



Bar Council response to the Law Commission Review of the Arbitration Act 1996 Second 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 Second Consultation Paper entitled Review of the Arbitration Act 1996¹. This response supplements the Bar Council's response dated 15 December 2022 to the Law Commission First Consultation Paper.

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 remain 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 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.

Q1. 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?

5. We agree. Such a new rule would create greater certainty, avoid the problems which arise from *Enka v Chubb*², reduce delay and save costs.

1 Consultation Paper 258 dated March 2023. <https://www.lawcom.gov.uk/project/review-of-the-arbitration-act-1996/>

2 *Enka Insaat ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38, [2020] 1 WLR 4117.

Q2. 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?

6. We agree. As we noted in paragraph 35 of our response to the First Consultation Paper³, on balance, we favour the proposed reform of section 67 both on the basis of fairness and finality, and practical considerations.

Q3. 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?

7. We agree.

Q4. 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?

8. We agree.

Q5. Do you think that discrimination should be generally prohibited in the context of arbitration?

9. Yes. As previously stated in our response to the First Consultation Paper, we welcome the Law Commission's intention to stamp out discrimination. We also take the view that the requirement of a protected characteristic in an arbitrator should be unenforceable unless that requirement can be justified as a proportionate means of achieving a legitimate aim.

Q6. What do you think the remedies should be where discrimination occurs in the context of arbitration?

³ <https://www.barcouncil.org.uk/uploads/assets/67d27022-e762-43e7-b0ec471e78d1634d/Bar-Council-response-to-the-Law-Commission-Review-of-the-Arbitration-Act-1996-consultation-paper-to-submit.pdf>

10. We consider that in the context of arbitration, the existing remedies of removal of the arbitrator under section 24 of the Arbitration Act 1996 and a challenge to the award under section 68 are sufficient. Other remedies may exist under the Equality Act 2010 but that is a separate matter. As the Law Commission rightly observes, “discrimination is wider than arbitration.”⁴ Care should be taken not to clutter the Arbitration Act with provisions that are already legislated for elsewhere.

Bar Council⁵
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⁴ See the Second Consultation Paper, paragraph 4.59.

⁵ Prepared by the Law Reform Committee and Alternative Dispute Resolution Panel