

# ARBITRATION BILL [HL]

## EXPLANATORY NOTES

### What these notes do

These Explanatory Notes relate to the Arbitration Bill [HL] as introduced in the House of Lords on 21 November 2023 (HL Bill 7).

- 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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## 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.<sup>1</sup>

## 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, 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.<sup>2</sup>
- 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 Government accepted all the recommendations.
- 4 The Arbitration Bill contains the following substantial initiatives:
  - 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;
  - a revised framework for challenges under section 67 of the Arbitration Act 1996 (where the challenge alleges that the arbitral tribunal lacked jurisdiction);
  - a new rule on the governing law of an arbitration agreement; and
  - clarification of court powers in support of arbitral proceedings, and in support of emergency arbitrators.

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<sup>1</sup> <https://lawcom.gov.uk/project/review-of-the-arbitration-act-1996/>

<sup>2</sup> <https://arbitration.qmul.ac.uk/research/2021-international-arbitration-survey/>

- 5 The Arbitration Bill contains the following minor changes to the Arbitration Act 1996:
- making appeals available from an application to stay legal proceedings;
  - 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.<sup>3</sup>

## Legal background

- 7 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. The Arbitration (Scotland) Act 2010 governs arbitration in Scotland.

## Territorial extent and application

- 8 The Sewel Convention means that the UK Parliament “will not normally legislate with regard to devolved matters without the consent” of the devolved legislatures.
- 9 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.
- 10 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). More generally, the Bill amends 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 of the Act applies to arbitrations seated in England and Wales, and in Northern Ireland, and also which provisions of the Act apply to arbitrations seated elsewhere).
- 11 See the table in Annex A for a summary of the position regarding territorial extent and application in the United Kingdom.

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<sup>3</sup> <https://lawcom.gov.uk/project/review-of-the-arbitration-act-1996/>

# Commentary on provisions of Bill

## Applicable law

### Clause 1: Law applicable to arbitration agreement

- 12 Clause 1 replaces the common law in *Enka v Chubb* (2020)<sup>4</sup> 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. 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.
- 13 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.
- 14 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).
- 15 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. In the absence of any such choice, 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).
- 16 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 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 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.

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<sup>4</sup> <https://www.supremecourt.uk/cases/uksc-2020-0091.html>

## The arbitral tribunal

### Clause 2: Impartiality: duty of disclosure

- 17 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).<sup>5</sup> Clause 2 codifies the general duty of disclosure as articulated in that case.
- 18 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)

- 19 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.
- 20 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.
- 21 Clauses 3 and 4 extend the scope of arbitrator immunity, up to a limit, as follows.
- 22 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 be liable for those costs.
- 23 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

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

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<sup>5</sup> <https://www.supremecourt.uk/cases/uksc-2018-0100.html>

- 25 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.
- 26 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

- 27 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

- 28 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

- 29 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.
- 30 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

- 31 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.
- 32 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

- 33 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.
- 34 Awards can also be challenged for serious irregularity (by section 68), where the remedies are: remit the award to the tribunal for reconsideration, vary, or set aside the award. 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.
- 35 Clause 10 amends section 67 to provide the remedies of remittance for reconsideration, and setting aside any type of award. 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

- 36 By sections 82 and 30 of the Arbitration Act 1996, an arbitral tribunal has jurisdiction if there is a valid arbitration agreement, if the tribunal is properly constituted, and in respect of matters which have been submitted to arbitration in accordance with the arbitration agreement.
- 37 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.
- 38 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.
- 39 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 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, unless necessary in the interests of justice.

### Clause 12: Challenging the award: time limit

- 40 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.
- 41 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.
- 42 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.)

## Miscellaneous minor amendments

### Clause 13: Right of appeal against court decision on staying legal proceedings

- 43 Under section 9 of the Arbitration Act 1996, a party can apply to court to stay legal proceedings in favour of arbitration proceedings. Clause 13 amends section 9 to state expressly that an appeal is available. This is consistent with the decision of the House of Lords in *Inco Europe v First Choice Distribution* (2000),<sup>6</sup> which assumed that an ability to appeal was intended.

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

- 44 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.
- 45 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

- 46 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.

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<sup>6</sup> <https://www.bailii.org/uk/cases/UKHL/2000/15.html>

## Final provisions

### Clause 16: Extent

- 47 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

- 48 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, which award was issued before the Bill came into force.

### Clause 18: Short title

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

## Commencement

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

## Financial implications of the Bill

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

## Parliamentary approval for financial costs or for charges imposed

52 The Bill will be introduced in the House of Lords. This section will be completed when the Bill transfers to the House of Commons.

## Compatibility with the European Convention on Human Rights

53 The Government considers that the Arbitration Bill [HL] is compatible with the European Convention on Human Rights. Accordingly, Lord Bellamy, Parliamentary Under Secretary of State, has made a statement under section 19(1)(a) of the Human Rights Act 1998 to this effect.

## Environment Act 2021

54 Lord Bellamy, Parliamentary Under Secretary of State, is of the view that the Bill as introduced into the House of Lords 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.

## Related documents

55 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

- 56 The Bill amends 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.

# ARBITRATION BILL [HL]

## EXPLANATORY NOTES

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Ordered by the House of Lords to be printed, 21 November 2023

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