Bar Council response to the Law Commission Review of the Arbitration Act 1996 consultation paper

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Law Commission consultation paper entitled Review of the Arbitration Act 1996[1].

2. The Bar Council represents over 17,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.

3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

4. We welcome the opportunity to comment on this well considered and balanced Consultation Paper by the Law Commission. We are generally of the view that the Arbitration Act 1996 is a clearly drafted piece of legislation which has operated successfully for many years. We are of the view that there is a strong case in favour of taking a minimal approach to making any changes to the Act because it is has stood the test of time, has been the subject of a large and internationally understood and respected body of caselaw, and is a cornerstone of the arbitral system which makes London one of the most important and attractive centres for arbitration in the world. We have considered the Law Commission's proposals in detail but

[1] https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2022/09/Arbitration-Consultation-Paper.pdf

have given relatively short answers, especially where we are of the same view as is expressed in the Consultation Paper. We do note that it cannot be said that there is unanimity amongst members of the Bar in relation to a number of the issues raised. We appreciate that some of the answers given in this response differ from those of other respondees from the Bar, including COMBAR, but recognise that they may also be tenable views. We can expand on our own reasoning if that would be helpful to the Law Commission.

Q1. 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?

5. We agree. We consider that confidentiality should be developed by the courts and by the parties through their adopted arbitration rules or as part of the arbitral procedure.

Q2. We provisionally conclude that the Arbitration Act 1996 should not impose a duty of independence on arbitrators. Do you agree?

6. We agree that the Arbitration Act should not impose a duty of independence. We consider that this is not necessary in view of the way that the traditional doctrine of impartiality in the common law has been developed by the judiciary.

Q3. 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?

7. We agree.

Q4. Should the Arbitration Act 1996 specify the state of knowledge required of an arbitrator's duty of disclosure, and why?

8. We do not think that the Arbitration Act should specify the state of knowledge required of an arbitrator's duty of disclosure.

Q5. 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?

9. We are of the view that the Arbitration Act should not attempt to specify the state of knowledge required of an arbitrator's duty of disclosure.

Q6. 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)?

10. We welcome the Law Commission's intention to stamp out discrimination. We take the view that the requirement that an arbitrator possess a particular protected characteristic in any agreement should only be enforceable where it effectively meets the threshold set out in the obiter comments of the Supreme Court in *Hashwani* (given that the appeal turned on whether the arrangement fell within the meaning of now repealed Regulations or Equality Act 2010 directed at preventing discrimination by reason of religion or belief in an employment context and the Court held it did not) which is that it must be a genuine requirement which is objectively justified having regard to whether the requirement is legitimate and proportionate in all the circumstances.

Q7. 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?

11. We strongly oppose discrimination and see the force in making the provisions in s.4 of the Equality Act 2010 applicable when it comes to the appointment of arbitrators. We have considered the Law Commission's provisional proposal but wondered whether consideration might be given to an alternative formulation, which would be as follows:

> "(1) the appointment of an arbitrator should not be susceptible to challenge on the basis of the arbitrator's protected characteristic(s), save for the purposes of enforcing an agreement between the parties satisfying the conditions in (2); 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 genuine, legitimate and objectively justified occupational requirement".

Q8. Should arbitrators incur liability for resignation at all, and why?

12. We are of the view that arbitrators should not incur liability for resignation as they act in a quasi-judicial capacity. There may be circumstances in which the arbitrator may have little option but to resign and should be able to do so without the fear of incurring liability for resigning.

Q9. Should arbitrators incur liability for resignation only if the resignation is proved to be unreasonable?

13. As stated in answer to Question 8, we take the view that arbitrators should not incur liability for resignation. We consider that it would be undesirable to have protracted disputes and potential further litigation on whether an arbitrator's resignation was unreasonable.

Q10. 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?

14. We agree that arbitrator immunity should extend to the costs of court proceedings arising out of the arbitration.

Q11. 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?

15. We agree with this proposal. We favour the Arbitration Act being amended to provide that an arbitral tribunal may adopt a summary procedure unless the parties agree otherwise.

16. Providing expressly for summary procedure in the Act may encourage some arbitrators to take this approach more readily. Provided the arbitral tribunal acts fairly when conducting the summary procedure and the threshold test is met (as set out under Question 14 below), we do not anticipate that adopting such a procedure should fall foul of the recognition and enforcement provisions of the New York Convention on the basis of a contention that a party was not given a reasonable opportunity to present their case.

Q12. 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?

17. We agree.

Q13. We provisionally propose that the Arbitration Act 1996 should stipulate the threshold for success in any summary procedure. Do you agree?

18. We agree. It would be desirable for there to be a set threshold for success as that would promote consistency.

Q14. 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?

19. We agree with this test being adopted as it has been tried and tested by the courts for some time and there is useful guidance from the case law that has developed.

Q15. 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?

20. We agree that it should be confirmed by amendment that s.44(2)(a) applies to the taking of evidence of witnesses by deposition only.

Q16. 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?

21. Yes, we agree, for the sake of clarity.

Q17. 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?

22. We agree.

Q18. We provisionally conclude that the provisions of the Arbitration Act 1996 should not apply generally to emergency arbitrators. Do you agree?

23. We agree. There is no universally accepted definition of the term "emergency arbitrator".

Q19. 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?

24. We agree.

Q20. Do you think that section 44(5) of the Arbitration Act 1996 should be repealed, and why?

25. We agree

Q21. 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.**

26. We prefer the second option because it is simpler and neater.

Q22. 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?

27. We agree. However, it should be noted that this was the view of the majority, but not all, of those compiling this response, and we note that a similar divergence of views has been expressed by other respondees, including COMBAR, although in their case, the majority do not agree with this proposal. The following responses on section 67 and the related questions therefore represent the majority view of those compiling this response on behalf of the Bar Council, but we appreciate that others legitimately take the contrary view.

28. There are competing considerations implicated in the proposed reform of section 67.

29. On the one hand, there are arguments against the proposed reform. For a start, arbitration is a consensual process. The right to challenge an arbitral award by way of a full rehearing offers an important safeguard to a party that maintains that they did not consent to that process in the first place. Further, empirical data and experience suggest that section 67 applications tend to be rare, and they are mainly decided without hearing witnesses. The Law Commission points to only four reported section 67 cases annually, with most of those cases being decided on the basis of documentary evidence that was submitted in the arbitration.[2]

30. On the other hand, there are arguments supporting the proposed reform. Under the current law, a party can participate in the arbitration proceedings and challenge the arbitral tribunal's jurisdiction at a full hearing which can include witnesses, documentary evidence and expert opinions. If that party is successful in its challenge before the tribunal, it will obtain a favourable award and foreclose arbitration. However, if that party is unsuccessful in its challenge before the tribunal, it can have another bite of the cherry: it can challenge the arbitral award before the English courts under section 67 and benefit from a full rehearing which may include fresh witnesses, documents and expert opinions.

31. In our view, it is an important principle of fairness that a party should not have the right to a full hearing to challenge jurisdiction on two occasions, once before tribunal and then in a *de novo* hearing before a court. We agree with the point made by the Law Commission that a party who challenges the jurisdiction before the arbitral tribunal is, on the current law, entitled to treat it as a 'dress rehearsal', in which the award becomes a sort of 'coaching' tool for that party in its subsequent challenge before the courts of law.[3] In our view, this should not be the case.

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[2] Although note that other commentators point to a higher number of section 67 cases. See for example Louis Flannery, listing fifteen section 67 cases in 2021: 88(4) *International Journal of Arbitration, Mediation and Dispute Management*.

[3] See paragraph 8.31.

32. Furthermore, the proposed reform of section 67 is supported by considerations of finality of an arbitral tribunal's decision which is an important public policy in English law. In litigation it is common for issues in a case, including dispositive issues, to be subject to challenge by way of an appeal only. It is not clear that there is a principled basis for adopting a different approach in relation to arbitration.[4]

33. There are also good practical considerations supporting the proposed reform of section 67. Hearing the same jurisdictional issue twice, before the arbitral tribunal and the courts of law, will significantly impact on the length of the proceedings and the costs of resolving the dispute. This is especially the case where the tribunal decides on the jurisdictional challenge in the same award with the merits and the unsuccessful party subsequently challenges the award before the court. If the court decides to set the award aside, the time and costs that the parties have spent arbitrating the merits of the dispute will be wasted.

34. Finally, it must be noted that the proposed reform (rightly in our view) maintains an important safeguard for non-participating parties. Specifically, under section 72 (which the Law Commission does not propose to amend), if a party does not participate in the arbitral process, it will still be entitled to challenge the arbitral award by way of a full hearing.

35. On balance, and subject to considering amending sections 32 and 103 too (see below), we favour the proposed reform of section 67 both on the basis of fairness and finality, and for practical reasons.

Q23. 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?

36. As regards section 32, we have to distinguish between the case where a party applies to the court before the tribunal has ruled on its jurisdiction and the case where a party applies to the court after the tribunal has ruled on its jurisdiction. While there are different considerations involved in these cases, they are currently treated identically under section 32.

37. In our view section 32 should distinguish between these two cases. Specifically, in respect of the case where a party applies to the court after the tribunal has ruled on its jurisdiction, the same considerations apply as in respect of the case where a party applies to the court to challenge the jurisdiction of the tribunal under section 67. Clearly, therefore, if

[4] Ali Malek, Christopher Harris and Paul Bonner Hughes: 88(4) *International Journal of Arbitration, Mediation and Dispute Management*.

section 67 is amended, section 32 should also be amended so that a party who applies to the court after the tribunal has ruled on its jurisdiction will not be entitled to a rehearing.

38. However, the case where a party applies to the court before the tribunal has ruled on its jurisdiction should be treated differently. Asking a court to decide a jurisdictional question as a preliminary matter can save time and costs and reduce uncertainty. If the court decides that the tribunal has jurisdiction, the route to challenging the tribunal's jurisdiction under section 67 will be foreclosed. If the court decides that the tribunal lacks jurisdiction, the parties will no longer need to spend time and costs in arbitration. In either way, parties will know where they stand. Therefore, when a party applies to the court before the tribunal has ruled on its jurisdiction, there are sound policy considerations for a law reform to incentivise the use of section 32 over the use of section 67, especially given the typically quick fashion in which preliminary applications are dealt with by English courts.

39. Thus, when a party applies to the court before the tribunal has ruled on its jurisdiction, the Law Commission should consider relaxing the current stringent procedural requirements set out in section 32, including the requirement that an application be made with the agreement in writing of all the other parties to the proceedings or permission of the tribunal. In practice, it is very rare that a party will obtain the other parties' agreement or the tribunal's permission to apply to the court. Section 32 can be amended to allow a party to bypass the other parties and the tribunal and be allowed to directly ask the court for leave to apply. In deciding whether to grant leave for a preliminary determination of the tribunal's jurisdiction, the court will of course ensure that section 32 is not abused.

Q24. 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?

40. We do not agree.

41. We are of the view that any amendment of section 67 should not disturb the delicate balance between the scope of review when an award is challenged and when a foreign award is enforced in England and Wales. Currently, a party resisting the enforcement of a foreign award in England and Wales can challenge the tribunal's jurisdiction under section 103 and benefit from a full rehearing, even if the jurisdictional question was raised and decided in the arbitration in the first place.

42. If the right to a rehearing is abolished for jurisdictional challenges in the context of section 67, the right to a rehearing should be abolished for jurisdictional challenges in the context of section 103 too. There are neither practical considerations nor any principled basis

to distinguish between these two circumstances. This is particularly the case since section 103 of the Arbitration Act covers *foreign* arbitral awards, which enjoy the benefit of the New York Convention on Enforcement of Foreign Arbitral Awards. New York Convention awards are presumed enforceable in accordance with the presumption of enforceability under Article V of the New York Convention ("*Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that"* (emphasis added)).

43. Therefore, we are of the view that section 103 should also be amended along the lines of the proposed amendment of section 67, so that where a party participated in the arbitral process and objected to the substantive jurisdiction of the arbitral tribunal, any challenge to the tribunal's ruling on jurisdiction the context of section 103 should be by way of an appeal and not a rehearing.

Q25. 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?

44. We agree with the proposed amendment and the reasons provided by the Consultation Paper in paragraphs 8.58 – 8.63.

Q26. 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?

45. We agree with the proposed amendment. In practice, there is nothing problematic in allowing a tribunal which has ruled that there is no substantive jurisdiction, to have the power to make an award of costs. In fact, this is preferrable as it saves parties from applying to court after the award and spending additional time and expense. In our view, it makes good sense that the current practice is expressly provided for in the Arbitration Act.

Q27. 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?

46. We agree. We would be strongly opposed to a default position which removed the right of appeal on a point of law.

47. We agree that the present position strikes a broadly appropriate balance between having a right of appeal and, on an opt-out basis, constraining the circumstances in which it can be exercised. Given that the balance is at least broadly right, it should not be changed, because it is well-established and well understood. Individuals and arbitral institutions who wish there to be a different regime are at liberty to (and in practice often do) contract for a different regime.

Q28. Do you think that section 7 of the Arbitration Act 1996 (separability of arbitration agreement) should be mandatory, and why?

48. Yes, we think it should be mandatory. While acknowledging that, as a general principle, the parties should be free to choose the terms of their agreement, we see no reason why they would not want the arbitration agreement to be separable. Given the obvious risk of them inadvertently ending up with an inseparable arbitration agreement when foreign law is chosen, we think it is desirable that it be mandatory.

Q29. 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?

49. Yes, we agree.

Q30. 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?

50. Yes, we agree, for the reasons given in the Consultation Paper.

Q31. 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?

51. We question whether there is a need to make express reference to remote hearings and electronic documentation, as arbitral tribunals have wide procedural powers and have used remote hearings and electronic documentation in practice. If there is to be any such express reference, then we should suggest that its wording be "future proofed" as far as possible to cover future technological developments.

Q32. Do you think that section 39 of the Arbitration Act 1996 should be amended to refer to "orders" (rather than "awards"), and why?

52. Yes. The current wording of the section and its heading is confusing and should be changed. We think that rulings under section 39 should be treated as orders and enforceable as such by means of sections 41 and 42: we agree that it is not desirable to subject a ruling under section 39 to the full range of challenges available against awards, as it could introduce unnecessary complexity, expense and delay into the interim stage of proceedings.

Q33. Do you think that section 39(1) of the Arbitration Act 1996 should be amended to refer to "remedies" (rather than "relief"), and why?

53. Yes, but only for consistency. We see no practical difference between the words in their context.

Q34. 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?

54. Yes, we agree.

Q35. 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?

55. Yes, we agree.

Q36. We provisionally propose that sections 85 to 87 of the Arbitration Act 1996 (on domestic arbitration agreements) should be repealed. Do you agree?

56. Yes, we agree.

Q37. Do you think that any of the suggestions discussed in Chapter 11 needs revisiting in full, and if so, why?

57. No.

Q38. 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?

58. No.

Bar Council[5]
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[5] Prepared by the Law Reform Committee