**A response to the Law Commission’s consultation paper Review of the Arbitration Act**

**Executive summary**

In response to the Law Commission’s Consultation Paper *Review of the Arbitration Act*, we offer responses to questions 7, 14, 16, 27, 31 and 36, and some thoughts on third party funding. Our views are as follows.

* Adopt the provisions on non-discrimination (Q7)
* Adopt the ‘manifestly without merit language’ in relation to summary awards (Q14)
* Consider adopting express rules on court orders against third parties (Q16)
* Exclude treaty arbitrations from the scope of s 69 (Q27)
* Keep open the issue as to the validity of electronic signatures (Q31)
* Keep open the issue of the particular needs of consumer and SME arbitrations (Q36), and
* Consider provisions on disclosure of third party funding (paras 11.13-17)

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Law et al (2022), *A response to the Law Commission’s consultation paper Review of the Arbitration Act*[[1]](#footnote-1)

**Responses to Questions**

**Question 7**

In principle, yes, the provisions on anti-discrimination should be adopted. The 2011 judgment of the UKSC in *Hashwani v Jvraj* [2011] UKSC 40 established that as an arbitrator could not be understood to be appointed through an employment contract, employment law precluding discrimination – equality law – do not apply to that relationship. The proposal aims to ensure that anti-discrimination rules apply to the appointment of arbitrators and challenges to arbitral appointments. The lack of diversity in international arbitration is well documented[[2]](#footnote-2) and the aim of the proposal is to promote diversity through a non-discrimination provision.

As regards wording, the proposal could have introduced an express provision precluding appointments which discriminate based on protected characteristics. This however is not the approach adopted. Instead, the proposal, on the one hand, precludes the appointment of an individual being challenged on the basis of that individual’s protected characteristics. On the other, it establishes that any agreement between the parties concerning the protected characteristics of the arbitrator to be appointed is unenforceable unless that agreement can be deemed to constitute a “proportionate means of achieving a legitimate aim”. It seems that this body of exceptions will need to be developed on a case by case or ad hoc basis.

Aligning protected characteristics for the purposes of the Arbitration Act with those identified under Section 4 of the Equality Act 2010 may be problematic. It has been noted that the limited scope of the 2010 Act (ie its limited application to specific contexts, namely employment, public services, public transport, club and associations, provision of services) and domestic nature may clash with the international character of arbitration seated in England (foreign parties, foreign applicable law).[[3]](#footnote-3) That is to say, it has been suggested that requiring foreign parties and arbitrators to comply with the duties established by the 2010 Act would undermine the “opt in/opt out ethos” of the Arbitration Act.[[4]](#footnote-4) It would seem however that rules against discrimination may – to draw an analogy – constitute a body of rules similar to public policy[[5]](#footnote-5) or “overriding mandatory provisions” in private international law, from which parties cannot derogate when choosing the applicable (substantive) law.[[6]](#footnote-6)

While aligning the protected characteristics under the Arbitration Act with those established in section 4 of the 2010 Act may generate coherence, and allow for the engagement of the case law of the latter, section 4 has been criticised. The Equality Act 2010 aimed to consolidate existing legislation on non-discrimination and equality and has come to be recognised as a key piece of legislation. Its section 4 however has been criticised in that it establishes a closed list of protected characteristics. Thus, it does not offer scope for expanded protections for characteristics that do not fall within this closed list. In particular, the protection afforded to trans people has been criticised[[7]](#footnote-7) as has the absence of a characteristic into which gender-fluid, non-binary or intersex persons may fall.

Thus, to the extent that the Law Commission proposes to introduce anti-discrimination provisions to the ends of increasing diversity and promoting a just society, alignment with developing societal norms is necessary.

**Question 14**

At 6.35, the Law Commission tentatively opts for ‘no reasonable prospects of success’ over ‘manifestly without merit’ as the threshold to issue a summary award. As the Law Commission also notes, in many sectors arbitrations are conducted by experienced professionals (‘commercial men’) as opposed to legally trained arbitrators. With this in mind, it may be preferable not to burden the Act with a concept replete with legal meaning, causing an expectation that the arbitrator should interpret and abide by extensive case law. An idiosyncratic concept may be the better option, even if upon appeal it comes to be somewhat assimilated to the threshold for summary judgment.

**Question 16: court orders in support of arbitral proceedings**

According to section 44 of the Act, the court has the power to make orders in support of arbitral proceedings. The Law Commission raises the possibility of provisions for courts to make orders against third parties (those not party to the arbitration).

The reference to the power of courts to make order against third parties under section 44 is arguably best made explicit. This is because: a) the involvement of third parties in the arbitration of international commercial disputes (e.g. maritime disputes) is a frequently occurring scenario; and b) the explicit reference to the power of courts to make orders against third parties would add certainty and reduce the possibility of challenges and other procedural inefficiencies.

Although as the Law Commission recognises, the court already has implicit power under s 44 to issue orders against third parties in appropriate cases, it is our opinion that the reform process should make the possibility of the court issuing orders against third parties explicit in the Act.

**Question 27**

by Dr Michail Risvas

Appeals on points of (customary public international) law under section 69 of the Arbitration Act 1996 and awards rendered by arbitral tribunals constituted on the basis of international investment treaties.

1. The Law Commission is of the view that in treaty “cases involv[ing] London arbitration, the courts seem content with the workings of the Arbitration Act 1996 as usual” and, therefore, the Law Commission is “not currently persuaded that there is any lack which needs reform”.[[8]](#footnote-8)
2. Section 69 is one of the most famous (or infamous, depending on the perspective) idiosyncratic features of the English Arbitration Act 1996. It provides that “[u]nless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings”.
3. In general, the position of the Law Commission is persuasive; however, for reasons set out below, it is suggested that, while Section 69 remains in the Arbitration Act (as the Law Commission recommends), appeals on customary international law, in particular, in relation to investment treaty awards, should be excluded from its scope of application.
4. Given that certain institutional arbitration rules such as the ICC Rules, [[9]](#footnote-9) and the LCIA Rules[[10]](#footnote-10) contain a broad waiver regarding any form of appeal, their choice excludes the application of Section 69.
5. Section 69 is not limited to a particular type of arbitral proceedings. Although comprehensive statistical data are not available, it seems that the majority of Section 69 cases are shipping cases.[[11]](#footnote-11)
6. Except for awards rendered by ICSID[[12]](#footnote-12) tribunals,[[13]](#footnote-13) Section 69 applies to awards rendered by tribunals constituted pursuant to international investment treaties as well. The vast majority of non-ICSID treaty arbitrations are conducted on the basis of the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules. According to the United Nations Conference on Trade and Development (UNCTAD) database, out of 1190 investment treaty arbitrations in total, 369 were UNCITRAL arbitrations and 644 were ICSID arbitrations.[[14]](#footnote-14) Contrary to several institutional arbitration rules (mentioned in para 4 above), the UNCITRAL Arbitration Rules do not contain a waiver excluding the right to appeal, and, therefore, the application of Section 69.
7. The scope of application of Section 69 extends to questions of public international law, to the extent that the relevant rules of customary international law are part of English law,[[15]](#footnote-15) given that Section 82 of the Arbitration Act 1996 provides that “question of law” means— (a) for a court in England and Wales, a question of the law of England and Wales”. This should change by excluding from the scope of application of Section 69 questions of customary international law (which might arise in the context of challenging an investment treaty award).
8. Εven those in favour of adopting less strict requirements for appeals on points of law, argue that the main advantage would be the development of common law, in particular in the fields of commercial law and contract law – not public international law.[[16]](#footnote-16) Contrary to contract-based arbitrations (usually between private parties), where the applicable law is domestic law (English law, if Section 69 is to be applied), in investment treaty arbitrations the applicable law is the international treaty and customary international law. As a result, the main advantage of Section 69, the need to ensure the uniform and correct application of English law, does not apply to investment treaty arbitrations.[[17]](#footnote-17)
9. Finally, as the Law Commission recognizes, “[t]he UNCITRAL Model Law contains no provision for an appeal from an arbitral award to a court on a point of law. Thus, the availability of an appeal on a point of law is not widespread internationally.”[[18]](#footnote-18) The exceptional nature of Section 69 speaks in favour of its restrictive application to question of English law (excluding questions of public international law).

**Question 31 - Remote hearings and electronic documentation as procedural matters**

The reform process has not considered the opportunity to introduce provisions in the Act explicitly referring to remote hearings and electronic service of documents. Although the consultation paper states that the Act is already adapted to modern technologies in light of section 34 which grants tribunals the right to agree any procedural matter (including the possibility of giving procedural directions for remote hearings and electronic documentation), this might have represented an opportunity for the Act to explicitly embrace modern technology (like arbitration Acts in foreign jurisdictions, e.g. the Netherlands).

Considering that electronic documents and signatures have become widespread and are widely used instead of handwritten signatures, it is worth considering the addition of a provision to the Act, for example in s 52, to the effect that ‘An electronic signature also bears all the legal consequences of a handwritten signature and its legal effect cannot be denied solely on the ground that it is in electronic form.’ Such provisions are present in legislation in other jurisdictions.[[19]](#footnote-19) While the eIDAS Regulation[[20]](#footnote-20) appears for the time being to be retained law in UK following Brexit through the *Electronic Identification and Trust Services for Electronic Transactions (Amendment etc.) (EU Exit) Regulations 2018*, it may be necessary to keep an eye on parliamentary processes to ensure that this continues to be the case, and if not ensure that suitable amendments are made to the Arbitration Act 1996.

**Question 36**

Whether the law works well for international commercial arbitration where the parties have significant resources and access to legal advice is a very different question to that of whether it works in a small scale, domestic context where one party is an SME or a natural person, and the other is a large corporation or also a natural person. In the latter case, an arbitration between natural persons of limited means may become unwieldy and confusing for all involved. If a large corporation is involved, there may be a deficiency in the equality of arms. Whether the Act as is or as amended works well in such cases is cannot be answered solely on the basis of the predominantly doctrinal report. It is suggested that empirical research is needed to explore this, and that openness should be maintained as to the need for a Domestic Arbitration Act where appropriate provision could be made for the principles of equality of arms and procedural effectiveness. For example, the Singapore Domestic Arbitration Act is specifically designed to cater for the property market, where the use of constructions specialists as adjudicators may result in errors on points of law and a more generous appeals mechanism is appropriate.[[21]](#footnote-21) The repeal of sections 85-87 as proposed in Question 36 would seem to necessitate such empirical research to see if they might be useful and should be brought into force instead of repealed.

**Third Party funding**

The Law Commission’s consultation paper does not request consultees’ views on the issue of whether the Act should contain a mandatory disclosure obligation in case a party has secured third party funding.[[22]](#footnote-22) As third party funding is becoming increasingly common, it is submitted that mandatory disclosure of third party funding would be a welcome addition to the Act. This would avoid applications for disclosure and challenges to tribunals’ independence and impartiality which may stem out of a third party funding scenario. Arbitration institutions such as the ICC, SIAC and the HKIAC have incorporated a mandatory disclosure requirement in their arbitral rules, and the consultation process arguably closes the door to the opportunity to seek views on this aspect.

1. Note the individual authorship of certain sections. Suggested format for citation: ‘Law et al (2022), *A response…* *per* Risvas’. All authors agree with the points made in individually attributed segments. [↑](#footnote-ref-1)
2. Cross-Institutional Task Force on Gender Diversity in Arbitral Appointments and Proceedings, ‘ICCA Reports No. 8: Report of the Cross-Institutional Task Force on Gender Diversity in Arbitral Appointments and Proceedings’ (2022); 2022 Update available at: https://www.arbitration-icca.org/icca-reports-no-8-report-cross-institutional-task-force-gender-diversity-arbitral-appointments-and [↑](#footnote-ref-2)
3. N King, ‘Equality and Non-Discrimination in International Arbitration: Recent Developments in the English Context’, *Opinio Juris* (April 2022); available at: https://opiniojuris.org/2022/04/04/equality-and-non-discrimination-in-international-arbitration-recent-developments-in-the-english-context/ [↑](#footnote-ref-3)
4. N King, ‘Equality and Non-Discrimination in International Arbitration: Recent Developments in the English Context’, *Opinio Juris* (April 2022); available at: https://opiniojuris.org/2022/04/04/equality-and-non-discrimination-in-international-arbitration-recent-developments-in-the-english-context/ [↑](#footnote-ref-4)
5. Eg Art 21 Rome I Regulation. [↑](#footnote-ref-5)
6. Eg Art 9(1) Rome I Regulation. [↑](#footnote-ref-6)
7. In particular, as regards the uncertainty in the definition of gender reassignment (whether the protection only applies to those undergoing a medical process). See *Ms R Taylor v Jaguar Land Rover Ltd* (England and Wales : Sex Discrimination) [2020] UKET 1304471/2018 (14 September 2020), in which it was provided that the medical process was not necessary. [↑](#footnote-ref-7)
8. Law Commission, Consultation Paper 257, Review of the Arbitration Act 1996 (September 2022), para 11.26. [↑](#footnote-ref-8)
9. ICC Rules (2021), Article 35(6): “Every award shall be binding on the parties. By submitting the dispute to arbitration under the Rules, the parties undertake to carry out any award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made”. See also *Lesotho Highlands Development Authority v Impregilo SpA* [2005] UKHL 43. [↑](#footnote-ref-9)
10. LCIA Rules (2020), Article 26.8: “Every award (including reasons for such award) shall be final and binding on the parties. The parties undertake to carry out any award immediately and without any delay (subject only to Article 27); and the parties also waive irrevocably their right to any form of appeal, review or recourse to any state court or other legal authority, insofar as such waiver shall not be prohibited under any applicable law.” [↑](#footnote-ref-10)
11. M Marshall, “Section 69 almost 20 years on….” (24 June 2015), available at <http://arbitrationblog.kluwerarbitration.com/2015/06/24/section-69-almost-20-years-on/> [↑](#footnote-ref-11)
12. The International Centre for the Settlement of Investment Disputes (ICSID) established by 1966 ICSID Convention (or commonly known as the Washington Convention). [↑](#footnote-ref-12)
13. See the Arbitration (International Investment Disputes) Act 1966 implementing the ICSID Convention in the domestic law of the United Kingdom. See also *Micula and others v Romania* [2020] UKSC 5, para 68: “The provisions of the 1966 Act must be interpreted in the context of the ICSID Convention and it should be presumed that Parliament, in enacting that legislation, intended that it should conform with the United Kingdom’s treaty obligations. It is a notable feature of the scheme of the ICSID Convention that once the authenticity of an award is established, a domestic court before which recognition is sought may not re-examine the award on its merits. Similarly, a domestic court may not refuse to enforce an authenticated ICSID award on grounds of national or international public policy. In this respect, the ICSID Convention differs significantly from the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958”. [↑](#footnote-ref-13)
14. See <https://investmentpolicy.unctad.org/investment-dispute-settlement> [↑](#footnote-ref-14)
15. See *The Republic of Serbia v Imagesat International NV* [2009] EWHC 2853 (Comm); *Republic of Ecuador v Occidental Exploration and Production Co* [2005] EWCA Civ 1116. [↑](#footnote-ref-15)
16. See Lord Thomas, “Developing commercial law through the courts: rebalancing the relationship between the courts and arbitration” (9 March 2016) available at <https://www.judiciary.uk/wp-content/uploads/2016/03/lcj-speech-bailli-lecture-20160309.pdf> [↑](#footnote-ref-16)
17. See also Taner Dedezade, “Are you in? or are you out? an analysis of Section 69 of the English Arbitration Act 1996: Appeals on a Question of Law” (2006) International Arbitration Law Review 56, 58: “This argument, of course, presupposes that the courts are in a better position to apply the law than the arbitrators. Such a proposition may well be true if the English courts are applying questions of domestic law. It is not so persuasive when the English courts are required to interpret international law”. [↑](#footnote-ref-17)
18. Law Commission, Consultation Paper 257, Review of the Arbitration Act 1996 (September 2022), para 9.19. [↑](#footnote-ref-18)
19. In the USA, the *Electronic Signatures in Global and National Commerce Act – An Act To facilitate the use of electronic records and signatures in interstate or foreign commerce* from 2000 provides: ‘General intent (1) a signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form; and (2) a contract relating to such transaction may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation.’ [↑](#footnote-ref-19)
20. *Regulation (EU) No 910/2014… on electronic identification and trust services for electronic transactions in the internal market…* recital (49): ‘This Regulation should establish the principle that an electronic signature should not be denied legal effect on the grounds that it is in an electronic form or that it does not meet the requirements of the qualified electronic signature. However, it is for national law to define the legal effect of electronic signatures, except for the requirements provided for in this Regulation according to which a qualified electronic signature should have the equivalent legal effect of a handwritten signature.’ [↑](#footnote-ref-20)
21. See to this effect Law Com 9.24. [↑](#footnote-ref-21)
22. Paras 11.13-17. [↑](#footnote-ref-22)