

Arbitration Bill [HL]

EXPLANATORY NOTES

Explanatory notes to the Bill, prepared by the Ministry of Justice, have been ordered to be published as HL Bill 7—EN.

EUROPEAN CONVENTION ON HUMAN RIGHTS

Lord Bellamy has made the following statement under section 19(1)(a) of the Human Rights Act 1998:

In my view the provisions of the Arbitration Bill [HL] are compatible with the Convention rights.

Arbitration Bill [HL]

[AS INTRODUCED]

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[AS INTRODUCED]

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B I L L

TO

Amend the Arbitration Act 1996.

BE IT ENACTED by the King’s most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Applicable law

1 Law applicable to arbitration agreement

- (1) The Arbitration Act 1996 is amended as follows.
- (2) After section 6 insert—

“6A Law applicable to arbitration agreement

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- (1) The law applicable to an arbitration agreement is—
 - (a) the law that the parties expressly agree applies to the arbitration agreement, or
 - (b) where no such agreement is made, the law of the seat of the arbitration in question.
- (2) For the purposes of subsection (1), agreement between the parties that a particular law applies to an agreement of which the arbitration agreement forms a part does not, of itself, constitute express agreement that that law also applies to the arbitration agreement.”
- (3) In section 2 (scope of application of provisions), in subsection (2) after the opening words insert—
 - “(za) section 6A (law applicable to arbitration agreement),”.

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The arbitral tribunal

2 Impartiality: duty of disclosure

- (1) The Arbitration Act 1996 is amended as follows.

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- (2) After section 23 insert –

“23A Impartiality: duty of disclosure

- (1) An individual who has been approached by a person in connection with the individual’s possible appointment as an arbitrator must, as soon as reasonably practical, disclose to the person any relevant circumstances of which the individual is, or becomes, aware. 5
- (2) An arbitrator must, as soon as reasonably practical, disclose to the parties to the arbitral proceedings any relevant circumstances of which the arbitrator is, or becomes, aware.
- (3) For the purposes of this section – 10
- (a) “relevant circumstances”, in relation to an individual, are circumstances that might reasonably give rise to justifiable doubts as to the individual’s impartiality in relation to the proceedings, or potential proceedings, concerned, and
- (b) an individual is to be treated as being aware of circumstances of which the individual ought reasonably to be aware.” 15
- (3) In Schedule 1 (mandatory provisions), after the entry for section 13, insert –
- “section 23A (impartiality: duty of disclosure);”.

3 Immunity of arbitrator: application for removal

- (1) The Arbitration Act 1996 is amended as follows. 20
- (2) In section 24 (power of court to remove arbitrator), after subsection (5) insert –
- “(5A) The court may not order the arbitrator to pay costs in proceedings under this section unless any act or omission of the arbitrator in connection with the proceedings is shown to have been in bad faith.”
- (3) In section 29(1) (general immunity of arbitrator), at the end insert “(and see section 24(5A) (immunity in respect of costs of proceedings for removal))”. 25

4 Immunity of arbitrator: resignation

- (1) The Arbitration Act 1996 is amended as follows.
- (2) In section 25 (resignation of arbitrator) – 30
- (a) in subsection (1), omit paragraph (b) (together with the “and” before it);
- (b) for subsections (3) and (4) substitute –
- “(3) Where an arbitrator resigns, a relevant person may (upon notice to the other relevant persons) apply to the court to make such order as it thinks fit with respect to the arbitrator’s entitlement (if any) to fees or expenses or the repayment of any fees or expenses already paid. 35
- (4) For the purposes of subsection (3), each of the parties and the arbitrator is a “relevant person”.”;

- (c) in the heading, at the end insert “: entitlement to fees or expenses”.
- (3) In section 29 (immunity of arbitrator)–
- (a) omit subsection (3);
 - (b) at the end insert–
 - “(4) An arbitrator’s resignation does not give rise to any liability for the arbitrator unless it is shown that the resignation was, in all the circumstances, unreasonable. 5
 - (5) But subsection (4) is subject to–
 - (a) agreement reached between the parties and the arbitrator as mentioned in section 25(1)(a); 10
 - (b) an order made under section 25(3).”
- (4) In the following provisions, for “25(3)(b)” substitute “25(3)”–
- (a) section 28(4) (joint and several liability of parties to arbitrators for fees and expenses);
 - (b) section 64(3) (recoverable fees and expenses of arbitrators); 15
 - (c) paragraphs 3(2) and 10(2) of Schedule 2 (modifications in relation to judge-arbitrators).

Jurisdiction of tribunal

5 Court determination of jurisdiction of tribunal

In section 32 of the Arbitration Act 1996 (determination of preliminary point of jurisdiction), after subsection (1) insert– 20

“(1A) An application under this section must not be considered to the extent that it is in respect of a question on which the tribunal has already ruled.”

6 Power to award costs despite no substantive jurisdiction 25

(1) Section 61 of the Arbitration Act 1996 (award of costs) is amended as follows.

(2) In subsection (1), omit “, subject to any agreement of the parties”.

(3) After subsection (1) insert–

“(1A) It is irrelevant for the purposes of subsection (1) whether the tribunal has ruled, or a court has held, that the tribunal has no substantive jurisdiction or has exceeded its substantive jurisdiction.” 30

(4) In subsection (2), omit “Unless the parties otherwise agree,”.

(5) After subsection (2) insert–

“(3) Subsections (1), (1A) and (2) are subject to any agreement of the parties.” 35

*Arbitral proceedings and powers of the court***7 Power to make award on summary basis**

After section 39 of the Arbitration Act 1996 insert –

“39A Power to make award on summary basis

- (1) Unless the parties otherwise agree, the arbitral tribunal may, on an application made by a party to the proceedings (upon notice to the other parties), make an award on a summary basis in relation to a claim, or a particular issue arising in a claim, if the tribunal considers that – 5
- (a) a party has no real prospect of succeeding on the claim or issue, or 10
- (b) a party has no real prospect of succeeding in the defence of the claim or issue.
- (2) For the purposes of subsection (1), an arbitral tribunal makes an award “on a summary basis” in relation to a claim or issue if the tribunal has exercised its power under section 34(1) (to decide all procedural and evidential matters) with a view to expediting the proceedings on the claim or issue. 15
- (3) Before exercising its power under section 34(1) as mentioned in subsection (2), an arbitral tribunal must afford the parties a reasonable opportunity to make representations to the tribunal.” 20

8 Emergency arbitrators

(1) The Arbitration Act 1996 is amended as follows.

(2) After section 41 insert –

“41A Emergency arbitrators

- (1) This section applies where – 25
- (a) the parties have agreed to the application of rules that provide for the appointment of an individual as an emergency arbitrator, and
- (b) an emergency arbitrator has been appointed pursuant to those rules. 30
- (2) Unless otherwise agreed by the parties, if without showing sufficient cause a party fails to comply with any order or directions of the emergency arbitrator, the emergency arbitrator may make a peremptory order to the same effect, prescribing such time for compliance with it as the emergency arbitrator considers appropriate.” 35
- (3) In section 41(7) (peremptory orders of tribunal), in the opening words –
- (a) after “peremptory order” insert “of the tribunal”;
- (b) omit “tribunal’s”.
- (4) In section 42 (enforcement of peremptory orders of tribunal) – 40

- (a) in subsection (1), at the end insert “or (as the case may be) the emergency arbitrator”;
- (b) in subsection (2)(a) and (b), after “the tribunal” insert “or the emergency arbitrator”;
- (c) in subsection (3), for “tribunal’s order” substitute “peremptory order”; 5
- (d) in subsection (4), for “tribunal’s order” substitute “peremptory order”;
- (e) in the heading, at the end insert “or emergency arbitrator”.
- (5) In section 44 (court powers exercisable in support of arbitral proceedings) –
- (a) for subsection (4) substitute –
- “**(4)** If the case is not one of urgency, the court may act only on the application of a party to the arbitral proceedings made with – 10
- (a) the permission of the tribunal or (as the case may be) the emergency arbitrator, or
- (b) the agreement in writing of the other parties.
- (4A)** An application under subsection (4) may be made only upon notice to the other parties and to the tribunal or the emergency arbitrator.”; 15
- (b) in subsection (5), after “tribunal” insert “or the emergency arbitrator”;
- (c) in subsection (6), after “tribunal” insert “, the emergency arbitrator”.
- (6) In section 82(1) (minor definitions) – 20
- (a) after the definition of “dispute” insert –
- ““emergency arbitrator” means an individual appointed as mentioned in section 41A(1);”;
- (b) in the definition of “peremptory order”, after “section 41(5)” insert “or 41A(2),”. 25
- (7) In section 83 (index of defined expressions), after the entry for “dispute” insert –
-
- “emergency arbitrator section 82(1) (and see section 41A(1))”.
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9 Court powers exercisable in support of arbitral proceedings in respect of third parties 30

- (1) Section 44 of the Arbitration Act 1996 (court powers exercisable in support of arbitral proceedings) is amended as follows.
- (2) In subsection (1), after “making orders” insert “(whether in relation to a party or any other person)”.
- (3) For subsection (7) substitute – 35
- “(6A) Subject to subsection (7), an appeal lies from a decision of the court under this section.
- (7) The leave of the court is required for any such appeal by a party or proposed party to the arbitral proceedings.”

*Powers of the court in relation to award***10 Challenging the award: remedies available to the court**

- (1) Section 67 of the Arbitration Act 1996 (challenging the award: substantive jurisdiction) is amended as follows.
- (2) In subsection (1), for paragraph (b) substitute— 5
- “(b) challenging an award made by the tribunal on the merits because the tribunal did not have substantive jurisdiction.”
- (3) For subsection (3) substitute—
- “(3) On an application under this section, the court may by order— 10
- (a) confirm the award,
- (b) vary the award,
- (c) remit the award to the tribunal, in whole or in part, for reconsideration,
- (d) set aside the award, in whole or in part, or
- (e) declare the award to be of no effect, in whole or in part. 15
- (3A) The court must not exercise its power to set aside or to declare an award to be of no effect, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration.”

11 Procedure on challenge under section 67 of the Arbitration Act 1996 20

In section 67 of the Arbitration Act 1996 (challenging the award: substantive jurisdiction), after subsection (3A) (as inserted by section 10(3)) insert—

- “(3B) Rules of court about the procedure to be followed on an application under this section may, in particular, include provision within subsection (3C) in relation to a case where the application— 25
- (a) relates to an objection as to the arbitral tribunal’s substantive jurisdiction on which the tribunal has already ruled, and
- (b) is made by a party that took part in the arbitral proceedings.
- (3C) Provision is within this subsection if it provides that—
- (a) a ground for the objection that was not raised before the arbitral tribunal must not be raised before the court unless the applicant shows that, at the time the applicant took part in the proceedings, the applicant did not know and could not with reasonable diligence have discovered the ground; 30
- (b) evidence that was not heard by the tribunal must not be heard by the court unless the applicant shows that, at the time the applicant took part in the proceedings, the applicant could not with reasonable diligence have put the evidence before the tribunal; 35

- (c) evidence that was heard by the tribunal must not be re-heard by the court, unless the court considers it necessary in the interests of justice.”

12 Challenging the award: time limit

- (1) Section 70 of the Arbitration Act 1996 (challenge or appeal: supplementary provisions) is amended as follows. 5
- (2) In subsection (3), for the words from “the date of the award” to the end substitute “the applicable date”.
- (3) After subsection (3) insert—
- “(3A) In subsection (3), “the applicable date” means— 10
- (a) in a case where there has been any arbitral process of appeal or review, the date when the applicant or appellant was notified of the result of that process;
- (b) in a case where the tribunal has, under section 57, made a material correction to an award or has made a material additional award, the date of the correction or additional award; 15
- (c) in a case where a material application for a correction to an award or for an additional award has been made to the tribunal under section 57 and the tribunal has decided not to grant the application, the date when the applicant or appellant was notified of that decision; 20
- (d) in any other case, the date of the award.
- (3B) For the purposes of subsection (3A)—
- (a) a correction to an award,
- (b) an additional award, or 25
- (c) an application under section 57,
- is “material” if any matter to which it relates is material to the application or appeal under section 67, 68 or 69.”
- (4) At the end insert—
- “(9) In this section, a reference to available recourse, or to anything done, under section 57 includes a reference to available recourse, or to anything equivalent done, pursuant to agreement reached between the parties as mentioned in section 57(1).” 30

Miscellaneous minor amendments

13 Right of appeal against court decision on staying legal proceedings 35

In section 9 of the Arbitration Act 1996 (stay of legal proceedings), at the end insert—

- “(6) The leave of the court is required for any appeal from a decision of the court under this section.”

14 Requirements to be met for court to consider applications

- (1) The Arbitration Act 1996 is amended as follows.
- (2) In section 32 (determination by court of preliminary point of jurisdiction)—
 - (a) in subsection (2)(b), omit the words from “and the court” to the end;
 - (b) omit subsection (3); 5
 - (c) in subsection (5), for “the conditions specified in subsection (2) are” substitute “either condition specified in subsection (2) is”.
- (3) In section 45 (determination by court of preliminary point of law)—
 - (a) in subsection (2)(b), omit the words from “and the court” to the end;
 - (b) in subsection (3), omit the words from “and, unless” to the end; 10
 - (c) in subsection (5), for “the conditions specified in subsection (2) are” substitute “either condition specified in subsection (2) is”.

15 Repeal of provisions relating to domestic arbitration agreements

Omit the following provisions of the Arbitration Act 1996—

- (a) sections 85 to 87 (domestic arbitration agreements) (which are not in force), together with the italic heading before section 85, and 15
- (b) section 88 (power to repeal or amend sections 85 to 87).

*Final provisions***16 Extent**

- (1) Any amendment or repeal made by this Act has the same extent as the provision amended or repealed. 20
- (2) This section and sections 17 and 18 extend to England and Wales and to Northern Ireland.

17 Commencement and transitional provision

- (1) This section and sections 16 and 18 come into force on the day on which this Act is passed. 25
- (2) The rest of this Act comes into force on such day as the Secretary of State may by regulations appoint.
- (3) The Secretary of State may by regulations make transitional or saving provision in connection with the coming into force of any provision of this Act. 30
- (4) Subject to any transitional or saving provision made under subsection (3), an amendment made by sections 1 to 14—
 - (a) does not apply to—
 - (i) arbitral proceedings commenced before the day on which the section making the amendment comes into force 35
 (“pre-commencement arbitral proceedings”),

-
- (ii) court proceedings (whenever commenced) in connection with pre-commencement arbitral proceedings or an award made in pre-commencement arbitral proceedings, or
 - (iii) any other court proceedings commenced before the day on which the section making the amendment comes into force; 5
 - (b) otherwise applies in relation to an arbitration agreement whenever made.
- (5) A power to make regulations under this section includes power to make different provision for different purposes.
- (6) Regulations under this section are to be made by statutory instrument. 10
- (7) In this section “arbitration agreement” means an arbitration agreement within the meaning of section 6 of the Arbitration Act 1996 to which Part 1 of that Act applies (see section 5 of that Act).

18 Short title

This Act may be cited as the Arbitration Act 2024. 15

Arbitration Bill [HL]

[AS INTRODUCED]

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B I L L

TO

Amend the Arbitration Act 1996.

Lord Bellamy

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