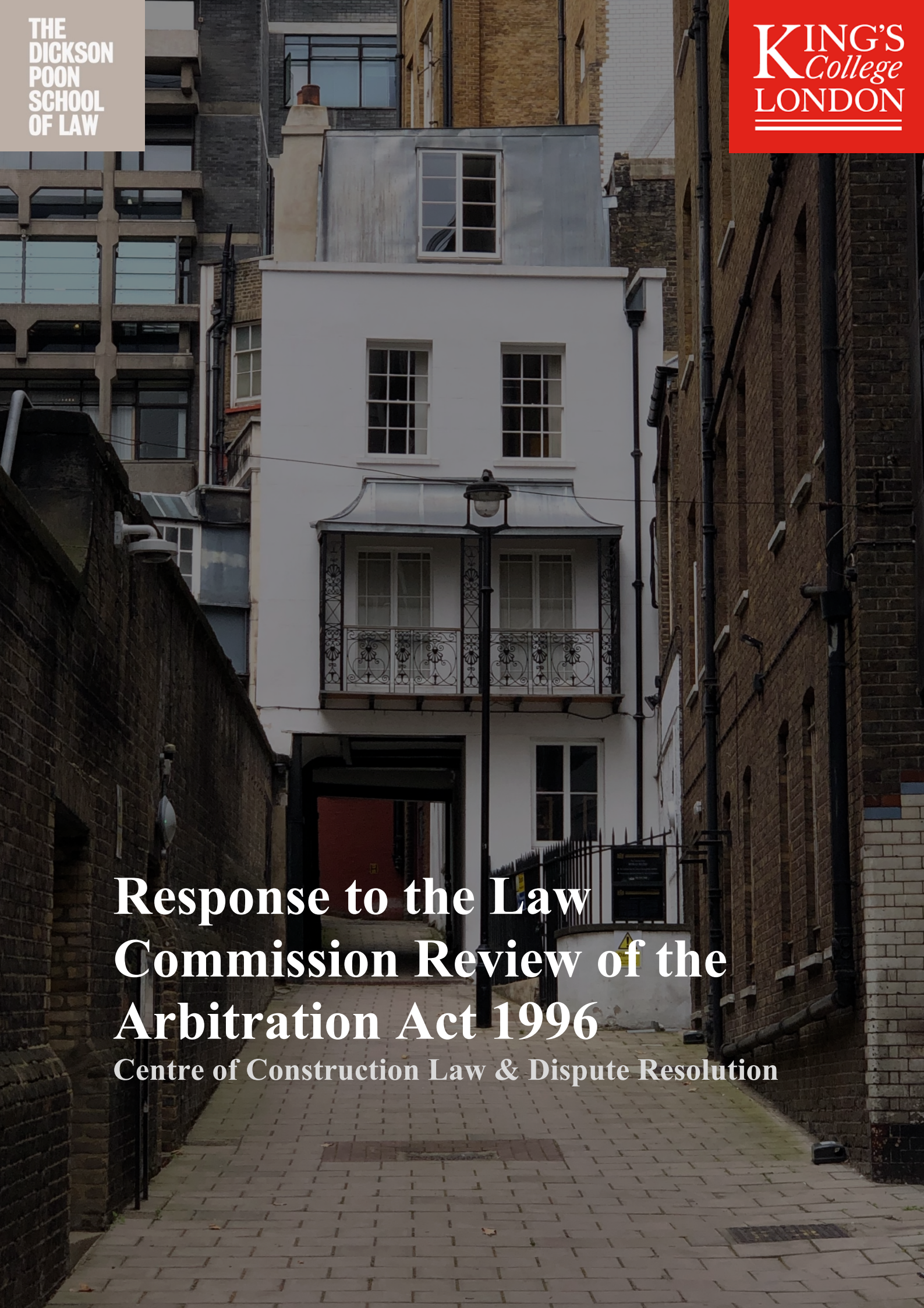

THE DICKSON POON SCHOOL OF LAW

KING'S College LONDON

Response to the Law Commission Review of the Arbitration Act 1996

Centre of Construction Law & Dispute Resolution

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Centre of Construction Law & Dispute Resolution

The Centre of Construction Law & Dispute Resolution (the 'Centre' or 'CCLDR') was founded in 1987 by Professor John Uff KC CBE, who was its first Director and the Nash Professor of Engineering Law. The current Director is Professor Renato Nazzini FCIArb. The main activities of the Centre are:

- The MSc programme, taught since 1988 in London
- Conferences and public lectures on all aspects of construction law
- Research and publications on all aspects of construction law

The Centre is part of The Dickson Poon School of Law at King's College London, which is consistently ranked among the top law schools internationally.

Introduction

In September 2022, the Law Commission of England & Wales published a consultation paper relating to its 'Review of the Arbitration Act 1996'. The paper asked 38 consultation questions exploring various areas of possible reform, ranging from confidentiality to appeals on a point of law. The CCLDR responds to the consultation through this paper. The intention is to provide the Law Commission with a construction arbitration perspective on the review of the Arbitration Act. To this end, the Centre has constituted a Taskforce of leading experts in arbitration and construction law who have been closely associated with the Centre.

Construction disputes have several characteristics that distinguish them from other types of commercial dispute resolution.

First, as explained by May LJ in *Pegram Shopfitters Ltd v Tally Wiejl (UK) Ltd*,[1] construction contracts are inherently susceptible to disputes. Construction disputes tend to be considerable in number and a common phenomenon in the lifecycle of a construction project. There are many reasons for this contentious environment, ranging from *force majeure* events to the fact that every construction project is unique – always a new, untested 'prototype' – and its participants cannot foresee all its risks in advance.

Secondly, construction disputes involve significant complexity and intricacy caused by factual technicalities and the sheer volume of evidence that, for particularly larger projects, often spans many years of data in great detail. Therefore, construction disputes particularly benefit from clear rules on the taking of evidence.

Thirdly, since construction projects are inherently collaborative in nature, requiring the input of many disciplines, construction disputes tend to involve multiple interested parties, the relationship between which is typically governed by independent contracts. The involvement of international parties, particularly in larger cross-border projects, further complicates this relationship as does the widespread use of bonds and other forms of security or complex funding arrangements by bodies such as world banks.

[1] [2003] EWCA Civ 1750.

Fourthly, as a result of the above characteristics, construction disputes necessitate an expedited, efficient and, insofar as possible, amicable resolution of disputes. At the heart of construction dispute resolution is the desire to progress with the projects without significant interruption. Therefore, construction disputes are frequently multi-tiered, involving various methods of ADR such as mediation, expert determination and dispute adjudication boards. This pursuit of expedited dispute resolution gave rise to some endemic features of the system, such as statutory adjudication enshrined in the Housing Grants, Construction and Regeneration Act 1996 ('HGCRA 1996'). Arbitration and litigation tend to be viewed as last-tier fora.

Finally, construction disputes are affected by the influence of standard forms on construction contracts, specific arbitration rules such as the CIMAR or the ICE Arbitration Procedure and sector-specific legislation such as the aforementioned HGCRA 1996.

Statistical data demonstrates that construction disputes account for a considerable share of arbitrations administered by many arbitral institutions. For instance, construction disputes repeatedly account for the largest proportion of cases registered by the International Chamber of Commerce. Taking a global perspective, the recent 'BCLP Arbitration Survey 2022: The reform of the Arbitration Act 1996' ('BCLP Survey') indicated that London (including anywhere else in England, Wales or Northern Ireland) remains the most popular seat of arbitrations among its 116 international questionnaire respondents.

Executive summary

Confidentiality. We agree that the Arbitration Act should not codify confidentiality, but we note potential complexities of the current common law principles. English law does not clarify whether confidentiality stems by virtue of the arbitration being seated in England or the law applicable to the arbitration agreement being English law. If the latter, following *Enka v Chubb*,[2] the arbitration agreement may be governed by domestic laws of other States. These laws may not provide for confidentiality. This is one of the reasons why, in response to the last consultation question, we invite the Law Commission to revisit the rules in *Enka.*

Arbitrator independence and disclosure. We agree with the Law Commission that the Act should not impose a duty of independence on arbitrators. In disputes concerning specific sectors, such as construction, an outright prohibition of any dependence could create an impossible standard for specialist arbitrators to meet. In any case, it seems likely that arbitrators' lack of independence would in almost all cases give rise to justifiable doubts as to impartiality. On the other hand, we agree with the Law Commission that arbitrators should have a continuing duty to disclose any circumstances which might reasonably give rise to justifiable doubts as to their impartiality. Several jurisdictions recognise such a duty already.

Discrimination. We disagree with the Law Commission's proposal that an appointment of an arbitrator should not be susceptible to challenge on the basis of the arbitrator's protected characteristics. While the intention behind the proposal is laudable, it would introduce difficulties in enforcing such an obligation. The main obstacle is that characteristics that are and are not protected by the Equality Act 2010 tend to be intertwined. Although the Law Commission envisages exceptions to the general rule, the uncertainty inherent in the proposed

[2] [2020] UKSC 38.

test would lead to undesirable arguments and, possibly, litigation concerning the circumstances in which discrimination is permitted. We are, instead, strongly in favour of non-legislative measures to ensure that any form of discrimination is eliminated in construction arbitration (and, of course, more generally).

Arbitrator immunity. We agree that the Arbitration Act should allow arbitrators to incur liability for resignation in some circumstances. However, such liability should only be incurred where the arbitrator resigned 'without any reasonable justification'.

Summary disposal. We agree that the Arbitration Act should expressly empower tribunals to dispose of claims or issues summarily. Although this power already exists in many arbitration rules, codification would assist not only where rules are silent or in cases of *ad hoc* arbitration, but also when arbitrators exercise their powers under the applicable rules, by making it clear that to do so is allowed by the procedural law.

Section 44 (court powers exercisable in support of arbitral proceedings). We disagree that section 44(2)(a) of the Arbitration Act 1996 should be amended to confirm that it relates to the taking of the evidence of witnesses by deposition only. There is no harm in the courts having overlapping powers under both provisions.

We agree that section 44 could expressly recognise that the courts can make orders against third parties.

In relation to section 44(5), we consider that it serves the useful purpose of limiting the court's intervention when the parties have agreed upon a different mechanism that provides for the same relief that the court could grant. Courts should only intervene if it is appropriate to do so. We propose amending section 44(5) to say that 'If the arbitral tribunal, any arbitral or other institution or person vested by the parties with power in that regard has the power to act effectively, the court shall act only if it deems appropriate to do so'.

In relation to section 44(3), we propose deleting the 'preserving evidence or assets' wording from the subsection, making it clear that, even if there is urgency, the court should still be entitled to make any order relating to the matters listed in section 44(2).

Finally, we agree that emergency arbitrators should be empowered to issue peremptory orders for non-compliance with their decisions. However, we propose that the amended Arbitration Act could initially empower the emergency arbitrator to issue such a peremptory order, but, once the tribunal is fully constituted, vest this authority in the arbitral tribunal. Furthermore, we consider that this mechanism can coexist with an amended section 44(4), allowing an application to be made by permission of the emergency arbitrator or the tribunal after the latter is constituted.

Challenging jurisdiction under section 67. We agree with the Law Commission's proposal, although note that an appellant may have a more limited scope to review the award than an applicant in a rehearing. In some circumstances, this may lead to unfairness as the appellant's case may be that it was never bound by any arbitration agreement. Further, section 32 contains an anomaly as it is also available after the tribunal rules on its own jurisdiction. Section 32 should only apply before the tribunal renders an award on jurisdiction and result in a hearing.

Appeal on a point of law. We propose to retain section 69 but amend it so that it operates as an opt-in provision. Several arguments support reform: (i) whether section 69 was excluded by the parties or not may be unclear. In such cases the default position should be no appeal, (ii) issues of law and fact tend to be difficult to distinguish in construction arbitration, where matters of complex technical assessment, delay or quantum are, more often than not, an inextricable web of legal and factual issues, (iii) few jurisdictions contain an appeal akin to section 69, (iv) most internationally used arbitration rules opt out of section 69 (eg the ICC or LCIA Rules) and (v) finality of the award and party autonomy.

Therefore, the current provision cannot be justified as a default rule. Similarly, section 45 should also be amended so as to work as an opt-in provision.

Minor reforms. We agree with all proposals but would clarify that section 39 applies to both orders and awards. Therefore, it should afford the tribunal the widest possible discretion in granting relief through an award or an order.

Other stakeholder suggestions not short-listed for review. We invite the Law Commission to revisit the principles in *Enka v Chubb*[3] relating to the law of the arbitration agreement. Current principles may pose difficulties not only to confidentiality but also to broader legal certainty of arbitration. The two possible avenues are: (i) to follow the Scottish and Swedish models where the law applicable to the arbitration agreement, in the absence of party agreement, is the law of the seat, or (ii) to follow Swiss law that proposes a more flexible approach to the validation principle.

Secondly, we invite the Law Commission to consider the impact of the GDPR on arbitration.

Finally, we believe that section 17 should be repealed due to the availability of a better appointment mechanism under section 18.

[3] [2020] UKSC 38.

Confidentiality

Consultation Question 1.

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

We agree and emphasise that codification of confidentiality should only come under consideration if leaving the issue to be governed and developed by the common law cannot be justified. So far, the case law on the issue has been coherent and without much ambiguity while allowing for sufficient flexibility. This balance between legal certainty and flexibility is essential to construction arbitrations that are virtually always confidential but with necessary exceptions, for example when the award needs to be enforced. In the experience of the Taskforce members, parties in arbitrations rarely express any concern about confidentiality under English law.

Although we propose not to codify confidentiality, we recognise the importance of the views of international parties and practitioners on the issue. The recent BCLP Survey showed that 83% of its 116 questionnaire respondents believed that the Arbitration Act should codify confidentiality or at least embed the general principle of confidentiality. We note that the majority of questionnaire respondents were based outside the UK, with 60% based in common law jurisdictions. This might indicate a general concern among international parties as to the legal certainty of confidentiality rules in UK-seated arbitrations, even if these principles appear clear to UK practitioners.

However, we remain of the view that confidentiality should not be codified for the following reasons.

First, in the experience of the members of the Taskforce, the lack of statutory provisions on confidentiality is rarely, or virtually never, cited by parties as a reason not to choose England, Wales or Northern Ireland as a seat.

Secondly, taking a comparative approach, by way of example, many key civil and common law jurisdictions where construction arbitrations are seated do not codify confidentiality, including France, Switzerland and Sweden, which are seats of choice in international arbitration:

- **France**: French law contains no confidentiality provision applicable to international arbitration. Parties must either apply arbitration rules that provide for it or enter into a separate agreement. The New Civil Procedure Code only applies confidentiality to tribunals' deliberations (Article 1479 CCP).

- **Switzerland**: There is no statutory confidentiality in Swiss law, although the Supreme Court has confirmed that proceedings are not open to the public.[4]

- **Germany**: The German Arbitration Act does not codify confidentiality either.

[4] Decision of the Swiss Supreme Court of June 19, 2006 4P.74/2006/ast.

- **Sweden**: The Swedish Arbitration Act is also silent on the point.

- **USA**: The Federal Arbitration Act and the Revised Uniform Arbitration Act lack a confidentiality provision. Confidentiality in the US only exists in some States in relation to specific arbitrations, eg arbitrations concerning attorney fees in California.

- **Singapore**: Singaporean law implies confidentiality through common law, rather than the International Arbitration Act (*Myanma Yaung Chi Oo v Win Win Nu*[5]).

Thirdly, regardless of legislative provisions, confidentiality is a matter of party autonomy and may be provided for in the arbitration agreement or in the rules chosen by the parties. For example, certain arbitration rules provide for confidentiality including the LCIA, SCC and SIAC Arbitration Rules. By contrast, the ICC arbitration rules, often used in construction arbitration, do not provide for confidentiality and merely authorise the tribunal to make an order on confidentiality at the parties' request. Typically, in an ICC arbitration, confidentiality is addressed in the terms of reference or in procedural order no 1.

Fourthly, codification might be a burdensome exercise as there must always be exceptions, as recognised at common law. Mere difficulty in drafting should, of course, not be a conclusive argument against legislation if legislation is needed. However, as we explained above, we consider that legislation is not needed.

If legislation were needed, we do consider that it would be possible, albeit complex, to draft adequate provisions.

If the concern is not to abandon the common law on exceptions to confidentiality, any amendment could provide that 'any rules of law relating to exceptions to confidentiality are preserved', mirroring section 118 of the Criminal Justice Act 2003 in relation to certain common law hearsay rules. However, such a legislative technique must be exercised with care and is not frequent in English law.

Further, we note that some common law jurisdictions opted for the codification of the duty of confidentiality. For example, the Australian International Arbitration Act contains a detailed confidentiality provision. However, this legislation was a response to the decision in *Esso Australia Resources v Plowman*[6] where the High Court held that an implied duty of confidentiality did not exist under Australian law. The Australian confidentiality provisions are notably complex, reflecting the legislator's intention to codify exceptions exhaustively.

By contrast, the Indian Arbitration & Conciliation Act 1996 (as amended in 2019), in section 42A, contains a much shorter confidentiality provision. It lists no specific exceptions but specifies that confidentiality applies '*[n]otwithstanding anything contained in any other law from the time being in force (...)*'. The Hong Kong Arbitration Ordinance, in section 18, also contains a brief confidentiality provision in which the exceptions to confidentiality are worded broadly and flexibly.

Some civil law jurisdictions where arbitrations are frequently seated codify confidentiality. The provisions contained in the UAE Federal Law No. 6 on Arbitration expressly apply to hearings

[5] [2003] 2 SLR(R) 547
[6] (1985) 183 CLR 10.

and awards in Articles 33 and 48 respectively without any mention of exceptions. Similarly, the Arbitration Law of the People's Republic of China expressly preserves the confidentiality of arbitral hearings in Article 40, without listing any exceptions.

Therefore, foreign jurisdictions, including relevant common law jurisdictions, provide solutions and examples that may address the Law Commission's concerns surrounding the codification of exceptions to confidentiality.

On balance, however, we consider that the complexity of drafting does weigh against codifying confidentiality, although it would not be, in and of itself, a sufficient reason not to do so.

Finally, we appreciate some potential complications associated with the current state of the law. For example, if confidentiality is an implied term in the arbitration agreement, in principle there might be an argument that it is governed by the law applicable to the arbitration agreement itself, rather than the law of the seat. Following *Enka v Chubb*,[7] many England-seated arbitrations will be conducted on the basis of an arbitration agreement governed by the domestic laws of other States. This gives rise to uncertainty as to whether the English case law on confidentiality applies when the arbitration agreement is governed by English law or when the arbitration is seated in England or in both cases.

However, this issue might be better resolved not by codifying confidentiality, but by reviewing the *Enka* decision. As we explain below, the Law Commission could consider codifying the test for determining the law applicable to the arbitration agreement, hence resolving the issue surrounding confidentiality from a different angle. We discuss possible solutions to this issue in the last section below 'Other stakeholder suggestions not short-listed for review' as a response to consultation question 38.

Arbitrator independence and disclosure

Consultation Question 2.

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

We agree. In disputes concerning specific sectors, such as construction, an outright prohibition of any dependence could create an impossible standard for specialist arbitrators to meet. In any case, it seems likely that arbitrators' lack of independence would in almost all cases give rise to justifiable doubts as to impartiality. The case of *Cofely Ltd v Anthony Bingham and Knowles Ltd*,[8] which the Law Commission discusses in relation to arbitrators' liability for resignation, is a helpful example. The arbitrator in the case received 18% of his appointments and 25% of income from the defendant. Therefore, this case was at its heart about lack of independence. However, the dependence of the arbitrator's practice on the defendant, and subsequent resistance to allegations, provided the Court with evidence of apparent bias. Therefore, the case supports the argument that, under English law, in appropriate cases, lack of independence evidences a lack of impartiality.

[7] [2020] UKSC 38.
[8] [2016] EWHC 240 (Comm).

We note that most leading seats of arbitration provide for independence and impartiality, including the UNCITRAL Model Law in Article 12: Singapore, Germany, France, Australia, Switzerland, Sweden, Hong Kong, People's Republic of China. The US Federal Arbitration Act provides for neither impartiality nor independence, although the principles have emerged through case law. However, as explained above, we believe that the English law test for impartiality effectively captures circumstances in which lack of independence gives rise to justifiable doubts as to impartiality. In this way, by focusing on impartiality, English law better accounts for specialist arbitrations and provides more flexibility to the parties. Robust disclosure obligations provide the necessary safeguard against any relevant form of arbitrator actual or apparent bias.

Consultation Question 3.

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

We agree. In the experience of the Taskforce, most arbitrators are cautious and, in most cases, already extensively disclose circumstances that could raise justifiable doubts as to their impartiality. However, such a continuing duty would allow the parties to make the final assessment as to arbitrators' suitability, rather than allowing arbitrators to make the assessment themselves.

The continuing duty of disclosure is included in the UNCITRAL Model Law and is relatively common in other jurisdictions:

- **Germany**: '*A person who is approached in connection with a possible appointment as an arbitrator is to disclose any and all circumstances likely to give rise to doubts as to their impartiality or independence. Arbitrators are under obligation, also after they have been appointed and until the arbitral proceedings have come to an end, to disclose such circumstances to the parties without undue delay unless they have already so informed the parties previously*' (section 1036(1), German Civil Code).

- **France**: '*(...) Before accepting a mandate, an arbitrator shall disclose any circumstance that may affect his or her independence or impartiality. He or she also shall disclose promptly any such circumstance that may arise after accepting the mandate (...)*' (Article 1456, French Civil Code).

- **USA**: the Federal Arbitration Act contains no specific requirements regarding independence impartiality or disclosure. Failure to disclose a conflict of interest would not alone suffice to annul an award (*Republic of Argentina v AWG Group Ltd*[9]).

- **Singapore**: no continuous codified duty of disclosure in legislation, albeit the SIAC Arbitration Rules provide for it.

- **Australia**: An arbitrator is required to disclose any circumstances likely to give rise to justifiable doubt as to their impartiality or independence when they are approached in connection with possible appointment or at any time throughout the proceedings (Article

[9] 894 F.3d 327, 334-35 (D.C. Cir. 2018).

12(1), UNCITRAL Model Law). A justifiable doubt only arises if there is a real danger of bias (section 18A(1), International Arbitration Act).

- **Switzerland**: arbitrators must disclose without delay any facts that could raise legitimate doubts as to their independence or impartiality until the end of the arbitration (Article 179(6) Federal Act on Private International Law).

Consultation Question 4.

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

Specifying the arbitrator's state of knowledge appears to be necessary for reasons of legal certainty. Introducing a new statutory duty of disclosure without specifying the state of knowledge required would introduce significant uncertainty and create problems in practice and, potentially, unnecessary arguments and litigation concerning alleged breaches of the new duty.

Such codification is all the more desirable given the potential uncertainty as to the scope of the duty of disclosure. The case *Newcastle United Football Company Limited v The Football Association Premier League Limited*[10] suggests that there may exist discrepancies between the level of disclosure envisaged by the IBA Guidelines on Conflicts of Interest in International Arbitration and English law. The Court acknowledged that only two of the arbitrator's 12 previous appointments would have to be disclosed under the IBA Rules, as they took place more than three years from the date of appointment, but a higher standard is currently required in English law following *Halliburton Co v Chubb Bermuda Insurance Ltd*:[11] arbitrators must disclose circumstances that 'would or might lead the fair-minded and informed observer to conclude that there was a real possibility that the arbitrator was biased.' Therefore, the CCLDR believes that the appropriate test should be codified to avoid any possible confusion regarding disclosure.

Consultation Question 5.

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

We prefer a test of 'reasonable inquiries'. A feature of the construction sector is that, in many jurisdictions, there is a relatively small number of leading construction companies, employers and consultants. Most construction arbitrators would, therefore, have acted for or against them in the past, or sat on tribunals in proceedings involving them, making a disclosure exercise difficult. Therefore, the reasonableness test should be flexible, taking into account the features of various sectors.

[10] [2021] EWHC 349 (Comm).
[11] [2020] UKSC 48.

We also believe that the amended Arbitration Act should clarify that a breach of disclosure obligations does not automatically disqualify the arbitrator. Whether failure to disclose should lead to the removal of the arbitrator must depend on all the circumstances of the case.

Discrimination

Consultation Question 6.

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

We agree with the Supreme Court's approach in *Hashwani v Jivraj*.[12] The problem would only arise in very narrow circumstances in practice. If it does, the Arbitration Act should give effect to party agreement. As we discuss below in greater detail, it might be difficult or impossible to assess whether a certain characteristic in an arbitrator is or is not 'necessary', as the Court of Appeal held in *Hashwani*. Characteristics that can be viewed as necessary are often intertwined with characteristics that may not be viewed as necessary.

Consultation Question 7.

We provisionally propose that: 1. the appointment of an arbitrator should not be susceptible to challenge on the basis of the arbitrator's protected characteristic(s); and 2. any agreement between the parties in relation to the arbitrator's protected characteristic(s) should be unenforceable; unless in the context of that arbitration, requiring the arbitrator to have that protected characteristic is a proportionate means of achieving a legitimate aim. "Protected characteristics" would be those identified in section 4 of the Equality Act 2010. Do you agree?

We disagree with this proposal due to the difficulties and challenges that enforcing such obligations would create. More importantly, such an application of the Equality Act 2010 might be legally incorrect. The Supreme Court observed in *Hashwani,* that it would be surprising to subject a person engaged in a one-off contract, such as an arbitrator, to 'the whole gamut of discrimination legislation'. In fact, the Court would not characterise the role of the arbitrator as 'employment under a contract personally to do work'.

Further, while the aim of prohibiting discrimination based on protected characteristics is a laudable one and one could in principle agree with the Law Commission, the proposals would be likely to cause problems in practice. For example, there could be circumstances where the required qualifications that do and do not constitute 'protected characteristics' under the Equality Act 2010 are intertwined. There are several English cases concerning a dispute arbitrated by Beth Din applying Jewish law (eg *Soleimany v Soleimany*[13] or *Schwebel v*

[12] [2011] UKSC 40.
[13] [1999] Q.B. 785.

Schwebel[14]). There, the central requirement for the arbitrator was knowledge of Jewish law (not a 'protected characteristic') but, under the Law Commission's proposals, it could be argued that this requirement presupposes the arbitrator being of Jewish religion and typically male (faith and gender both being a 'protected characteristic').

Similarly, a significant number of arbitration clauses and arbitration rules have nationality requirements. Nationality is not listed as a protected characteristic under the Equality Act 2010 section 4, but it is included in the definition of 'race' (which is a protected characteristic) under section 9. This would trigger challenges since arbitration clauses frequently contain nationality requirements.

We appreciate a possible counterargument: the above protected characteristic requirements may be a 'proportionate means of achieving a legitimate aim' and hence be enforceable. If so, however, arbitral institutions in the first place (in institutional arbitration) and then the courts would have to decide whether the requirement is legitimate and proportionate or not. We believe this would lead to undesirable, case-by-case litigation where the courts must decide the circumstances in which discrimination is permitted. Further, in some cases, a particular requirement could always be a proportionate means of achieving a legitimate aim. For example, the Equality Act deems age as a protected characteristic. Since age often correlates with experience, parties can always make the argument that age discrimination is permitted.

Further, by connecting the definition of 'protected characteristics' with the Equality Act 2010, the reform would import the case law stemming from this Act. This is undesirable and would reduce legal certainty to parties in arbitration.

For the above reasons, the CCLDR proposes to tackle discrimination through strong measures outside legislation, including discrimination beyond the protected characteristics under the Equality Act 2010 (for example, discrimination against people of non-binary gender or from disadvantaged socio-economic backgrounds). For example, the Equal Representation in Arbitration Pledge has achieved significant success in increasing the number of women on arbitral panels without requiring legislation.

Arbitrator immunity

Consultation Question 8.

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

We agree. The Arbitration Act should disincentivise resignations by arbitrators without good reasons. After the acceptance of appointment, arbitrators should be bound to resolve the dispute as they offer their services on a commercial basis and in return for what may be regarded as substantial fees. The costs to the parties of having a determination of their rights delayed by an arbitrator's resignation, and the need to find a replacement arbitrator, may be high and an arbitrator's liability for such costs would mitigate the negative impact of her resignation to some extent.

[14] [2010] EWHC 3280 (TCC).

Consultation Question 9.

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

We agree that circumstances could exist where an arbitrator should incur liability for resignation. Equally, there may well be circumstances in which an arbitrator would be perfectly entitled to resign. We propose, therefore, that arbitrators should incur liability only if they resign 'without any reasonable justification'. We do not think it is necessary to identify what such justification would entail, but it could be for example due to poor health.

Consultation Question 10.

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

We agree with the proposal.

Summary disposal

Consultation Question 11.

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

We agree. Further, such a provision should be non-mandatory. We note that the BCLP Survey cited above revealed that 77% of questionnaire respondents replied that the Arbitration Act should include an express provision on summary disposal, which suggests that users of the system may favour this approach.

We also note that the following sets of rules provide for some form of summary disposal:

- **LCIA Arbitration Rules 2020**, Article 22: '*(viii) to determine that any claim, defence, counterclaim, cross-claim, defence to counterclaim or defence to cross-claim is manifestly outside the jurisdiction of the Arbitral Tribunal, or is inadmissible or manifestly without merit; and where appropriate to issue an order or award to that effect (an "Early Determination")*'

- **ICC Arbitration Rules 2021** are silent on summary disposal. However, the ICC 'Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration' says that any party may '*apply to the arbitral tribunal for the expeditious determination of one or more claims or defenses, on grounds that such claims or defenses are manifestly devoid of merit or fall manifestly outside the arbitral tribunal's jurisdiction*.'

- **SIAC Arbitration Rules 2016**, '*Rule 29 "Early Dismissal of Claims and Defences":*

29.1 A party may apply to the Tribunal for the early dismissal of a claim or defence on the basis that:
a. a claim or defence is manifestly without legal merit; or
b. a claim or defence is manifestly outside the jurisdiction of the Tribunal.

29.2 An application for the early dismissal of a claim or defence under Rule 29.1 shall state in detail the facts and legal basis supporting the application. The party applying for early dismissal shall, at the same time as it files the application with the Tribunal, send a copy of the application to the other party, and shall notify the Tribunal that it has done so, specifying the mode of service employed and the date of service.

29.3 The Tribunal may, in its discretion, allow the application for the early dismissal of a claim or defence under Rule 29.1 to proceed. If the application is allowed to proceed, the Tribunal shall, after giving the parties the opportunity to be heard, decide whether to grant, in whole or in part, the application for early dismissal under Rule 29.1

29.4 If the application is allowed to proceed, the Tribunal shall make an order or Award on the application, with reasons, which may be in summary form. The order or Award shall be made within 60 days of the date of filing of the application, unless, in exceptional circumstances, the Registrar extends the time.'

- **SCC Arbitration Rules 2017**, '*Article 39:*

(1) A party may request that the Arbitral Tribunal decide one or more issues of fact or law by way of summary procedure, without necessarily undertaking every procedural step that might otherwise be adopted for the arbitration.

(2) A request for summary procedure may concern issues of jurisdiction, admissibility or the merits. It may include, for example, an assertion that:
(i) an allegation of fact or law material to the outcome of the case is manifestly unsustainable;
(ii) even if the facts alleged by the other party are assumed to be true, no award could be rendered in favour of that party under the applicable law; or
(iii) any issue of fact or law material to the outcome of the case is, for any other reason, suitable to determination by way of summary procedure.

(3) The request shall specify the grounds relied on and the form of summary procedure proposed, and demonstrate that such procedure is efficient and appropriate in all the circumstances of the case.

(4) After providing the other party an opportunity to submit comments, the Arbitral Tribunal shall issue an order either dismissing the request or fixing the summary procedure in the form it deems appropriate.

(5) In determining whether to grant a request for summary procedure, the Arbitral Tribunal shall have regard to all relevant circumstances, including the extent to which the summary procedure contributes to a more efficient and expeditious resolution of the dispute.

(6) If the request for summary procedure is granted, the Arbitral Tribunal shall seek to make its order or award on the issues under consideration in an efficient and expeditious

manner having regard to the circumstances of the case, while giving each party an equal and reasonable opportunity to present its case pursuant to Article 23(2).'

Further, we note that, following *Travis Coal Restructured Holdings v Essar Global Fund Limited*,[15] summary disposal is already a power that tribunals may have if the parties have so provided in the arbitration agreement. In *Travis*:

- The arbitration agreement provided that *'[t]he arbitrators shall have the discretion to hear and determine at any stage of the arbitration any issue asserted by any party to be dispositive of any claim or counterclaim, in whole or in part, in accordance with such procedures as the arbitrators may deem appropriate, and the arbitrators may render an award on such issue.*'

- The court held that the arbitration agreement empowered the tribunal to deal with a fraud allegation by way of summary disposal.

Notwithstanding the *Travis* case, we believe that for the above arbitration rules providing for summary disposal to operate effectively when the seat of the proceedings is in England, it would be desirable for the Arbitration Act to provide statutory backing to the arbitrators' powers. Furthermore, such powers would be available when rules are silent – such as the ICC Rules – and in *ad hoc* arbitrations.

Consultation Question 12.

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

We agree. Indeed, if such a power is granted to the tribunal in the Arbitration Act, the only way in which it could be exercised is in consultation with the parties but always at the discretion of the tribunal. In particular, the tribunal should always retain the discretion not to exercise the power, for example when to do so would expose the award to a refusal of enforcement in a foreign jurisdiction when enforcement may be likely (eg the country of domicile of one of the parties).

Further, the tribunal should always have a choice as to whether to dispose summarily of any claim, defence or issue by order or award. The exercise of this choice will depend on the nature of the issue that is summarily dismissed and the reason for the summary dismissal.

Consultation Question 13.

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

We agree.

[15] [2014] EWHC 2510 (Comm).

Consultation Question 14.

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

We agree and add that summary disposal should clearly also apply to claims that are manifestly outside the jurisdiction of the tribunal. It should also apply to any issue of fact or law so as to allow the tribunal to summarily dispose of any issues. The definitions of 'claim' and 'defence' can be unclear and complex in an international context.

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

Consultation Question 15.

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

We disagree. While there can be an element of overlap between sections 43 and 44, there is no harm in the courts having some overlapping powers under the two sections.

Consultation Question 16.

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

In the experience of the Taskforce members, this is already clear. However, it does no harm to clarify this in legislation, although it is not needed.

Consultation Question 17.

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

We agree. Third parties should have the full right of appeal as they have not entered into an arbitration agreement and hence restricted their access to courts.

Consultation Question 18.

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

We agree, subject to the discussion below.

Consultation Question 19.

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

We agree. We see no reason why the court should administer any such scheme. Parties choose a scheme of emergency arbitrators when they adopt institutional rules that so provide. Parties in *ad hoc* arbitrations consciously elected not to use arbitration rules and we believe that the Arbitration Act should not impose such a procedure on them. If the emergency arbitrator procedure is unavailable, the parties can still rely on courts to issue interim measures under section 44.

Consultation Question 20.

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

We agree that, in principle, the powers of the courts should be preserved as much as possible and the mere fact that an emergency arbitrator procedure is available should not prevent the courts from acting. However, we consider that section 44(5) serves the useful purpose of limiting the court's intervention when the parties have agreed upon a different mechanism that provides for the same relief that the court could grant. Therefore, we propose amending section 44(5) as follows: 'If the arbitral tribunal, any arbitral or other institution or person vested by the parties with power in that regard has the power to act effectively, the court shall act only if it deems appropriate to do so'. In this way, the power of the court to intervene is still constrained but there is a more flexible safety valve.

We would also raise the following question. Section 44(3) suggests that the court cannot make all orders under section 44(2), but only those relating to the preservation of evidence or assets, although the case law has construed 'assets' quite widely. While it makes sense that, if the case is one of urgency, the conditions of the agreement of the parties or permission of the tribunal should not apply, it is not clear why, in an urgent case, the court should not have all the powers that it would otherwise have. We propose deleting 'preserving evidence or assets' wording from the subsection, making it clear that, even if there is urgency, the court has the power to make any order relating to the matters listed in section 44(2).

Consultation Question 21.

Which of the following ways of accommodating the orders of any emergency arbitrator do you prefer, and why? 1. A provision which empowers an emergency arbitrator, whose order has been ignored, to issue a peremptory order, which, if still ignored, might result in the court ordering compliance. 2. An amendment which allows an emergency arbitrator to give permission for an application under section 44(4) of the Arbitration Act 1996. If you prefer a different option, please let us know.

Option 1 appears to be a reasonable and effective solution. A peremptory order is the typical approach of arbitrators addressing non-compliance with an order, including those granting applications for interim measures. The CCLDR views decisions of emergency arbitrators as

orders of the arbitral tribunal. The authority of both stems from the arbitration agreement. However, after rendering its decision, the emergency arbitrator drops out of the picture. Therefore, a practical issue could emerge since the emergency arbitrator would or could be unable to issue a peremptory order after rendering a decision. We propose, therefore, that the Arbitration Act could empower the emergency arbitrator to issue such a peremptory order, but, once the tribunal is fully constituted, give this authority to the arbitral tribunal.

Furthermore, Options 1 and 2 are not mutually exclusive. Option 2 could be adopted too, by making it clear that an application can be made under section 44(4) by permission of the emergency arbitrator or the tribunal after the latter is constituted.

Challenging jurisdiction under section 67

Consultation Question 22.

We provisionally propose that:
1. where a party has participated in arbitral proceedings, and has objected to the jurisdiction of the arbitral tribunal; and
2. the tribunal has ruled on its jurisdiction in an award,

then any subsequent challenge under section 67 of the Arbitration Act 1996 should be by way of an appeal and not a rehearing.

Do you agree?

We agree in principle with the proposal. We note, however, that an appeal will give the appellant a more limited scope to review the decision of the tribunal. While this may be entirely justifiable when the very validity or effectiveness of the arbitration agreement is not at issue, for example when the challenge relates to the constitution of the tribunal, there is a valid argument that if a party objects that it never agreed to arbitration, then its right to challenge the decision of the tribunal that the tribunal has jurisdiction should be unfettered. It would be difficult, however, to provide for two different regimes depending on the nature of the challenge. On balance, therefore, we agree with the Law Commission's proposals given that arbitration is no longer an 'exception' to the jurisdiction of the courts but a dispute resolution mechanism functionally equivalent, in all respects, to court proceedings.

There is a question as to non-participating parties. Should their section 67 application be a rehearing or an appeal? In principle, their position is not different from a party who does participate in the proceedings but raises an objection to the jurisdiction of the tribunal. In both cases, the objection may go to the very root of the power of the tribunal to rule on any of the claims or counterclaims or issues in the case. It is not clear why a participating party should have a more limited opportunity to challenge the jurisdiction of the tribunal than a non-participating party.

Consultation Question 23.

If section 67 of the Arbitration Act 1996 is limited, in some circumstances, to an appeal rather than a rehearing, do you think that the same limitation should apply to section 32, and why?

Currently, section 32 is also available after the tribunal has ruled on jurisdiction. This is an anomaly. Section 32 should be amended to clarify that it only applies before the tribunal has rendered any award on jurisdiction. If this is the case, section 32 should result in a hearing on jurisdiction. It could never be an appeal as there would be nothing to appeal.

Consultation Question 24.

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

Consultation Question 25.

We provisionally propose that, in addition to the existing remedies under section 67(3) of the Arbitration Act 1996, the court should have a remedy of declaring the award to be of no effect, in whole or in part. Do you agree?

Consultation Question 26.

We provisionally propose that an arbitral tribunal should be able to make an award of costs in consequence of an award ruling that it has no substantive jurisdiction. Do you agree?

We agree with all the recommendations above.

Appeal on a point of law

Consultation Question 27.

We provisionally conclude that section 69 of the Arbitration Act 1996 strikes the right balance between competing interests in respect of the ability to appeal an arbitral award on a point of law. We do not therefore propose any reform to section 69. Do you agree?

We disagree. We believe that section 69 should be retained but as an opt-in provision. Although the issue is finely balanced, we recognise several arguments in favour of amendment:

- **Whether section 69 was excluded by the parties or not may be unclear. In such cases, the default position should be no appeal.** Section 69, in its current form as a default mechanism that must be expressly excluded, could be viewed as inconsistent with party autonomy to select arbitration as the only forum to resolve disputes. Whether section 69 has been excluded or not may be a disputed issue and give rise to a considerable degree of uncertainty: see *National Iranian Oil Co v Crescent Petroleum Co International Ltd*.[16] In these cases, it is consistent with the parties' choice of arbitration that the default position should be that there is no appeal on points of law.

- **Issues of law and fact tend to be difficult to distinguish in construction arbitration, where matters of complex technical assessment, delay or quantum are, more often than not, an inextricable web of legal and factual issues.** We recognise that this is a complication that all appeals grapple with, be it in litigation or arbitration. However,

[16] [2022] EWHC 1645 (Comm).

international parties selecting London (or anywhere else in England, Wales or Northern Ireland) as the seat and English law to govern their contracts expect the award to be truly final. They should be allowed to appeal it on points of law only if they so expressly choose.

- **Few jurisdictions contain an appeal akin to section 69.** The UNCITRAL Model Law on Commercial Arbitration excludes such recourse. Singaporean law only permits appeals, on an opt-out basis, for domestic arbitrations. New Zealand law takes a similar approach in relation to domestic arbitrations and permits appeals, on an opt-in basis, to international arbitrations. The US, Hong Kong and Australia equally do not provide for appeals in international arbitration and do so only in relation to some domestic arbitrations.

- **Most internationally used arbitration rules opt out of section 69 (eg the ICC or LCIA Rules).** Arbitration rules cater to arbitrations seated in various jurisdictions. Therefore, the default opt-out from appeals should not be viewed as a criticism of section 69 specifically. Other arbitration rules do not (GAFTA, FOSFA or LMAA) reflecting a conscious choice to keep the appeal on points of law that is deemed useful in specific sectors to which these rules cater. Should section 69 be amended to operate as an opt-in provision, any institution whose rules reflect such a conscious choice would simply have to refer to section 69 specifically, if they do not do so already.

- **Finality of the award and party autonomy.** If the parties (i) have selected England and Wales or Northern Ireland as the seat of their arbitration; (ii) have selected English law as the law governing the contract; and (iii) have not selected a set of rules that opts in or out of section 69, it is highly unlikely that they would not check all possible remedies against their award. If they wish to retain section 69, they can, therefore, simply opt in.

We recognise that there is a view that section 69 should be retained in its current form. The BCLP Arbitration Survey 2022 found that 67% of questionnaire respondents preferred to retain section 69. The Taskforce considers that this is not an argument against the proposed amendment because, if the parties so choose, they can always 'opt into' section 69. If and to the extent appeals on points of law are seen as desirable, in certain sectors or by certain parties, this additional avenue of recourse under the Arbitration Act is retained, albeit as an opt-in provision.

For the same reasons, we believe that section 45 should be amended to operate as an opt-in provision.

If section 69 and section 45 are amended to operate as opt-in provisions, a further issue that arises for consideration is whether the agreement of the parties should suffice to give a party the right to appeal under section 69 or to apply under section 45 or whether further safeguards should apply, that is, leave of the court under section 69 and permission of the tribunal and leave of the court under section 45. Currently, if the parties agree to the application or appeal, no further safeguards apply. However, it may be considered that at least the leave of the court – if not the permission of the tribunal under section 45 – could be retained as a way of ensuring that unmeritorious applications and appeals are weeded out without the need for a full determination on the merits.

Minor reforms

Consultation Question 28.

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

We believe the arguments are finely balanced. Separability is a key rule to ensure the effectiveness of arbitration and that arbitration gives parties an efficient and functionally equivalent alternative to court litigation. On the other hand, if the parties, in their contractual autonomy, decide that the validity, existence and effectiveness of their arbitration agreement should depend on the validity, existence and effectiveness of the main contract, why should they be prevented to do so? Although such circumstances rarely occur in practice, they are not non-existent.

On balance, however, we believe that separability should be mandatory to avoid potential arguments that any given contract should be construed in a way that excludes the separability rule.

We note that, currently, separability applies when English law governs the arbitration agreement. Following the *Enka* case, there may be many arbitrations seated in England, Wales or Northern Ireland where English law does not govern the arbitration agreement and separability does not, therefore, apply. We suggest below that *Enka* should be revisited.

Consultation Question 29.

We provisionally propose to confirm that an appeal is available from a decision of the court under section 9 of the Arbitration Act 1996. Do you agree?

We agree and would also suggest amending section 9 to expressly clarify that tribunals are permitted to continue the proceedings while a section 9 application is pending.

Consultation Question 30.

Do you think that an application under section 32 of the Arbitration Act 1996 (determination of preliminary point of jurisdiction) and section 45 (determination of preliminary point of law) should merely require either the agreement of the parties or the permission of the tribunal, and why?

We believe that section 45 should be amended to operate as an opt-in provision. If so, there would be an argument that the leave of the court, but not the permission of the tribunal, should be retained. The issue is further discussed above.

Section 32 is anomalous in allowing the courts, even without party agreement, to rule on jurisdiction before the tribunal has done so. We agree that the section may serve some useful purpose in terms of saving time and costs if a significant jurisdictional issue exists which is likely to go to court pursuant to a section 67 application. However, given that the section deprives a party of at least the opportunity of having the jurisdictional issue resolved by the

tribunal, we would favour retaining the court's permission, in addition to tribunal permission, if the parties do not agree.

Consultation Question 31.

Do you think that the Arbitration Act 1996 should make express reference to remote hearings and electronic documentation as procedural matters in respect of which the arbitral tribunal might give directions, and why?

Such matters are typically within the ambit of section 34 and, in the experience of the Taskforce members, cause no issues in practice. There would be no harm in providing expressly that the hearings may be held remotely, by video or teleconference but one should resist the temptation of legislating for everything that is allowed to clarify that it is indeed allowed. This would make for even longer statutes than they are today. In fact, as concluded by the ICCA Report 'Does a Right to a Physical Hearing Exist in International Arbitration?', most analysed *leges arbitri* did not provide for the right to an in-person hearing. However, the Report finds that '[*t]here is no reported case in which an award has been vacated solely on the basis of a hearing being held remotely, nor is there any reported decision of an arbitrator being disqualified for such conduct*'.[17]

Consultation Question 32.

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

We note that, upon the drafting of the Act, this language was used intentionally although it gave rise to subsequent confusion. Section 39 was intended as arbitration's alternative to statutory adjudication under the HGCRA 1996. The purpose was to minimise the multiplicity of proceedings (i.e., the need to bring a claim in adjudication) and give the parties the possibility of resolving disputes expeditiously under a single arbitral process.

A preliminary decision can be either an award or an order, depending on its content. In *ZCCM v Kansanshi Holdings*,[18] it was held that a decision is more likely to be an award if it finally disposes of an arbitrated matter. If so, a provisional decision under section 39 does indeed appear to be inherently an order. On the other hand, it would be preferable to give the tribunal discretion as to the form, order or award. After all, in practice, some provisional decisions or interim measures are sometimes issued in the form of awards.

For the above reasons, we propose that section 39 should refer to the arbitrators' 'power to make provisional awards or orders'. We also propose to amend section 39(1) to say: 'The parties are free to agree that the tribunal shall have power to order on a provisional basis, in a provisional award or order, any relief which it would have power to grant in a final award.' Such amendments would enable the tribunal to choose, at its discretion, whether it is appropriate to grant relief in a provisional award or order, depending on the circumstances of each individual case.

[17] ICCA Report 'Does a Right to a Physical Hearing Exist in International Arbitration?' (2022).
[18] [2019] EWHC 1285 (Comm).

Consultation Question 33.

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

We agree. This would make section 39 consistent with section 48.

Consultation Question 34.

We provisionally propose that section 70(3) of the Arbitration Act 1996 should be amended so that, if there has been a request under section 57 for a correction or additional award material to the application or appeal, time runs from the date when the applicant or appellant was notified of the result of that request. Do you agree?

Consultation Question 35.

We provisionally conclude that section 70(8) of the Arbitration Act 1996 (granting leave to appeal subject to conditions) should be retained as we consider that it serves a useful function. Do you agree?

Consultation Question 36.

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

We agree with the above proposals.

Other stakeholder suggestions not short-listed for review

Consultation Question 37.

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

Consultation Question 38.

Is there any significant topic within the Arbitration Act 1996, not addressed in this consultation paper, which you think is in need of review and potential reform? If so, what is the topic, and why does it call for review?

i. The law applicable to the arbitration agreement

First, as mentioned above, we believe that the Law Commission should explore whether *Enka v Chubb* should be overruled by way of amending the Act. As the Supreme Court itself recognised in that case, the law most closely connected with the arbitration agreement is the law of the seat. It would make much sense, therefore, if that law applied to the arbitration

agreement by default.[19] Parties would always be free to choose another law, but they should do so expressly in relation to the arbitration agreement itself. This would have a number of obvious advantages:

- The law governing the arbitration agreement would be the same as the law governing the procedure, achieving a better fit between the law governing the agreement that sets out the rights and obligations of the parties in relation to the arbitration and the procedural law.

- In an arbitration seated in England, Wales or Northern Ireland, the law governing the separability of the arbitration agreement would be more likely to be English law.

- In an arbitration seated in England, Wales or Northern Ireland, the law applying to confidentiality would be more likely to be English law even if the view were to be taken that the law governing confidentiality is the law of the arbitration agreement (as confidentiality is an implied term of such an agreement) rather than the law of the seat.

- The law of the arbitration agreement would follow the neutral dispute resolution forum rather than the law governing the substantive relationship unless the parties agree otherwise.

- The principle of separability would apply to all arbitrations seated in England and Wales or Northern Ireland, unless the parties expressly chose a different law to govern the arbitration agreement.

- The law of the arbitration agreement would be the law of the court that has the power to review the jurisdiction of the tribunal.

We envisage two alternative avenues:

Alternative 1: follow the approach adopted in Scotland and Sweden where the law of the seat is expressly implied as the law of the arbitration agreement, subject to express agreement to the contrary. The Swedish Arbitration Act in section 48 states: '*Where an arbitration agreement has an international connection, the agreement shall be governed by the law agreed upon by the parties. Where the parties have not reached such an agreement, the arbitration agreement shall be governed by the law of the country in which, by virtue of the agreement, the proceedings have taken place or shall take place.*'

Similarly, Article 6 of the Arbitration (Scotland) Act 2010, provides that '*[w]here (a) the parties to an arbitration agreement agree that an arbitration under that agreement is to be seated in Scotland, but (b) the arbitration agreement does not specify the law which is to govern it, then, unless the parties otherwise agree, the arbitration agreement is to be governed by Scots law.*'

Alternative 2: follow the flexible Swiss approach to the validation principle. Article 178(2) of the Swiss PILA states: '*As regards its substance, an arbitration agreement is valid if it conforms either to the law chosen by the parties, to the law governing the subject-matter of the dispute, in particular the law governing the main contract, or to Swiss law.*'

[19] See R Nazzini 'The Law Applicable to the Arbitration Agreement: Towards Transnational Principles' (2016) 65 ICLQ 681-703.

ii. GDPR in arbitration

Secondly, the Law Commission could revise the issue of data protection in arbitration. Issues such as the application of the GDPR give rise to practical difficulties. Following Brexit, the UK is no longer bound by EU law so the Act could be amended to clarify to what extent, if any, the GDPR applies in relation to arbitrations to which the Act applies.

iii. Section 17

Thirdly, we believe that section 17 should be repealed so that, if a party refuses to appoint an arbitrator in the circumstances envisaged by that section, the non-defaulting party may apply to the court under section 18. The court's intervention would be more in line with international practice and avoid any 'due process' or 'equality of arms' argument by the defaulting party at the enforcement stage outside the United Kingdom.

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