Arbitration Bill
Bar Council written evidence to the Special Public Bill Committee

About Us

The Bar Council represents approximately 17,500 barristers in England and Wales. It is also the Approved Regulator for the Bar of England and Wales. A strong and independent Bar exists to serve the public and is crucial to the administration of justice and upholding the rule of law.

Scope of Response

This submission addresses the questions posed by the Special Public Bill Committee.

Question 1: Whether you agree with the proposed reforms and whether the reforms achieve what they are intended to

The Bar Council supports the proposed reforms of the Arbitration Act 1996 and considers that the reforms should achieve the stated intentions. The Bar Council has previously submitted responses to the Law Commission's Consultation Papers on the review of the Arbitration Act 1996 on 15 December 2022[1] and 22 May 2023[2].

Provisions in the Government's bill that differ from the version proposed by the Law Commission concerning:

Question 2: Changing the bill so that it now provides the changes to the law apply to all arbitration agreements whenever made except those where arbitrations have already commenced.

It is sensible to provide that changes made by the Bill should apply to all arbitration agreements whenever made, except those where arbitrations have already commenced. We are aware that there are many arbitration agreements in existence and it may take many years for disputes under them to go to arbitration. Therefore, it would be undesirable to have two different regimes governing arbitrations for an indefinite time into the future, particularly as the changes envisaged by the Bill are intended to improve the arbitration process and procedures.

[1] https://www.barcouncil.org.uk/static/67d27022-e762-43e7-b0ec471e78d1634d/Bar-Council-response-to-the-Law-Commission-Review-of-the-Arbitration-Act-1996-consultation-paper-to-submit.pdf

[2] https://www.barcouncil.org.uk/static/aae231fa-55ec-41b2-bf7ab18fe1b00589/Bar-Council-response-to-the-Law-Commission-Review-of-the-Arbitration-Act-1996-second-consultation-paper-to-submit.pdf

Question 3: Extending the extent of the bill to Northern Ireland

It is not a matter for the Bar Council of England and Wales to comment on whether the Bill should extend to Northern Ireland. However, we understand that the Arbitration Act 1986 (apart from sections 92, 93 and Schedule 2) does apply to Northern Ireland. We suggest that the Bar Council of Northern Ireland is best placed to response to this Question on behalf of the referral Bar.

Question 4: What impact the reforms are likely to have on the arbitration market in the United Kingdom/the City of London

The reforms are likely to be beneficial for the arbitration market in the UK, especially for London where many large-scale commercial arbitrations are held. In particular, the reforms which clarify the powers of courts to support arbitration proceedings and emergency arbitrators and those which underpin arbitrators' powers for summarily dismissing issues that have no real prospect of success should facilitate and make for more efficient arbitrations. Dealing with issues suitable for summary determination serve to curtail parties taking weak or hopeless points which can delay proceedings and increase costs.

Clause 1 of the Bill (referred to below) should result in more arbitrations with their seat in England and Wales being dealt with under the law of England and Wales (that being the default position where the parties have not expressly chosen another law). This provides a straightforward test as to the applicable law and should result in more disputes being arbitrated in England and Wales pursuant to our law which should benefit lawyers practising here, as well as having wider financial benefits.

To conclude, the Bill's reforms should assist in strengthening UK's position as a leading centre for arbitration by the improvements proposed.

Question 5: Is clause 1(2) of the Bill (adding new Section 6A to the Arbitration Act 1996) sufficiently clear in its drafting (*see Hansard 19 December 2023 Grand Committee Col 429GC-430GC and 433GC to 434GC*)[2]?

Clause 1(1) of the Bill reverses the majority decision by the Supreme Court in Enka v Chubb and meets the Law Commission's proposal that the applicable law should be that which the parties expressly agreed should apply to the arbitration, but in the absence of such agreement, the applicable law is that of the seat of the arbitration.

Clause 1(1) states that:

"The law applicable to an arbitration agreement is –

> *(a) the law that the parties expressly agree applies to the arbitration agreement, or*
>
> *(b) where no such agreement is made, the law of the seat of the arbitration in question."*

Clause 1(2) goes on to state that:

"For the purposes of subsection (1), agreement between the parties that a particular law applies to an agreement of which the arbitration agreement forms a part does not, of itself, constitute express agreement that that law also applies to the arbitration agreement"

We appreciate that Clause 1(2) is trying to make clear that an agreement between the parties that a particular law applies, does not necessarily mean there is an express agreement that such law also applies to the arbitration agreement.

However, the way Clause 1(2) is worded does not serve to clarify Clause 1(1) and could be misconstrued. We see difficulties in redrafting Clause 1(2) other than in a cumbersome manner which may detract from the straightforward provision set out in Clause 1(1). There is merit in Lord Hoffmann's suggestion that Clause 1(2) should not be included as a new Section 6A(2). Clause 1(1) aligns our law with the arbitration law of Scotland in this regard. Scotland manages without an equivalent provision to Clause 1(2). There appears to be no necessity to include a clause like Clause 1(2) in this Bill. If further explanation is needed for the proper interpretation of Clause 1(1), perhaps this could be inserted in Explanatory Notes which may accompany the Bill.

Question 6: Whether the amendment to section 67 of the Arbitration Act 1996 relating to challenges to substantive jurisdiction set out a sufficiently clear approach?

The Bar Council appreciates that amendment of section 67 of the Arbitration Act 1996 was an issue much debated by lawyers and arbitrators during the course of the Law Commission's consultation. There is merit in using rules of court about the procedure to be followed on an application under s.67 as set out under Clause 11. We consider that the amendments relating to challenges to substantive jurisdiction set out a sufficiently clear approach.

The Bar Council
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