ARBITRATION BILL [HL]

EXPLANATORY NOTES

What these notes do

These Explanatory Notes relate to the Arbitration Bill [HL] as brought from the House of Lords on 6 November 2024 (Bill 57).

- These Explanatory Notes have been prepared by the Ministry of Justice in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by Parliament.
- These Explanatory Notes explain what each part of the Bill will mean in practice; provide background information on the development of policy; and provide additional information on how the Bill will affect existing legislation in this area.
- These Explanatory Notes might best be read alongside the Bill. They are not, and are not intended to be, a comprehensive description of the Bill.

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These Explanatory Notes relate to the Arbitration Bill [HL] as brought from the House of Lords on 6 November 2024 (Bill 57)

Overview of the Bill

1 The Bill is concerned with arbitration, which is typically when disputes are resolved by an arbitrator who is privately appointed rather than by a judge sitting in court. Arbitration in England, Wales and Northern Ireland is regulated by the Arbitration Act 1996. The Bill gives effect to the recommendations of the Law Commission of England and Wales to amend the Arbitration Act 1996.[1]

Policy background

2 Arbitration happens in a wide range of settings, both domestic and international, from family law and rent reviews, through commodity trades and shipping, to international commercial contracts and investor claims against states. The Law Commission estimates that there are at least 5000 arbitrations annually in England and Wales, worth at least £2.5 billion to the economy in arbitrator and legal fees alone. Arbitration is also an important node in a mutually supporting network of business that includes legal services, banking, insurance, and trade. In a 2021 survey by Queen Mary University of London and White & Case LLP, London was ranked equal first with Singapore as the world's most preferred seat for international arbitration.[2]

3 The Arbitration Act 1996, which governs arbitration in England, Wales, and Northern Ireland, is now over 25 years old. Other countries competing for a greater share of international arbitration have enacted or revised their arbitration legislation more recently. In March 2021, the Ministry of Justice asked the Law Commission to review the Arbitration Act 1996. The Law Commission began its review in January 2022. It published its first consultation paper in September 2022, and its second consultation paper in March 2023. It published its final report, along with a draft Bill, in September 2023. The final report of the Law Commission concluded that the Arbitration Act 1996 generally works well, and that root and branch reform is not needed nor wanted. Nevertheless, the Law Commission made a number of recommendations for targeted reform. The Arbitration Bill enacts the Law Commission's recommendations.

4 The Arbitration Bill contains the following substantial initiatives:

- clarification of the law applicable to arbitration agreements;
- codification of an arbitrator's duty of disclosure;
- strengthening of arbitrator immunity around resignation and applications for removal;
- introduction of a power for arbitrators to dispose summarily of issues which have no real prospect of success;
- clarification of court powers in support of arbitral proceedings, and in support of emergency arbitrators; and
- a revised framework for challenges under section 67 of the Arbitration Act 1996 (where the challenge alleges that the arbitral tribunal lacked jurisdiction).

5 The Arbitration Bill contains the following minor changes to the Arbitration Act 1996:

[1] https://lawcom.gov.uk/project/review-of-the-arbitration-act-1996/

[2] https://arbitration.qmul.ac.uk/research/2021-international-arbitration-survey/

- clarifying the availability of appeals under Part 1 of the Act;
- simplifying preliminary applications to court on questions of jurisdiction and points of law;
- clarifying time limits for challenging awards; and
- repealing unused provisions on domestic arbitration agreements.

6 The intent of the Bill is to further the principle found in section 1 of the Arbitration Act 1996: to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense. Thereby, the aim is to fulfil the policy objective of ensuring that the Act is fit for purpose and that it continues to promote the UK as a leading destination for arbitrations. Further policy and background to the Law Commission's recommendations is provided in its final report and the two consultation papers which preceded it.[3]

7 An Arbitration Bill that sought to enact the Law Commission's recommended reforms was introduced in the previous Parliament in November 2023. However, that Bill fell upon prorogation while awaiting its Report Stage in the first House after passing through a Special Public Bill Committee. This Bill as introduced replicates the provisions of that previous Bill as amended at Lords Special Public Bill Committee Stage with one change to ensure Clause 1 (*Law applicable to arbitration agreement*) does not apply to arbitration agreements made between investors and states, where those agreements are derived from treaties or non-UK legislation (see para. 18 below). This Bill was amended in the House of Lords at Committee Stage, so the wording of Clause 13 (*Appeals to Court of Appeal from High Court decisions*) gives better effect to the underlying policy intention (see para. 45 below).

Legal background

8 The current legislation governing arbitration in England, Wales, and Northern Ireland, is primarily the Arbitration Act 1996. By section 99 of the 1996 Act, Part II of the Arbitration Act 1950 continues to apply to the enforcement of foreign arbitral awards under the Geneva Convention 1923. However, for the enforcement of foreign arbitral awards, almost all countries have signed up instead to the later New York Convention 1958. Part III of the 1996 Act gives effect to the New York Convention. Investor-state arbitrations which fall under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICISID Convention) are separately governed by the Arbitration (International Investment Disputes) Act 1966. The Arbitration (Scotland) Act 2010 governs arbitration in Scotland.

[3] https://lawcom.gov.uk/project/review-of-the-arbitration-act-1996/

Territorial extent and application

9 The Sewel Convention means that the UK Parliament "will not normally legislate with regard to devolved matters without the consent" of the devolved legislatures.

10 This Bill falls outside the legislative competence of the Senedd Cymru. Civil justice is devolved in Scotland, which has its own separate legislation on arbitration – the Arbitration (Scotland) Act 2010. This is unaffected by the Bill, which does not extend to Scotland. The Arbitration Act 1996 applies to Northern Ireland. Civil justice is now also devolved in Northern Ireland; this Bill does extend to Northern Ireland, so the legislative consent motion process will be engaged for Northern Ireland.

11 Any amendment or repeal made to the Arbitration Act 1996 by the Bill has the same extent as the provision in the Act which is amended or repealed (see clause 16 of the Bill). As for amendments to Part 1 of the Arbitration Act 1996, the scope of application of Part 1 is set out in section 2 of the Act (which explains how Part 1 applies to arbitrations seated in England and Wales, and in Northern Ireland, and also which provisions of the Act apply to arbitrations seated elsewhere).

12 See the table in Annex A for a summary of the position regarding territorial extent and application in the United Kingdom.

Commentary on provisions of Bill

Applicable law

Clause 1: Law applicable to arbitration agreement

13 Clause 1 replaces the common law in *Enka v Chubb* (2020)[4] with a statutory rule. By inserting section 6A(1) into the Arbitration Act 1996, the law governing the arbitration agreement will be the law expressly chosen by the parties, otherwise it will be the law of the seat, except in the cases where the arbitration agreement arises from a treaty (see below). This is regardless of where the arbitration is seated. For example, where the arbitration is seated in England and Wales, then the agreement to arbitrate will usually be governed by the law of England and Wales. By inserted section 6A(2), any law chosen to govern the main contract does not count as an express choice of law to govern the agreement to arbitrate.

14 The reason for clause 1 is as follows. The Arbitration Act 1996 applies when the parties have agreed in writing to arbitrate their dispute. Often the agreement to arbitrate is a clause in a main contract. For example, there might be a main contract to build a factory, and one of the clauses provides that any dispute will be resolved through arbitration. Although the agreement to arbitrate is a clause in a main contract, the law sometimes treats the agreement to arbitrate as a free-standing or separable agreement.

15 There may be an international dimension to a main contract and its agreement to arbitrate. For example, one party might be German, and the other party Chinese, with both agreeing to resolve their dispute by way of arbitration in London (as a neutral venue). In such circumstances, it is necessary to determine which country's laws govern the agreement to arbitrate. In the present example, the agreement to arbitrate could be governed by the law of Germany, or China, or England and Wales, or another law entirely. Determining the governing law is important, as different governing laws may give different answers to important questions like who is party to the agreement (for example, whether the agreement extends to a subsidiary company), and whether this type of dispute is even capable of resolution by arbitration (as a matter of public policy, some types of dispute must be resolved by the courts rather than through arbitration).

16 In its decision in *Enka v Chubb*, the Supreme Court said, broadly, as follows. The agreement to arbitrate is governed by the law chosen by the parties. This can mean that the agreement to arbitrate is governed by the law chosen to govern the main contract – unless, for example, that law would invalidate the agreement to arbitrate. Otherwise the agreement to arbitrate will be governed by the law with which it is most closely connected, which is usually the law of the seat. The seat is the place where the arbitration is deemed legally to occur (even if hearings take place elsewhere or online). In the above example, the seat of the arbitration is England and Wales (London).

17 It is common for there to be an express choice of law to govern the main contract, and an express choice of seat for an arbitration, but no express choice of law to govern the agreement to arbitrate. It is therefore common for an arbitration to be seated in England and Wales but, as a result of the decision in *Enka v Chubb*, for the arbitration agreement to be governed by a foreign law (the law governing the main contract). Clause 1 provides a new default rule that aligns the seat of the arbitration with the law governing the arbitration agreement. For example, where an arbitration is seated in England and

[4] https://www.supremecourt.uk/cases/uksc-2020-0091.html

Wales, then by default the agreement to arbitrate will now be governed by the law of England and Wales. This is unless the parties expressly agree a different law to govern the arbitration agreement. Where no seat has yet been agreed or designated, the courts could if necessary resolve the matter.

18 However, inserted section 6A(3) and (4) provide that the section does not apply to arbitration agreements derived from standing offers to arbitrate contained in treaties or non-UK legislation. This means, for example, that non-ICSID investor-state arbitration agreements will tend not to be covered by the default rule in section 6A(1). However, investor-state agreements which arise under commercial contracts (rather than treaties or foreign legislation) will remain to be captured by the default rule in inserted section 6A(1).

The arbitral tribunal

Clause 2: Impartiality: duty of disclosure

19 The Arbitration Act 1996 imposes a duty of impartiality on arbitrators (by section 33). Additionally, a duty of disclosure was recognised by the Supreme Court in its decision in *Halliburton v Chubb* (2020).[5] Clause 2 codifies the general duty of disclosure as articulated in that case.

20 Clause 2 requires an arbitrator to disclose circumstances that might reasonably give rise to justifiable doubts as to their impartiality. It applies prior to the arbitrator's appointment, when they are being approached with a view to appointment. It is a continuing duty which also applies after their appointment. Where an arbitrator is appointed by someone other than the parties, the arbitrator may need to repeat their disclosure to the parties upon appointment. The duty extends to circumstances of which the arbitrator is aware, and of which they ought reasonably to be aware. Inserted section 23A will be a mandatory provision (like the duty of impartiality in section 33); the parties cannot agree to dispense with the duty of disclosure.

Clause 3 (Immunity of arbitrator: application for removal) and Clause 4 (Immunity of arbitrator: resignation)

21 The Arbitration Act 1996, section 29, provides that an arbitrator is not liable for anything done in the discharge of their functions unless they acted in bad faith. Such immunity supports an arbitrator to make robust and impartial decisions without fear that a party will express their disappointment by suing the arbitrator. It also supports the finality of the dispute resolution process by preventing a party who is disappointed with losing the arbitration from bringing further proceedings against the arbitrator. Judges enjoy a similar immunity for similar reasons.

22 There are still ways of dealing with a recalcitrant arbitrator. For example, the parties can revoke an arbitrator's authority (by section 23) or apply to court to remove an arbitrator (by section 24). In both cases, the arbitrator may lose their entitlement to fees and expenses.

23 Clauses 3 and 4 extend the scope of arbitrator immunity, up to a limit, as follows.

24 Clause 3 provides that an arbitrator will not be liable for the costs of an application to court under section 24 for their removal, unless the arbitrator has acted in bad faith. This aligns with the general immunity already provided by section 29. This reverses case law which held that an arbitrator could

[5] https://www.supremecourt.uk/cases/uksc-2018-0100.html

be liable for those costs.

25 Clause 4 provides that an arbitrator will no longer be liable for resignation unless the resignation is shown by a complainant to be unreasonable.

Jurisdiction of tribunal

Clause 5: Court determination of jurisdiction of tribunal

26 By sections 82 and 30 of the Arbitration Act 1996, an arbitral tribunal has jurisdiction if there is a valid arbitration agreement, the tribunal is properly constituted, and the matters which have been submitted to arbitration are in accordance with the arbitration agreement.

27 A party who participates in the arbitration proceedings might object that the arbitral tribunal lacks jurisdiction. The tribunal itself is usually empowered to decide, in the first instance, whether it has jurisdiction (by section 30). The court can be asked to rule on whether the tribunal has jurisdiction, including as follows. One way is to wait until the tribunal has issued a ruling, and then challenge that ruling under section 67, which allows a challenge to an arbitral award on the basis that the tribunal lacked jurisdiction. Another way is by invoking section 32, which allows the court to decide whether the tribunal has jurisdiction as a preliminary point. Sections 32 and 67 have different requirements.

28 Clause 5 amends section 32 to make it clear that it can only be invoked instead of the tribunal ruling on its jurisdiction. If the tribunal has already ruled, then any challenge must be brought through section 67.

Clause 6: Power to award costs despite no substantive jurisdiction

29 The arbitral tribunal or the court might rule that the tribunal has no jurisdiction to resolve a particular dispute. In this case, the arbitration proceedings must come to an end. Clause 6 provides that, in those circumstances, the tribunal can nevertheless award the costs of the arbitration proceedings up until that point.

Arbitral proceedings and powers of the court

Clause 7: Power to make award on summary basis

30 Clause 7 confers express power on arbitrators to make an award on a summary basis to dispose of an issue where an arbitrating party has no real prospect of succeeding on that issue. "Summary basis" means that the tribunal has adopted an expedited procedure to consider whether a party has a real prospect of succeeding on that issue. Inserted section 39A will not be mandatory; the parties can agree to disapply it (they can "opt out"). Arbitrators can exercise the power to make an award on a summary basis only upon an application by one of the arbitrating parties. The "no real prospect of success" threshold is the same as that applied in court proceedings in England and Wales. As for the expedited procedure, this is not prescribed by clause 7 but will be a matter for the arbitrator to decide on a case-by-case basis; inserted section 39A(3) requires the tribunal to give the parties a reasonable opportunity to make representations about the procedure to adopt.

Clause 8: Emergency arbitrators

31 Arbitral rules sometimes provide a regime for the appointment of emergency arbitrators. An emergency arbitrator is appointed on an interim basis, pending the constitution of the full arbitral tribunal, to make orders on urgent matters, for example for the preservation of evidence. Once constituted, the full tribunal can usually review the orders of the emergency arbitrator.

32 Under the Arbitration Act 1996, when a normal arbitrator makes an order during arbitration proceedings, and an arbitrating party fails to comply with that order, possible consequences include

the following. The arbitrator can issue a peremptory order (by section 41), and if there is still no compliance, an application can be made to court for the court to order compliance with the arbitrator's order (by section 42). Alternatively, an application can be made directly to court, for the court to make its own order (by section 44). Clause 8 amends the Act to extend that scheme to emergency arbitrators.

Clause 9: Court powers exercisable in support of arbitral proceedings in respect of third parties

33 By section 44 of the Arbitration Act 1996, the court can make orders in support of arbitration proceedings on the following matters: taking of witness evidence, preservation of evidence, orders relating to relevant property, sale of goods, interim injunctions, and the appointment of a receiver. Arbitrating parties require the leave (permission) of the court to appeal under section 44.

34 Clause 9 amends section 44 to make it clear that court orders under that section are available against third parties (people who are not party to the arbitration proceedings). For example, orders might be made against third parties who hold relevant evidence, or against banks which hold relevant funds. This aligns the position in arbitration proceedings with the position in court proceedings. Also, clause 9 provides that third parties will not require the leave of the court to bring an appeal, thereby giving third parties the full rights of appeal usually available in court proceedings.

Powers of the court in relation to award

Clause 10: Challenging the award: remedies available to the court

35 An arbitral tribunal can issue an award on whether it has jurisdiction, and it can issue an award on the merits of the dispute. Either type of award can be challenged under section 67 of the Arbitration Act 1996 on the basis that the arbitral tribunal did not have jurisdiction.

36 Awards can also be challenged for serious irregularity (by section 68), where the remedies are: remit the award to the tribunal for reconsideration, set aside the award, or declare the award to be of no effect. And awards can be appealed on a point of law (by section 69), where the remedies are: confirm, vary, remit for reconsideration, or set aside the award. In both sections there is a proviso that an award will not be set aside unless it is inappropriate to remit the award to the tribunal.

37 Clause 10 amends section 67 to provide the remedies of remittance for reconsideration, and declaring the award to be of no effect. This will render section 67 consistent with the scheme of remedies in sections 68 and 69, and consistent with the assumptions in the case law that these remedies were intended to be available.

Clause 11: Procedure on challenge under section 67 of the Arbitration Act 1996

38 By sections 82 and 30 of the Arbitration Act 1996, an arbitral tribunal has jurisdiction if there is a valid arbitration agreement, the tribunal is properly constituted, and the matters which have been submitted to arbitration are in accordance with the arbitration agreement.

39 A party who participates in the arbitration proceedings might object that the arbitral tribunal lacks jurisdiction. The tribunal itself is usually empowered to decide, in the first instance, whether it has jurisdiction (by section 30). Once the tribunal has issued an award, either on its jurisdiction or also on the merits of the dispute, a party can challenge that award before the court under section 67 on the basis that the tribunal had no jurisdiction after all.

40 In its decision in *Dallah v Pakistan* (2010), the Supreme Court said that, even where the question of the tribunal's jurisdiction has been fully debated before the tribunal, a challenge under section 67 is a full rehearing before the court.

41 Clause 11 amends section 67 to confer power for rules of court to provide as follows. Where an application is made under section 67, by a party who took part in the arbitration proceedings, that

relates to an objection on which the tribunal has already ruled, then there will generally be no full rehearing before the court. This would be a departure from *Dallah v Pakistan*. Specifically, rules of court will be able to provide that, unless necessary in the interests of justice, there should be no new grounds of objection and no new evidence before the court, unless it was not reasonably possible to put these before the tribunal; and evidence should not be reheard by the court.

Clause 12: Challenging the award: time limit

42 Under the Arbitration Act 1996, an arbitral award can be challenged before the courts on the basis that the tribunal lacked jurisdiction (section 67), or on the basis of serious irregularity (section 68), or the award can be appealed on a point of law (section 69). In all cases, the challenge must comply with the further requirements of section 70.

43 By section 70, an applicant must first exhaust any available arbitral process of appeal or review (section 70(2)(a)) and any available recourse under section 57 to correct the award or issue an additional award (section 70(2)(b)). The application to court must be made within 28 days.

44 Clause 12 amends section 70 to clarify that the time limit of 28 days begins to run after any arbitral appeal or any application under section 57. (In any other case, it begins to run from the date of the award.)

Appeals from High Court decisions

Clause 13: Appeals to Court of Appeal from High Court decisions

45 Various applications can be made to the High Court under Part 1 of the Arbitration Act 1996. For example, under section 9 a party can apply to court to stay legal proceedings in favour of arbitration proceedings. Some sections in Part 1 say expressly that a decision of the High Court can be appealed to the Court of Appeal only with the permission of the High Court. Other sections in Part 1, including section 9, are silent.

46 Rights of appeal to the Court of Appeal are governed by the Senior Courts Act 1981 (for England and Wales) and by the Judicature (Northern Ireland) Act 1978 (for Northern Ireland). The Arbitration Act 1996, Schedule 3, paragraphs 34(2) and 37(2), amended those Acts, in effect to say that no appeal was possible under Part 1 except for those sections which expressly required the permission of the High Court. This was a drafting error. The House of Lords in *Inco Europe v First Choice Distribution* (2000),[6] a case involving section 9, identified the drafting error, and said that the 1981 Act should be read as follows: the usual full rights to appeal to the Court of Appeal are available under all sections of Part 1 of the 1996 Act, except that an appeal requires the permission of the High Court only for those sections which say so expressly. Clause 13 corrects the drafting error in line with the House of Lords decision.

Miscellaneous minor amendments

Clause 14: Requirements to be met for court to consider applications

47 Under section 32 of the Arbitration Act 1996, an arbitrating party can apply to the court for the court to make a preliminary ruling on whether the arbitral tribunal has jurisdiction. Under section 45, a party can apply to the court for the court to rule on a preliminary point of law arising in the arbitration.

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[6] https://www.bailii.org/uk/cases/UKHL/2000/15.html

48 Clause 14 amends both sections so that an application will require either the agreement of the parties or the permission of the tribunal. It removes the further requirement to satisfy the court on a list of matters. Nevertheless, the court still retains a general discretion whether to accede to the application.

Clause 15: Repeal of provisions relating to domestic arbitration provisions

49 Sections 85 to 88 of the Arbitration Act 1996 concern domestic arbitration agreements, which is when all the parties are from the United Kingdom and the arbitration is seated in the United Kingdom. The seat of an arbitration is where the arbitration is deemed legally to occur, even if hearings are held elsewhere or online. Sections 85 to 87 have never been brought into force. Section 88 was brought into force, but only grants the Secretary of State the power to repeal sections 85 to 87. Clause 15 repeals all these unused sections.

Final provisions

Clause 16: Extent

50 Any amendment or repeal made by the Bill to the Arbitration Act 1996 has the same extent as the provision in the Act which is amended or repealed.

Clause 17: Commencement and transitional provision

51 Clauses 16 (Extent), 17 (Commencement and transitional provision) and 18 (Short title) come into force on the day on which the Bill is passed into law. The rest of the Bill comes into force on such day as the Secretary of State may by regulations appoint. Those regulations may contain transitional and saving provisions. In the absence of such provisions, the amendments will apply to arbitration agreements whenever made, but not to arbitration proceedings commenced before the date on which the rest of the Bill comes into force, nor to legal proceedings in respect of such arbitration proceedings. An example of the latter might be legal proceedings to enforce an arbitral award, where the award was issued before the Bill came into force.

Clause 18: Short title

52 This clause establishes that the Bill may be referenced as the Arbitration Act 2024 once in force.

Commencement

53 Clause 17 makes provision regarding when measures in this Bill will come into force.

Financial implications of the Bill

54 The Bill has no financial implications in terms of public expenditure.

Parliamentary approval for financial costs or for charges imposed

55 The Bill does not require either a money resolution or a ways and means resolution.

Compatibility with the European Convention on Human Rights

56 The Government considers that the Arbitration Bill [HL] is compatible with the European Convention

on Human Rights. Accordingly, the Lord Chancellor and Secretary of State for Justice, the Rt Hon. Shabana Mahmood MP, has made a statement under section 19(1)(a) of the Human Rights Act 1998 to this effect.

Environment Act 2021

57 The Lord Chancellor and Secretary of State for Justice, the Rt Hon. Shabana Mahmood MP, is of the view that the Bill as introduced into the House of Commons does not contain provision which, if enacted, would be environmental law for the purposes of section 20 of the Environment Act 2021. Accordingly, no statement under that section has been made.

Trade between Northern Ireland and the rest of the UK

58 The Lord Chancellor and Secretary of State for Justice, the Rt Hon. Shabana Mahmood MP, is of the view that the Bill as introduced into the House of Commons does not contain provision which, if enacted, would affect trade between Northern Ireland and the rest of the United Kingdom. Accordingly, no statement under section 13C of the European Union (Withdrawal) Act 2018 has been made.

Related documents

59 The following documents are relevant to the Bill and can be read at the stated location:

- Consultation papers and final report of the Law Commission of England and Wales: https://www.lawcom.gov.uk/project/review-of-the-arbitration-act-1996/

Annex A - Territorial extent and application in the United Kingdom

Provision	England	Wales		Scotland		Northern Ireland	
	Extends to E & W and applies to England?	**Extends to E & W and applies to Wales?**	**Legislative Consent Motion process engaged?**	**Extends and applies to Scotland?**	**Legislative Consent Motion process engaged?**	**Extends and applies to Northern Ireland?**	**Legislative Consent Motion process engaged?**
Clauses 1 to 18	Yes	Yes	No	No	No	Yes	Yes

Subject matter and legislative competence of devolved legislatures

The Bill concerns Part 1 of the Arbitration Act 1996 which extends to England and Wales and Northern Ireland. The amendments made by the Bill have the same extent as the provision amended. Justice is not devolved to Wales but is devolved to Northern Ireland.

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