Response to the Law Commission of England and Wales Second Consultation on the Review of the English Arbitration Act 1996
University of Aberdeen, Scotland
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1. Introduction

This response is provided by a working group of the Centre for Commercial Law and Centre for Private International Law at the University of Aberdeen. The working group is coordinated by Dr Gloria M Alvarez, FCIArb and consists of Dr Patricia Živković, Dr Nevena Jevremović, Ilias Kazeem, Baffour Yiadom-Boakye, Aysu Baser, Konstantina Kalaitsoglou, and Tung Xuan Le with comments from Professor Justin Borg-Barthet and Dr Burcu Yüksel Ripley.[1]

The School of Law at the University of Aberdeen is thankful for the opportunity to respond to the Law Commission's extensive and clear review of the Arbitration Act 1996. We also responded to the first consultation on the Review of the Arbitration Act 1996.[2] We note that, while the Arbitration Act 1996 extends to England, Wales and Northern Ireland, the Act is of utmost importance in Scotland given the ample number of stakeholders and industry users IN Scotland who choose London as seat of arbitral proceedings. It is in this sense of plurality; we consider this contribution can provide intra-UK perspectives to the domestic and international approach the Consultation already presents.

2. Response

Chapter 2: Proper law of the arbitration agreement

Question 1.

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

Yes, we agree. The proposed rule should be included in the Arbitration Act 1996. In our view, the rule is necessary to promote clarity and legal certainty. Although certain principles have been set out in *Enka v Chubb* to provide clarity on the matter, they are still too complex and difficult to apply in practice because they require courts to assess a range of factual connections, the appreciation of the relative relevance of which will vary on a case-by-case basis. We are of the view that the proposed rule would simplify the matter and make the law more predictable and user-friendly. In addition, the reform would minimise the possibility of conflicting decisions by courts on the proper law of the arbitration agreement, as well as addressing the limitation of the 'validation' principle as seen in the *Kebab-Ji* case.

[1] The Dispute Resolution expertise at the University of Aberdeen, School of law can be found here: https://www.abdn.ac.uk/law/research/dispute-resolution-professional-network-1221.php.

[2] University of Aberdeen, School of Law, Response to EAA Consultation, December 2022, available at https://www.abdn.ac.uk/law/research/centre-for-commercial-law/public-policy-stakeholder-engagement-1109.php#panel1519).

Moreover, the proposed rule is likely to result in more arbitration agreements governed by the law of England and Wales because London is a popular choice for seat. Thus, the rule will allow parties to take advantage of English law and its pro-arbitration stance, even when the parties have omitted to choose English law in an arbitration seated in England. The proposed rule would have no negative consequences for party autonomy as it would apply only where the parties have not designated the proper law of the arbitration agreement expressly in the arbitration agreement itself.

The requirement that the designation of an alternative governing law must be expressly stated in the arbitration agreement itself provides further clarity. It eliminates the possibility of the complexity associated with the identification of an implied choice, thereby guiding the parties on the need to make a clear choice or have the default rule apply.

In sum, we believe that this default rule will not only simplify the law on this point, but it will also increase the opportunity for parties to benefit from the pro-arbitration stance of English law in appropriate cases.

Chapter 3: Challenging jurisdiction under section 67

Question 2.

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

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

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

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

Yes, we agree. The proposal for reform strikes an appropriate balance between relevant concerns. The fact that practice has shown that full rehearing under Section 67 is rare shows that the position to limit it to exceptional cases is meritorious. The proposal for reform aligns with the development in practice, with the added advantage that it clarifies the applicable procedure for challenging the decisions of arbitral tribunals under Section 67. As we noted in our response to the first consultation, a full re-hearing of challenge under Section 67 impedes procedural fairness, efficiency, and competence-competence. However, we appreciate how the proposal for reform has developed regarding the slippery slope on the effect of terminologies of "appeal", and "re-hearing". We also understand the contention that regardless of our view of the negative implications of rehearing, it is necessary in certain cases. It is thus sensible for a reform to allow exceptions in exceptional cases, as the proposal seeks to do.

The proposed approach provides sufficient grounds to identify the exceptional cases where rehearing will be necessary. It stipulates that the court shall not consider new grounds of objection or evidence that were available to the parties during the arbitral proceedings unless it can be established that such grounds or evidence could not have been advanced with reasonable diligence. This requirement aligns with the principle of finality in arbitration, which emphasises the need for parties to present all relevant issues before the tribunal in a timely manner. Also, it provides that the court shall not revisit the evidence that was presented before the tribunal, except in limited and exceptional circumstances that serve the interests of justice. This further underscores the importance of finality and efficiency in the arbitral process.

Lastly, the approach acknowledges that the court may allow a challenge where the tribunal's determination of its own jurisdiction was wrong. This aspect of the approach is consistent with the contention that a tribunal's decision on its own jurisdiction should not be final as that is a fundamental question in the arbitral process. However, it also strikes an appropriate balance with the principle of competence-competence because this standard will ensure that weight will be attached to the tribunal's decision unless it is found to be wrong. At the same time, we do encourage further guidance on the meaning of the word "wrong" in the context of the new provision to ensure the predictability and efficiency of the process. Specifically, further guidance is necessary to outline if the "wrong decisions on jurisdiction" include a misapplication of the law (which would make the ground too broad) or a defect in the arbitral procedure.

In sum, the proposed approach strikes an appropriate balance between the interests of finality and competence-competence in arbitration, while ensuring that parties have a meaningful opportunity to challenge the tribunal's jurisdiction in suitable cases.

Question 3.

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

We agree. We consider the matter to be procedural in nature and thus agree that the Arbitration Act 1996 should confer the power to the court to implement the proposal in Q2. We are aware of considerations around the scope of the intervention of the court in the proceedings, and accessibility of the rules to foreign parties. However, we do not consider that these concerns represent an impediment to the solution that the Consultation paper offers. We do note that the powers and the orders alike should be well-defined, narrow, and exhaustive to promote predictability and efficiency of the arbitral process.

Chapter 4: Discrimination

Question 4.

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

We agree that it should be deemed justified to require an arbitrator to have a nationality different from the nationality of the parties. This is in accordance with *Hashwani v Jivraj*[3] and the proposed position in the first consultation paper on discrimination. The requirement for an arbitrator to have a nationality different from the nationality of the parties may be legitimate and justified to present a sense of impartiality on the part of an arbitrator and to avoid perceptions of bias. This is especially so in the context of small and microstates (in which people tend to be known to one another) but also more generally in the example in paragraph 4.28 of the second consultation paper with England and Germany. This justification is also in accordance with party autonomy and recognised by institutional rules. Article 6.1. of the LCIA Rules states that "[w]here the parties are of different nationalities, a sole arbitrator or the presiding arbitrator shall not have the same nationality as any party unless the parties who are not of the same nationality as the arbitrator candidate all agree in writing otherwise." In the same manner, the 2021 ICC Arbitration Rules provides in Article 13(5) that "[w]here the Court is to appoint the sole arbitrator or the president of the arbitral tribunal, such sole arbitrator or president of the arbitral tribunal shall be of a nationality other than those of the parties. The requirement for an arbitrator with different nationality from the nationality of parties reflects the consensual and flexible nature of arbitration.

Question 5.

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

We firmly support the general prohibition of discrimination in the context of arbitration. This includes opposing any form of parties' discriminatory appointments or behaviour by arbitrators. We believe in upholding the principles of fairness, equality, and non-discrimination in all aspects of arbitration proceedings. We note that discrimination is indirectly prohibited in arbitration particularly on the part of arbitrators in the conduct of proceedings through the requirement for an impartial tribunal under Section 1(a) of the Arbitration Act 1996. This places an obligation on arbitrators to conduct arbitral proceedings in a neutral manner and not favour one party to the detriment of another.

Additionally, we recognise the importance of addressing potentially discriminatory appointments by national courts under Section 18(3)(d). Such appointments should be subject to scrutiny and rectification if found to be discriminatory. It is crucial to ensure that the composition of arbitral tribunals is free from bias and discrimination, preserving the integrity and impartiality of the arbitration process. By condemning all forms of discrimination and promoting diversity and inclusivity, we aim to create an environment where arbitration can truly serve as a fair and effective means of dispute resolution for all parties involved.

[3] [2011] UKSC 40, [2011] 1 WLR 1872.

Question 6.

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

While we welcome the general prohibition of discrimination in arbitration, we anticipate certain challenges in terms of enforcement of such a prohibition and provide potential solutions below. The challenges would arise due to the arbitration's confidential nature. Namely, confidentiality is one of the cornerstones of international arbitration and as such it restricts who has access to information pertaining to individual arbitration cases, including nominations and appointments of arbitrators.

Still, we believe that a statutory provision explicitly prohibiting discrimination would significantly impact behaviour of all arbitration stakeholders (parties, arbitrators, arbitral institutions, national courts) in this regard. Moreover, the general prohibition of discrimination in arbitration would have direct horizontal effects that would cover discriminatory actions of private stakeholders, and it would impose State obligations to combat such discrimination in the context of arbitration.

In addressing discriminatory behaviour by arbitrators, we propose the inclusion of an additional ground in Section 68, complementing the existing remedies of removal under Section 24 and the current grounds for claiming serious irregularity under Section 68. This new ground would directly address discriminatory conduct on the part of arbitrators, providing an avenue for redress.

We also invite drafters to consider potential remedies for addressing discriminatory appointments by institutions and courts. In the case of institutional appointments, we suggest allowing claims to be brought by either party or by an aggrieved person who acts as an arbitrator for the relevant institution. In order to strengthen and emphasise accountability in this field, we suggest that a reporting mechanism (either mandatory or voluntary) can be established for arbitral institutions seated in the jurisdiction of England and Wales on the statistics of institutional appointment in relation to protected and non-protected characteristics (i.e. those that are not governed by the Equality Act, but the institutions decide to report on), in order to empower interested parties to raise relevant claims. Additionally, the Arbitration Act 1996 could require internal consultations and the reasoning underpinning institutional appointments to be recorded and included in such annual reports. While acknowledging the complexities involved, we believe that exploring these avenues for remedying discrimination in arbitration is crucial to ensure a fair and equitable process for all parties involved.