Bar Council response to the Law Commission consultation on the 14th Programme of Law Reform

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Law Commission's consultation on the 14th Programme of Law Reform.[1]

2. The Bar Council represents approximately 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 (BSB).

Overview

4. The Bar Council welcomes the opportunity to offer comments on the following areas of law proposed for reform by the Law Commission. We are grateful as ever for the engagement by the Law Commission with the Bar Council on this and many other

[1] https://www.lawcom.gov.uk/consultation-on-14th-programme-of-law-reform-now-open/

topics. It was particularly helpful to be given an opportunity to engage with the Chair and the Law Commissioners in advance of the commencement of the consultation period. The Bar Council remains committed to supporting the Law Commission in its valuable work, at a time when the need for law and lawyers to respond rapidly, but with no less rigour, to changing circumstances has never been more important.

(1) Workers' Rights

5. As we move into a new phase of the pandemic, this is an opportune time to take stock of some of the issues that have come to light, or become more pronounced, as a result of the pandemic. We would suggest that this is particularly the case in relation to the present legislation relating to protection for employees who raise health and safety issues as an individual employment right. However, the vexed issue around who is a "worker" or "employee" continues to bedevil employers and putative workers alike in a way which affects their day to day lives and has affected their ability to access benefits, safety measures and other assistance during the pandemic. A prime example of this has been the availability of Statutory Sick Pay, itself extended to meet the challenges of self-isolation, for those working in the 'gig economy'. Whilst recognising the increasing number of cases at the highest levels which tackle different aspects of worker status, we consider that this is an area which is ripe for consultation and reform. It is of enormous importance to the economy as well as those working within it.

Health and Safety as an Individual Employment Right

6. The current legal framework is contained within s.44 (protection from detriment) and s.100 (protection from dismissal) Employment Rights Act 1996 ('ERA').

7. The health and safety provisions provide protections to employees in specific circumstances.

8. These provisions are supplemented by the whistleblowing protections contained within the various subsections of s.43 Employment Rights Act 1996 ("ERA"). The whistleblowing protections are essentially an 'anti-retaliation' provision in respect of a worker who makes a protected disclosure.

9. In summary, these provisions protect a worker that has disclosed information to their employer provided that the disclosure of information relates to one of the

matters listed in s.43B ERA. This includes the fact that someone has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject or that the health or safety of any individual has been, is being or is likely to be endangered. Protection for 'whistleblowers' has historically been seen as weak and generally offers remedy only after the event of being subjected to detriment.

10. The pandemic generated much discussion as to the extent to which an individual who was seeking to protect their own health or the health of someone that they lived with was in fact protected by the above provisions.

11. It is suggested that this area of law would benefit from consideration with a view to a) simplification and b) allowing a wider range of circumstances to qualify for protection.

12. More specifically, the following points could be addressed:

a. S.100(1)(C) creates hurdles for the protection of an employee who brings to his employer's attention by reasonable means circumstances connected with his work which he reasonably believes are harmful or potentially harmful to health and safety. Those hurdles are the existence of a health and safety representative or health and safety committee. We would suggest that the reasons for these hurdles being in place are largely historic and are based upon a model of a large manufacturing workplace with a traditional structure.

Those hurdles are only disapplied when "it was not reasonably practicable" for the employee to raise the issue by those means. It is suggested that this is unnecessarily complex. Someone raising a health and safety issue in good faith should have the benefit of protection irrespective of the internal mechanisms of the employer. The public interest lies in health and safety being openly raised in the workplace and the protection of an individual that does so. A focus on internal processes in such circumstances is unnecessary or otiose and arguably any benefit, such as the reduction of the administrative burden imposed by multiple employees raising multiple issues around essentially the same things by requiring these to be funneled through a representative or committee, is outweighed by the disincentivising effect.

b. There has been much debate over whether or not the language of "circumstances of danger" and "serious and imminent" within s.100(1)(d) and

s.100(1)(e) would cover an employee that has a legitimate fear of catching Covid within the workplace. Arguably, the risk from a virus does not sit within this characterisation. Equally there has been some debate as to whether in view of the limited authority on point, commuting or travelling to work would be caught by this provision at all.

c. Furthermore, the protection offered by s.100(1)(e) ERA appears to be unnecessarily restrictive. The language of "circumstances of danger" and "serious and imminent" give an indication of seriousness and immediacy. However, this leaves unprotected the employee that removes a health and safety risk that isn't immediate or sufficiently serious. Such an employee has removed a risk but has no anti-retaliation protection. The public interest lies in favour of ensuring that the workplace is safe for the staff and public and health and safety principles do not focus exclusively on the immediacy of the danger.

(2) Flexible working laws

13. Legislation currently provides a right to request flexible working for employees with at least 26 weeks' continuous employment who have not made such a request in the last 12 months. Workers, including agency workers, are not covered. A working parent, or indeed anyone including someone previously self-employed, re-entering the employed workforce after time away would not have the right to make such a request due to the length of service requirement. When a formal flexible working request is made, the employer has a duty to consider it. However, the employer may refuse it on a wide range of grounds and has up to three months in which to do so. The right is mainly procedural rather than substantive and while a refusal to grant flexible working arrangements may give rise to other claims, in practice the legislation is seen as toothless. ACAS has issued guidance and a Code of Practice. This can be taken into account by an Employment Tribunal, but failure to follow either does not lead to sanction.

14. The COVID-19 pandemic has highlighted to many employers for the first time just what is possible in terms of flexible working, with a large percentage of the population forced into adopting such measures in direct response to the Government's stay-at-home orders and other restrictions. Working from home is but one of many ways of working flexibly (sometimes also described as agile working).

15. At the same time, COVID-19 is likely to cause a huge dislocation in the job market with many losing their jobs altogether whilst other seek to find ways to rebuild businesses and work creatively in a brave new world. As the CJRS furlough scheme tapers and then comes to an end, there are likely to be considerable job losses and high turnover in the labour market. Those with caring responsibilities who already have agreed flexible working arrangements with their existing employers will be seriously disadvantaged in obtaining new employment which takes into account their flexible working needs.

16. With schools shut for many months and many parents taking on home-schooling, the TUC survey highlighted a disparity between the sexes with many mothers taking on a greater proportion of childcare responsibilities at home. There has been concern across many sectors that any gains for women in the workplace may be lost and that inequalities could become further entrenched if action is not taken.

17. The Government wishes to build back better and to look at ways of supporting the economy. Maximising and harnessing the talents of the working population and creating a productive and diverse workforce must be central to that mission.

18. We suggest that addressing the law on flexible working is an important step on that journey not only in terms of unleashing economic potential, but in speaking to the value placed on all of the working population irrespective of race, sex, caring responsibilities, disability and any other characteristic protected by the Equality Act 2010.

19. Working parents are not the only group whose economic productivity, wellbeing and personal autonomy stands to be increased by this, but it is this sector of the population which makes up a considerable proportion of those likely to be beneficially impacted by a greater entitlement to flexible working.

20. It is clear that flexible working is a subject on which a number of other organisations are providing insightful views and knowledgeable input e.g. Pregnant Then Screwed, Working Families and CIPD which co-chaired the Government's Flexible Working Taskforce. The CIPD published a report which found that flexible working had plateaued since 2010 despite its extended availability to all employees since 2014.

Reform

21. We invite the Law Commission to consider making flexible working its flagship reform in labour law. Our initial proposals for law reform focus on the availability of the right as well as its substance. We suggest that simplicity in reframing the right and its application to all of the working population will increase the uptake of flexible working, decrease administrative burden for employers and make it easier to educate and assist everyone as to the framework within which flexible working can take place. Rebuilding better will be easier with clear and simple changes.

- Making the right to request flexible working a day 1 right for all employees.
- Creating a right to work flexibly with narrow exceptions, more closely defined than the statutory reasons which currently apply;
- Removing the limitation that only one flexible working request may be made in a 12-month period and replacing it with a need for there to be a material change of circumstances;
- Extending the right to request and also the right to work flexibly to workers;
- Creating useful tools and guidance to support employers in offering trial periods of flexible work and evaluating applications.

(3) Commercial leasehold[2]

Landlord and Tenant Act 1954

The Act generally

22. We believe that, overall, the Act achieves a fair balance between the interests of landlords and tenants. The security of tenure it provides to business tenants is very important to providing the stability and confidence required to encourage business owners to invest in the long-term success of their businesses. This is particularly important to those businesses where a significant part of their goodwill is bound up with the premises they trade from, e.g. retail and hospitality businesses. It also prevents landlords exploiting a tenant's reliance on that goodwill by demanding excessive rents. It achieves all this while retaining for landlords a measure of freedom where they require the premises for their own purposes or to redevelop them.

[2] https://www.lawcom.gov.uk/14th-programme-kite-flying-document/#leasehold

23. We are not aware of any factors that make a convincing case for altering this balance or doing away entirely with the protections afforded to tenants by the Act. While the rise of online retail and the changes brought about by the Covid-19 pandemic may lead to a reduction in demand for certain kinds of business premises, it may well lead to an increase in demand for others. And the Act does more than merely address the problems caused to tenants by a shortage of business premises, it also provides the stability required for investment in location-dependent businesses. This drives prosperity and leads ultimately to a benefit to landlords as well as tenants.

24. If the Law Commission does decide to consider reform of the Act, we would urge it to look very carefully at any proposals to abolish or diminish security of tenure – whether from Government or elsewhere – and to consider whether any claimed economic benefits stand up to scrutiny.

Specific problems

25. There are specific areas that merit consideration for reform.

26. First, the significant disruption caused by the Covid-19 pandemic raises the question of whether the Act should make provision for renewed leases to include terms that might alleviate some of the difficulties that tenants in some sectors have experienced during lockdown. The most obvious question is whether such leases should contain terms that reduce or abate entirely the obligation to pay rent when businesses are not able to trade from their premises as a result of a pandemic or similar emergency. In principle, this is already possible under the Act (s.35(1)) but the legislation could lower the bar for such terms. However, we are not convinced that such reform is necessary or desirable. Those terms would have the effect of passing on the consequences of such disruption to landlords, many of whom will hardly be better able to bear them than tenants. Ultimately, given the rarity of such events, their risks and consequences may be best dealt with through insurance or through the kind of government intervention as has occurred under the Coronavirus Act 2020.

27. Second, and related to the point above, consideration might be given to whether the Act might be amended to allow the court to order that a renewed lease reserve a turnover rent or a hybrid of a base rent and turnover rent. Currently, it is not clear if it is open to the court to impose such rental models (see s.34(1), and the discussion in Reynolds & Clark, Renewal of Business Tenancies (Fifth edition),

paragraphs 8-99 to 8-102). This kind of model could have the effect of reducing the rent due if a business were to be prevented from trading from its premises. However, the effects would be far more wide ranging and the consequences of widespread adoption of it would have to be considered.

28. Third, consideration might be given to the procedures for contracting out of the effect of Part II of the Act. It is obviously right to allow parties to contract out of the Act's protection, and likewise right that an intending tenant be warned of the consequences of doing so. However, in the transactional context, the requirements of giving notice and doing so the prescribed amount of time before the lease is completed is inefficient and creates delay. There are also uncertainties which may be create traps for the unwary, e.g. whether a fresh notice should be given when there is an assignment of the benefit of an agreement for lease. In the context of lease renewal litigation, the requirement creates delay where the parties agree a compromise involving the grant of a contracted-out tenancy. Before the 2003 reforms this could be achieved by inserting a suitable term into a consent order approved by the court but now a notice is required. Consideration might be given to simply requiring that a contracted-out lease carry a clear warning in prescribed form on its face.

The Landlord and Tenant (Covenants) Act 1995

The Act generally

29. We believe that the reforms introduced by the Act were beneficial and there is no case for revisiting them. However, the Act is complicated and does give rise to some difficulties. Two illustrations are provided.

The application of the Act

30. There is uncertainty as to how the Act applies to agreements for lease. Under s.28(1) of the Act, "tenancy" is defined as including "an agreement for a tenancy" but it is unclear whether the Act is intended to transfer the benefit and burden of agreements for tenancies when the landlord-to-be's interest in the land is transferred. The point has arisen in different contexts in Ridgewood Properties Group Ltd v Valero Energy Ltd [2013] Ch 525 and in Bella Italia Restaurants Ltd v Stane Park Ltd [2019] EWHC 2747 (Ch). This can cause uncertainty where there is an assignment of the landlord-to-be's interest with the benefit of the agreements for lease, which is common in the "forward-funding" model of development finance, where the developer

acquires the site and planning permission, arranges to let the development and then sells it before the development is undertaken.

Anti-avoidance

31. There has been a long-standing problem in that the anti-avoidance provisions of the Act prevent the guarantor of a tenant's obligations under a lease from guaranteeing the obligations of a party that takes an assignment of the lease from the tenant: see K/S Victoria Street v House of Fraser (Stores Management) [2012] Ch 497. This has the effect of preventing the parent of a subsidiary company that holds a lease providing a guarantee if the lease is assigned to a different subsidiary. It can also complicate the financial arrangements between retiring and continuing partners who hold leasehold property for the partnership, as the retiring partner may have to remain a lessee and rely on an indemnity from the other members of the firm for the lease liabilities.

32. As an additional but related matter, the decision in EMI Group Ltd v O&H Q1 Ltd [2016] EWHC 529 (Ch) is illogical, as it prevents the assignment of lease by a tenant to a partner that has guaranteed its liabilities under the lease. It should be possible for parties to do this if they wish to.

Terminal dilapidations

33. We do not consider that there is a compelling case for overhauling the law relating to terminal dilapidations, which is relatively clear, predictable and well understood by the market. In particular s.18(1) of the Landlord and Tenant Act 1927 strikes a fair balance between the interests of landlord and tenant and works well.

34. We can foresee that the changing landscape of the commercial-property market could lead to more cases in the future where there is to be a change of use following the end of a lease, which could impact upon terminal dilapidations claims or claims relating to the reinstatement of alterations. But we do not consider there are significant problems in the existing law.

(4) **Automated decision-making**[3]

[3] https://www.lawcom.gov.uk/14th-programme-kite-flying-document/#AutomatedDecisionMaking, number (2) on the Index, views from the IT Panel of the Bar Council

35. This appears to us to be a worthy area for further research and potential reform to ensure transparency of such decision-making.

(5) **Conflict of laws and emerging technology**[4]

36. Whilst this area seems pertinent to consider, there is already much investigation going on into the use of smart contracts. The Law Commission is mid-way through its own consultation: https://www.lawcom.gov.uk/project/smart-contracts/.

37. Moreover, the LawTech Delivery Panel recently published its seminal statement on crypto assets and smart contracts: https://35z8e83m1ih83drye280o9d1-wpengine.netdna-ssl.com/wp-ontent/uploads/2019/11/6.6056_JO_Cryptocurrencies_Statement_FINAL_WEB_111119-1.pdf

38. Nonetheless, it is an interesting issue that raises several problems – for example, if your AI is using personal data and is based in a country with poor data protection law or if a party was based in different countries using AI developed in another third country, where would you go to look for liability? It is notable that the GNU General Public License, which is a series of widely used open software licenses, does not have a 'jurisdiction' clause – it was deliberately omitted. This makes the licence, which has to be used in the form drafted, flexible and useable in multiple jurisdictions.

(6) Data sharing and information law[5]

39. We agree that the current rules are not transparent and would benefit from a review. In relation to the recent ICO data sharing code practice, the Information Commissioner recognised that problems still exist:

"But we cannot pretend that a code of practice is a panacea to solve all the challenges for data sharing. Or that targeted ICO engagement and advice will solve everything. There are other

[4] https://www.lawcom.gov.uk/14th-programme-kite-flying-document/#EmergingTechnologies, number (4) on Index, views of IT Panel of the Bar Council

[5] https://www.lawcom.gov.uk/14th-programme-kite-flying-document/#DataSharing, number 6 on Index, views of IT Panel of the Bar Council

barriers to data sharing, including cultural, technical and organisational factors. Overcoming these will require more than just the ICO; it will require a collective effort from practitioners, government and the regulator."

40. This review will need to consider the competitive environment provided by the EU's developments in this area: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2102

41. We agree that the issue of information-sharing between public bodies calls out for a review by the Law Commission. The statute book remains replete with a wide variety of ad hoc "gateways" permitting disclosure by different public bodies for different reasons, and overlapping in a complex and often untransparent way with principles derived from the Human Rights Act 1998 and data protection law (for an example, see *R(Ali) v Minister for the Cabinet Office* [2012] EWHC (Admin) 1943 on disclosure of census information).

42. Public bodies now hold a large amount of often sensitive information about individual citizens, and need to hold that information to do their work effectively: and exchange of that information often generates considerable gains in terms of effective delivery of public services and protection of the public. But information will only be provided, and public consent in the use of such information maintained, if the legal framework governing such exchanges is accessible and principled, which it is not now. A review would be especially timely as many of the provisions at issue refer to or were formulated in the light of principles of EU law.

(7) Justice in the Digital Age[6]

43. An analysis of remote working is very much needed given the recent move to and expansion of online justice, which does not appear to have a basis in recorded data. HMCTS may not have the data which this review would need, but getting the data and analysing it is really important; it is an area ripe for debate.

44. In addition, the Post Office case has demonstrated that the presumptions on computer–based evidence can be used to defeat justice (see:

[6] https://www.lawcom.gov.uk/14th-programme-kite-flying-document/#DigitalJustice, number 10 on Index, views of IT Panel of the Bar Council

https://ials.blogs.sas.ac.uk/2019/06/25/the-use-of-the-word-robust-to-describe-software-code/). This requires reform.

45. The question of costs recovery against losing public bodies is a contentious area for litigants. It deserves review.

(8) Product liability and emerging technology[7]

46. The limiting definition of "products" in the current law in a society increasingly paying for and reliant on streamed or online delivery of software (including "Software as a service"(SaaS)) does not seem justified. The distinction between this and a delivery of the software on a physical medium (such as CD-ROM) is not recognised by the consumer as affecting their rights. This issue is worthy of reform.

(9) Technological Advances and Procedural Efficiency in the Criminal Courts[8]

The Law Commission has asked: Has the criminal law kept pace with technological change?

47. We agree that this could be a fruitful area of consideration by the Law Commission.

48. We agree that the use of pre-recorded (s. 28) interviews involves practical and legal issues. In addition, there is inconsistency in the deployment of evidence from body-worn cameras – police forces may use them as a sort of 'evidence gathering' process, but this does not replace the Police reducing any initial complaint captured as body worn footage (BWF) to writing in a traditional form. BWF is more often used at trial as a form of real evidence rather than as an alternative to witness statements. If BWF were to be used as an alternative, then the Police Constables obtaining the initial account would need more extensive training with regard to interview techniques to ensure that the evidence adduced is properly admissible in criminal courts. Otherwise, the efficiency of the trial process is likely to be reduced with a greater number of legal arguments regarding admissibility of a complainant's evidence, and the knock-on effect to effectiveness of trials if a complainant's account is deemed to be inadmissible.

[7] https://www.lawcom.gov.uk/14th-programme-kite-flying-document/#ProductLiability, number 15 on Index, views of IT Panel

[8] https://www.lawcom.gov.uk/14th-programme-kite-flying-document/#ProceduralEfficiency, number 17 on Index, views of IT Panel

49. The use of CVP in (mainly) criminal Courts has been essential during the pandemic. However, this was an emergency measure which is now being replaced. It is unclear if sufficient attention has been paid to the deficiencies with the system, so that these can be avoided in future, and so that an integrated and uniform system for the conduct of hearings, presentation of evidence and pre- and post-trial conference facilities can be implemented. When there is an expectation by all parties that a trial will occur, rather than a resolution at an earlier stage, then CVP is a very valuable tool. However, when there is a possibility of agreement between the parties that could potentially reduce the burden placed upon the court system then the use of CVP, rather than presence of the parties at court, can reduce procedural efficiency in criminal courts.

50. An assessment of the effectiveness of these processes would be welcomed.

51. Subject to having the necessary technology, and the interests of justice test, the Bar Council supports in principle increasing the volume of remote non-trial work. There are many administrative hearings that can be undertaken more efficiently and swiftly remotely. We have previously invited a review of the nature of the type of hearing to which this is best suited so that a national framework with a consistent approach can be adopted. This is a low-cost solution that is likely to free up courtroom space for trials and have no adverse impact on the interests of justice. Accordingly, the recently proposed extension to the temporary amendments to s.51 CJA 2003 which were introduced as a result of the pandemic is in general terms to be approved of.

52. That general approval does not however extend to remote juries (the proposed amended s.51(2) CJA 2003). The reasons for this are based on (i) a legal analysis of the provision, (ii) policy considerations, and (iii) practicalities. [9]

53. We also raise for consideration the particular position of the defendant in the trial process. Any barrier that is placed between a defendant and a jury – whether it be a Perspex dock screen, or a video link – risks alienating them, with potential adverse consequences for the defendant.

54. These and other issues could well be the subject of consideration by the Law Commission. Reforms which were introduced at pace to respond to a particular need

[9] See the response to the Police, Crime, Sentencing and Courts Bill at committee stage and for MPs on remote juries

may not be necessary – or appropriate – when the current public health emergency has passed. Conversely, there may well be scope for greater use of technology than has hitherto been considered.

55. If it is to be effective, however, the scope of such a review will inevitably need to consider practicalities. One basic example of a technology "fail" in the criminal justice system is that in most courtrooms there are two large screens fixed to opposing walls. One screen is usually positioned above the heads of the jury, which is of course useless for their purposes. The other is usually placed on the wall facing the jury, which is often so far away that any detail of the image on screen will likely be lost. Solutions are obvious – for example more, smaller screens, closer to the jury, or the making available of iPads or the like for the use of jurors during the currency of a trial. These are not the types of matters that the LC would usually consider, but given the focus of this proposed topic, attention to practicalities will be essential.

(10) The Search, Production and Seizure of Electronic Material[10]

56. In a criminal context, the search and seizure of electronic material must be in accordance with PACE Code B. Home Office guidance was also released in 2016. While both of these provide strong guidance in relation to the seizure of electronic material contained within a physical device (computers, laptops, mobile phones, etc.), and the criminal courts are well-used to deploying this material at trial, the legal context for online/cloud-based electronic material is less defined.

57. Online/ cloud based electronic material presents a difficulty in relation to the seizure of material, especially when this is held on overseas servers or in jurisdictions which do not have Memorandums of Understanding with the UK. These difficulties are not insurmountable but a clearer and straight-forward process would be welcomed.

(11) The UK Statute Book[11]

52. This topic seems sensible to consider. It would clearly make more sense to move the UK Statute Book onto the same facilities (on the National Archive) with the same access as the one planned for all legal judgements after the move from BAILII.

[10] https://www.lawcom.gov.uk/14th-programme-kite-flying-document/#ElectronicMaterial, number 18 on Index, views of IT Panel

[11] https://www.lawcom.gov.uk/14th-programme-kite-flying-document/#UKStatute, number 19 on Index, views of IT Panel

It would be helpful to have an accessible electronic resource for everybody that has all law resources. That would also aid transparency.

(12) Review of the Arbitration Act 1996 and Trust Law Arbitration[12]

Introduction

53. This submission addresses the potential use of arbitration of trust disputes and the use of summary judgment procedures in arbitration.

54. The potential use of arbitration in trust disputes has been the subject of discussion for over 10 years and the law, particularly relating to arbitrability of disputes and enforceability of awards merits analysis and clarification. Stakeholders have suggested legislative intervention.[13] Any intervention should encompass all trusts, family and commercial.

55. There is a growing demand for expedited procedures in arbitration as evidenced by the responses of 25% of commercial stakeholders recently surveyed.[14] In response, many major international arbitral institutions have changed their arbitration rules to include procedural provisions aiming to expedite proceedings, including summary judgment procedures. Whether the availability of expedited procedures should be put on a statutory footing also deserves consideration.

Importance of Clear and Up to Date Arbitration Law

56. London is a preferred seat for international dispute resolution[15] and English law is frequently the chosen applicable law. London's prominence in the field comes from a long tradition, the acknowledged effectiveness of the 1996 Act and the supportive legal system including specialist courts.

57. There is also a significant body of domestic disputes resolved by arbitration under the 1996 Act. Furthermore, as the law of trusts and fiduciaries is historically a creature of equity, London suggests itself as a natural seat to resolve such disputes.

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[12] https://www.lawcom.gov.uk/14th-programme-kite-flying-document/#Arbitration, number 1 on Index, prepared by the Bar Council's ADR Panel

[13] 2012 Report of the Executive Committee of the Trust Law Committee of STEP https://www.step.org/step-journal/tqr-april-2012/arbitration-trust-disputes

[14] 2021 International Arbitration Survey: Adapting arbitration to a changing world, Queen Mary- White & Case page 12, Chart 8

[15] *Ibidem* p.2

58. In the view of the Alternative Dispute Resolution (ADR) Panel of the Bar Council it is imperative that the laws of England & Wales should not only remain up to date and crystal clear on the arbitrability of important matters but should give an international lead. This is especially the case because the law of trusts is a creature of equity, and arguably a common law jurisdiction is more appropriate, notwithstanding that similar instruments have evolved in civil law jurisdictions.

Trust Arbitration and International Growth of use of Trusts

59. It has been noted there has been an increased use of trusts, in part due to the 1985 Hague Convention on the Law Applicable to Trusts and their Recognition[16]. For example, the American Arbitration Association produced Wills and Trusts Arbitration Rules recognising that "[e]very year billions of dollars are administered by executors and trustees."

60. This will inevitably result in increased number of disputes and it is desirable that, subject to policy considerations, stakeholders in trust instruments should have as wide a range of dispute resolution procedures available to them as parties in commercial transactions.

61. In April 2012, the Executive Committee of the Trust Law Committee of the Society of Trust and Estates Practitioners ("STEP"), proposed an amendment to the Arbitration Act 1996 to facilitate arbitration of certain trust disputes as it was of the view that without enabling legislation, it was plainly impossible under English law for a settlor or testator validly to require beneficiaries to submit any dispute to arbitration.[17] The committee advocated enabling legislation excluding however arbitration of disputes as to the validity of the trust disposition itself.

62. The ADR Panel is of the view that the law should be as clear as possible to delineate the scope of these choices and give domestic and international parties the same level of comfort that they come to expect when choosing English law in commercial transactions.

Arbitral Institutions Responses

[16] *Explanatory Note Accompanying the ICC Arbitration Clause for Trust Disputes (2018) October 2018 (ICC Publication 891-0 ENG ISBN 978-92-842-0519-6)*
[17] supra

63. Arbitral institutions have responded including the abovementioned The American Arbitration Association's Wills and Trusts Arbitration Rules.

64. The International Court of Arbitration in Paris established a task force to review the issues presented by the arbitration of trust disputes in light of the ICC Arbitration Rules.

65. The work of the Task Force produced a draft arbitration clause in 2009, revised in 2012 and 2017.

International Legislative Responses

66. In Guernsey, section 63 of the Trusts (Guernsey) Law 2007 which provides for settlement of action against trustee by alternative dispute resolution to be binding on beneficiaries. Also in the USA, s 731.401 of the Florida Probate Code provides that, "(1) A provision in a will or trust requiring the arbitration of disputes, other than disputes of the validity of all or a part of a will or trust, between or among the beneficiaries and a fiduciary under the will or trust, or any combination of such persons or entities, is enforceable."

Stakeholders and Agreement to Arbitrate Trust Disputes

67. The stakeholders in a trust are the settlor, sometimes as well as the trustees and beneficiaries having different and often competing and complex rights and obligations.[18] Trust disputes may be classified as internal, in the sense that they arise as between stakeholders, or external as between trustees and third parties.

68. Arbitration is a consensual process. The Arbitration Act 1996 sub-s. 5(1) provides that the Act applies to an agreement in writing, and sub-s. 1(2) states that "parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest."

69. Typically, the parties to the deed of trust are the settlor and the trustees. There may be a nominated protector of the beneficiaries' interests. This presents a difficulty immediately as regards beneficiaries who typically are not parties to the deed. They may be under an incapacity at law, and may not even be identified when the deed is

[18] As distinct from disputes between trustees and third parties which present on the whole less complex issues.

executed or a dispute subsequently arises. Binding beneficiaries under an incapacity, as yet unborn or unascertained, without adequate safeguards is likely to offend Article 6(1) of the European Convention on Human Rights which requires fair procedures.

Areas of Concern – Trusts

52. A fundamental question is perhaps the nature of an arbitrator's jurisdiction. Arbitration is historically embedded in a common law mercantile context as a creature of contract whereas trusts are creatures of equity.

53. The authors of the discussion paper of Executive Committee of the Trust Law Committee (TLC) of STEP concluded in 2008 that, without enabling legislation, it was plainly impossible under English law for a settlor or testator validly to require beneficiaries to submit any dispute to arbitration.[19]

54. The ICC Task Force produced a draft arbitration clause in 2009, revised in 2012 and 2017 and the evolution of this clause flags a number of the principal issues in focus.

55. The 2008 ICC clause provided for the principle of "**deemed acquiescenc**e" whereby a beneficiary who accepts "any benefit, interest or right under the Trust" is deemed to be bound by it but also the principle that a beneficiary could be required to accept arbitration as a condition of receiving any benefit under the trust. This latter requirement, a **conditional grant of benefit**, was deleted from the 2018 revision.

56. The 2018 revised ICC clause purports to **bind protectors and other power** holders to refer disputes to arbitration.

57. The 2018 ICC revision has express provision for **confidentiality,** which impacts on transparency among stakeholders. It is noteworthy that the abovementioned recommendations of the 2008 STEP discussion paper, proposed the adoption of procedural rules, by statutory instrument or otherwise, requiring arbitrations which are determinative of the rights or obligations of any beneficiary under a trust to be held in public unless the interests of one or more children are involved; or all the parties, being of full capacity, agree to the contrary; or the court directs to the contrary. It is noteworthy that while transparency has in recent years become available in

[19] supra

international arbitration in the context of Investor-State disputes for example,[20] the fundamental expectation, and frequently the dominant reason for choosing arbitration over litigation is the confidentiality of the process.

Summary judgment in arbitration

52. Most arbitral rules already **implicitly** grant tribunals the power to conduct summary proceedings. Worldwide, there has been a recent trend however towards adopting **express** summary judgment procedures in arbitration.

53. The Singapore International Arbitration Centre (SIAC) has so far led the way. On 1 August 2016 the SIAC became the first major international arbitration centre to allow a tribunal to summarily dismiss claims and defences. Rule 29 of the SIAC Arbitration Rules provides that a party may apply to the tribunal for the early dismissal of a claim or defence on the grounds that it is:

- Manifestly without legal merit; or
- Manifestly outside the jurisdiction of the tribunal.

52. The tribunal has a discretion to refuse to deal with the application. If however it decides to deal with it, it must within 60 days of the date the application was filed, make a reasoned order or award on the application, which may be in a summary form.

53. The Stockholm Chamber of Commerce (SCC) also introduced a summary procedure for the determination of factual or legal issues on 1 January 2017. Article 39 of the SCC Arbitration Rules provides that a party may apply to the tribunal for the adoption of a summary procedure in relation to issues of jurisdiction, admissibility, or merits. In summary, the grounds for such an application are:

- A material factual or legal allegation is manifestly unsustainable.
- No award can be rendered in favour of a party under the applicable law irrespective of the validity of its allegations.
- Any material legal or factual issue is suitable for determination by way of summary procedure.

[20] United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 2014) (the "Mauritius Convention on Transparency") signed by the UK 17/03/2015, not ratified.

52. The tribunal has to provide the other party an opportunity to submit comments replying to the request, after which it either dismisses the request or adopts the summary procedure it considers appropriate.

53. It is important to note that in both of the examples cited above the parties have an opportunity to make submissions to the tribunal about whether a summary judgment or procedure should be adopted, and the tribunal retains a discretion. There is **no automatic right** for a party to apply for summary judgment as such.

Conclusions

52. The ADR Panel of the Bar Council of England & Wales suggests that the law governing arbitration of trusts deserves full consideration and clarification by the Law Reform Commission.

53. The Panel also suggests that consideration be given to statutory provisions expressly empowering arbitrators to adopt summary procedures and setting guidelines for the exercise of such powers.

(13) Contempt of court

The Law Commission has asked: Is there a need for greater clarity in relation to contempt in the face of the court and the law of contempt more widely?

54. We agree that this is an area that would benefit from joined-up consideration. Whether codification is required or not is a different matter. But cases such as *Yaxley-Lennon*, where there was widespread confusion both outside and within the criminal justice system as to issues such as the proper scope of contempt, and even the forum in which such issues should be considered, suggest that some clarification of the law in this area would be beneficial.

(14) Review of appeal powers in the criminal courts

55. There are a number of aspects of the appellate regime that might benefit from consideration by the Law Commission. These include:

(i) Whether the test for appeal from the Divisional Court on a question of compliance with s.6 of the HRA 1998 would benefit from codification: see the recent decision of the Supreme Court in *DPP v. Ziegler & others* [2021] UKSC 23, in which the court was divided as to the proper approach.

(ii) Whether to re-consider the various situations in which sentences can be referred to the Court of Appeal for a decision as to whether they are unduly lenient – at present there are arguably some anomalies between offences that can be referred and those that cannot;

(iii) Whether the test for referral of cases from the CCRC to the Court of Appeal should be reframed. See for example the discussion here: https://publications.parliament.uk/pa/cm201415/cmselect/cmjust/850/85005.htm

Bar Council[21]

6th August 2021

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[21] Prepared by the Law Reform Committee, with contributions from the IT Panel of the Bar Council and the Alternative Dispute Resolution Panel of the Bar Council