Law Commission Consultation Paper 257 – Review of the Arbitration Act 1996

A response on behalf of the Chancery Bar Association

A. Introduction

1. This is a response on behalf of the Chancery Bar Association to Law Commission Consultation Paper 257 – Review of the Arbitration Act 1996 (the '**Consultation Paper**').

2. The Chancery Bar Association is a specialist bar association for barristers practising Chancery law. The Chancery field is very diverse, spanning finance, business, insolvency, property, intellectual property, trusts and estates, fraud, asset tracing, and specialist areas such as charities, pensions, and tax. Chancery practice also involves work for international clients before the English courts, as well as fully international work in courts and tribunals around the world.

3. Arbitration is an important feature of the work of many Association members. Arbitration has become fundamental to the resolution of international commercial disputes, in respect of which the United Kingdom remains a major centre for excellence. Moreover, since the UK's exit from the European Union, which has created material difficulty and uncertainty in respect of the reciprocal recognition and enforcement of civil and commercial judgments between the UK and EU Member States, the importance of the arbitral process – including the ready enforcement of arbitral awards pursuant to the New York Convention – is only likely to grow.

4. In the commercial sphere, we agree wholeheartedly with the Commission that "*the Arbitration Act 1996 works well*",[1] and that large-scale amendment to the Arbitration Act 1996 would be unnecessary and undesirable. As set out below, in very large measure we agree with the Commission's recommendations as to the (limited) amendment required to the Act to keep it 'best in class'.

[1] Consultation Paper, paragraph 1.36.

5. However, the Association continues to advocate in particular for the introduction of legislation to facilitate trust arbitration. We address trust arbitration at our response to Consultation Question 38 below.

B. Response to Consultation Questions

Consultation Question 1: Confidentiality

6. The Commission's analysis of the confidentiality of the arbitral process is at Chapter 2 of the Consultation Paper. Having undertaken a review of the approach to confidentiality in arbitrations within English law and the approach taken in some other jurisdictions (paragraphs 2.3 – 2.30), the Commission set out a possible proposal for codification at paragraph 2.32:

"*One option might be to include in the Arbitration Act 1996 a provision stating explicitly that arbitrations are private and confidential, unless an exception applies. The provision could then set out a non-exhaustive list of exceptions, to include the principal exceptions to confidentiality which have already been identified in case law:*

(1) where there is consent;

(2) where the court so orders;

(3) where reasonably necessary for the protection of the legitimate interests, or the fulfilment of the legal duties, of an arbitral party;

(4) where required by the interests of justice; and

(5) *where required by the public interest.*"

7. The Commission suggests that these provisions could be made mandatory,[2] and would have "*the merit of stating the default rule, and providing at least some guidance to users of the Act on the principal exceptions to confidentiality*".[3]

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[2] Consultation Paper, paragraph 2.36. The Commission argues that "*There seems little added value in the Arbitration Act 1996 offering an optional scheme of confidentiality when arbitral rules do that already. Any added value would instead be in the form of a codification of the law. And of course, the law is mandatory*".

[3] Consultation Paper, paragraph 2.35.

8. However, the Commission concluded that the above proposal would not be put forward for recommendation on the basis that:

   a. Confidentiality should not be the presumption in all types of arbitration[4] since some types of arbitration favour transparency and in other areas, "*there is a trend towards transparency, at least in some respects, such as the publication of awards*".[5]

   b. The list of exceptions provided are not particularly "*useful guidance to users in terms of how they would apply in any particular case*".[6]

   c. The precise dividing line between transparency and confidentiality in the arbitration context is still a "*a matter of debate*" and is a line which "*will likely be drawn in different places depending on the context*" which "*militates against a one-size-fits-all approach*".[7]

9. From the Chancery perspective, we recommend that the Commission reconsider the codification of confidentiality provisions, on the grounds that:

   a. Default confidentiality provisions are included in the arbitration legislation of a number of offshore jurisdictions.

   b. *Pace* the Commission's remarks (regarding the trend towards transparency in the arbitral process), in light of a recent re-emphasis by the Courts on the principles of transparency and open justice, the confidentiality of the arbitral process is increasingly important to practitioners and clients.

   c. The codification of default confidentiality rules would provide clarity and certainty.

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4 Consultation Paper, paragraph 2.40.
5 Consultation Paper, paragraph 2.40.
6 Consultation Paper, paragraph 2.42.
7 Consultation Paper, paragraph 2.43.

(a) Default confidentiality provisions in other jurisdictions

10. As is acknowledged by the Commission,[8] there is no express provision for confidentiality within the Arbitration Act 1996, yet arbitrations are nevertheless normally considered confidential and private in England and Wales. The general position is that the confidentiality of the proceedings stems from an implied term within the arbitration agreement: see Toulson & Phipps on Confidentiality, 4th Edn at paragraph 22-026; *Dolling-Baker v Merrett* [1990] 1 WLR 1205, per Parker LJ at 1213 and *Emmott v Wilson* [2008] EWCA Civ 184 at [105].[9]

11. However, the obligation of confidentiality in the English arbitral context is nuanced in at least two ways:

    a. Not every piece of information will necessarily attract the same level of confidentiality protection, such that there may be greater reasons in favour of disclosing an arbitral award as opposed to, for instance, a statement of case filed within the proceedings.[10] As Mance LJ noted in *Department of Economics, Policy and Development of the City of Moscow v Bankers Trust Co* [2004] EWCA Civ 314 at [40]: "*The factors militating in favour of publicity have to be weighed together with the desirability of preserving the confidentiality of the original arbitration and its subject-matter. There is a spectrum. At one end is the arbitration itself, and at the other an order following a reasoned judgment under s.68*".

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8 Consultation Paper, paragraph 2.7.

9 Lawrence Collins LJ held that "*case law over the last 20 years has established that there is an obligation, implied by law and arising out of the nature of arbitration, on both parties not to disclose or use for any other purpose any documents prepared for and used in the arbitration, or disclosed or produced in the course of the arbitration, or transcripts or notes of the evidence in the arbitration or the award, and not to disclose in any other way what evidence has been given by any witness in the arbitration*".

10 See Toulson & Phipps on Confidentiality, 4th Edn at 22-026 – 22-029.

b. Second, the obligation of confidentiality is subject to numerous specific exceptions. As set out by Lawrence Collins LJ in *Emmott v Wilson*, *supra*:

"*On the authorities as they now stand, the principal cases in which disclosure will be permissible are these: the first is where there is consent, express or implied; second, where there is an order, or leave of the court (but that does not mean that the court has a general discretion to lift the obligation of confidentiality); third, where it is reasonably necessary for the protection of the legitimate interests of an arbitrating party; fourth, where the interests of justice require disclosure, and also (perhaps) where the public interest requires disclosure.*"

12. The approach to arbitral confidentiality has therefore developed incrementally through the case law. Without a clear statutory codification, there is a certain amount of ambiguity in the precise contours of the confidentiality obligation, and of derogations from it.

13. The Commission rightly notes[11] that this approach is at odds with the position taken in other jurisdictions, which *do* provide a clear and explicit statutory framework, codifying both the general obligation of confidentiality and the circumstances in which parties and tribunals are permitted to disclose otherwise confidential information. This is particularly evident in offshore jurisdictions.[12]

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[11] Consultation Paper, paragraph 2.25.

[12] An example being Bermuda: see the decision of the Supreme Court of Bermuda in *ACE Bermuda Insurance Ltd v Ford Motor Company* [2016] SC (Bda) 1 Civ which reiterated that arbitration proceedings in Bermuda are "*both private and confidential*" (at [25]) and which followed the approach taken in English law, including the comments in *Department of Economics, Policy and Development of the City of Moscow v Bankers Trust Co* (supra), see paragraphs 25 – 41. See also the Cayman Islands, the Arbitration Law 2012 provides, inter alia, at section 81(1) and 81(3) that "*An arbitral tribunal shall conduct the arbitral proceedings in private and confidentially*" and requires the "*arbitral tribunal and the parties* … [to] *take reasonable steps to prevent unauthorized disclosure of confidential information by any third party involved in the conduct of the arbitration*". Section 81(2) provides for various exceptions to permit disclosure by the arbitral tribunal or a party of confidential information and these are framed in much the same way as in The Bahamas and England more generally. For instance, an arbitral tribunal or party can disclose confidential information if it is authorized by the parties or "*can reasonably be considered as having been so authorized*" or is in the public interest, is "*necessary in the interests of justice*" or "*can reasonably be considered as being needed to protect a party's lawful interests*".

14. For instance, in The Bahamas[13] there is an extensive legislative regime providing for the confidentiality of arbitrations in the Arbitration Act 2009, Part V. In summary:

a. Section 18 states the general starting point that:

"*Subject to section 19 every arbitration agreement to which this section applies is deemed to provide that the parties and the arbitral tribunal must not disclose confidential information*"

b. Section 19 then provides "*Limits on prohibition on disclosure*" and enables a party or an arbitral tribunal to disclose confidential information:

"*(a) to a professional or other adviser of any of the parties;*
(b) if both of the following matters apply –
(i) the disclosure is necessary –
(A) to ensure that a party has a full opportunity to present the party's case;
(B) for the establishment or protection of a party's legal rights in relation to a third party; or
(C) for the making and prosecution of an application to the Court under this Act; and
(ii) the disclosure is no more than what is reasonably required to serve any of the purposes referred to in subparagraph (i) (A) to (C);
(c) if the disclosure is in accordance with an order made, or a subpoena issued, by the Court;
(d) if both of the following matters apply –
(i) the disclosure is authorized or required by law (except this Act) or required by a competent regulatory body; and
(ii) the party who, or the arbitral tribunal that, makes the disclosure provides to the other party and the arbitral tribunal or, as the case may be, the parties, written details of the disclosure (including an explanation of the reasons for the disclosure); or
(e) if the disclosure is in accordance with an order made by –
(i) an arbitral tribunal under section 20; or
(ii) the Supreme Court under section 21."

[13] Provision for trust arbitrations is made pursuant to s. 91A and 91B of the Trustee Act 1998.

c. Section 20 gives the arbitral tribunal the further power to order disclosure in a situation which is not covered under section 19(a) to (d) whilst Section 21 permits the Supreme Court of The Bahamas to make an order on an appeal by a party, after an order under section 20 has been made by the arbitral tribunal refusing the disclosure request. The Court must be satisfied, inter alia, that the "*public interest in preserving the confidentiality of arbitral proceedings is outweighed by other considerations that render it desirable in the public interest for the confidential information to be disclosed*".

d. Section 22 provides for court proceedings under the Arbitration Act 2009 to be conducted in public unless "*the Court makes an order that the whole or any part of the proceedings must be conducted in private*".

15. Similarly, in Guernsey,[14] section 8 of the Arbitration (Guernsey) Law, 2016 provides:

"*(1) Unless the arbitration agreement otherwise provides, an arbitration is confidential and so –*

(a) the hearing shall be conducted in private, with only the parties, their advisors and the arbitrators permitted to be present throughout, and

(b) the documents used in, prepared for, and in, the arbitration proceedings ("the arbitral documents") shall not be used or disclosed for any other purpose, subject to subsection (2).

(2) Subsection (1)(b) does not prohibit –

(a) the arbitral documents from being disclosed with the consent of the parties, or pursuant to an order or direction of the court,

(b) the use of an arbitral document by any person where -

(i) the document has previously been placed in the public domain in good faith, and

(ii) that person has obtained the document from a source other than the arbitration proceedings,

[14] Where provision for trust arbitration is made pursuant to the Trusts (Guernsey) Law 2007, section 63: see Lewin on Trusts, 20th Edn at 49-008.

(c) the disclosure of an arbitration award to a third party if it is necessary to do so in order to enforce or protect the legal rights of a party to the arbitration agreement"

16. In light of this, we recommend that the Commission revisit its decision not to recommend its proposal for codification. As the Commission acknowledged, its proposal would provide welcome guidance, both as to the conceptual basis for the obligation of confidentiality, and the circumstances permitting parties to derogate from it.

17. We also note that a clear and explicit statutory framework for arbitral confidentiality would assist in facilitating trust arbitration. Trust disputes often involve conflicts between family members or questions concerning the succession plans of a settlor, all of which are likely to involve highly sensitive information which potential litigants would not wish to be ventilated in public proceedings.[15]

(b) Open justice

18. Both in England and in offshore jurisdictions, there have been a number of recent decisions in which privacy applications, brought by litigants seeking to protect inherently sensitive commercial or family information, have been rejected by courts emphasizing the importance of open justice.[16] For example:

    a. *V v T* [2014] EWHC 3432 (Ch), in which the Court declined an application under CPR 39.2(3) for the hearing of a claim under the Variation of Trusts Act 1958 be heard in private.[17] The Court emphasised the "*fundamental principle of open justice*" and applied a number of traditional corollaries of this principle, including, *inter alia*, that the public are entitled to attend court proceedings, the media is entitled to report on them, and the hearing of cases in

[15] See also Lewin on Trusts, 20th Edn at 49-001: "*An alternative to proceedings in court is arbitration. Arbitration offers advantages of privacy and confidentiality, often matters significant in family trusts, and a choice of arbitrator*"

[16] For a further example see *Gestrust SA v Sixteen Defendants* [2016] EWHC 3067 see at [98].

[17] The Court however did order reporting restrictions (despite ordering that the hearing be in open court) in light of the specific family circumstances: see [28].

public will deter inappropriate behaviour by the court. Morgan J specifically noted at [20] – [21] that the inherent sensitivity of the information sought to be kept private (concerning the family in question) did not justify a derogation from the open justice principle:

"*I suspect that in many applications under the 1958 Act the parties are reluctant to have their cases heard in open court. The subject matter of an application under the 1958 Act may be regarded by the parties as a private family matter involving a discussion of the family's private financial affairs. The parties may take the view that those matters concern no-one but themselves and that is a sufficient justification for the hearing to be in private. If that is their view, the law is clear that it is not a sufficient justification for the hearing to be in private. The 1958 Act conferred this jurisdiction upon the court. In 1958, and at all times since, the general principle has been that court hearings are in open court and that has applied to applications under this Act as to other court hearings.*

[21] *In the present case, the parties have suggested that there are specific reasons why the court should be persuaded to derogate from the general principle of open justice. The first reason put forward relates to the fact that the trusts directly or indirectly own the shares in a private company. It is said that there is a risk that a hearing in open court would lead to the company's customers becoming aware of the levels of profit made by the company and that would lead to those customers effectively squeezing the profit margins of the company, damaging the value of the trust assets. I have considered the evidence put forward in support of this submission and I do not regard it as particularly strong. It certainly does not come anywhere near satisfying the requirement of clear and cogent evidence justifying a derogation from the open justice principle.*"[18]

b. Similarly, in *Hamersmith-Stewart v Cromwell Trust Company Ltd & Others* 2021/CLE/gen/01043[19] the Supreme Court of The Bahamas recently rejected a trustee's

[18] This decision was applied by the Court of Appeal in *MN v OP* [2019] EWCA Civ 679 at [26] – [28].

[19] See also the Court of Appeal decision in *Hot Pancakes Limited et al v Amber Louise Murphy et al* SCCiv App. 95 of 2020.

application to seal the Court's file, and took the opportunity to re-emphasise the importance of the open justice principle. Charles J noted that the principle is protected in the Constitution of The Bahamas at Article 20(9)[20] (albeit the principle was subject to exceptions such as national security concerns or "*where the release of confidential information such as private financial records might harm the reputation of one of the parties*"[21]). The Court emphasised the "*heavy burden*" that an applicant had to discharge to displace the open justice principle[22] and rejected the trustee's arguments that, *inter alia*, the provision for trust arbitrations in The Bahamas through the 2011 Trustee Amendment Act had "*reinforced the public policy of protecting trust matters from prying eyes and ensuring confidentiality*",[23] concluding:

"*In my judgment, the effects on the trusts, asserted by the Trustee are no more than inconveniences. If the risk was sufficiently compelling to justify derogation from open justice, many parties to litigation would be entitled to sealing orders, which would undermine the effectiveness of the principle of open justice itself*"[24]

19. The trend in a number of recent cases is therefore to emphasise the requirement that Court proceedings be open and transparent, even where the subject matter of the litigation is a sensitive family dispute. In light of this trend, the ability to resolve such disputes via arbitration, in a private and confidential manner, offers an attractive alternative to prospective litigants: something that would be reinforced by the statutory codification of arbitral confidentiality.

<u>Consultation Questions 6 and 7: Protected characteristics</u>

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20 At [12].

21 At [16].

22 At [41] for instance: "*it is the Court that has to determine whether the matter should be sealed or not, bearing in mind the constitutional principle of open justice. This principle, as I earlier stated, is rooted in deep and long history dating back hundreds of years and it could be traced to decisions made before the signing of Magna Carta in 1215. This principle is viewed as an underlying or core principle of English law. Today, the concept is so widely accepted that there is a general presumption that there should be judicial openness. Now, in The Bahamas, it has constitutional connotations.*

23 At [27].

24 At [32] – [33].

20. In Chapter 4, the Commission considers issues of discrimination in the context of arbitral appointments and in particular the degree to which parties can stipulate criteria for the choice of an arbitrator which might otherwise be considered discriminatory.[25] Specific consideration is given to the Supreme Court decision in *Hashwani v Jivraj* [2011] UKSC 40. In *Hashwani*, an arbitration agreement provided that "*in the event of a dispute between them which they were unable to resolve, that dispute should be resolved by arbitration before three arbitrators, each of whom should be a respected member of the Ismaili community, of which they were both members*".[26] Lord Clarke set out the relevant question for determination as follows:

"*The question is whether, in all the circumstances the provision that all the arbitrators should be respected members of the Ismaili community was legitimate and justified. In my opinion it was … The parties could properly regard arbitration before three Ismailis as likely to involve a procedure in which the parties could have confidence and as likely to lead to conclusions of fact in which they could have particular confidence*"[27]

21. The Commission's proposal is to recommend that:

"*(1) the appointment of an arbitrator should not be susceptible to challenge on the basis of the arbitrator's protected characteristic(s); and*
(2) any agreement between the parties in relation to the arbitrator's protected characteristic(s) should be unenforceable unless in the context of that arbitration, requiring the arbitrator to have that protected characteristic is a proportionate means of achieving a legitimate aim.
'Protected characteristics' would be those identified in section 4 of the Equality Act 2020"[28]

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25 Consultation Paper, paragraph 4.2.

26 Per Lord Clarke at [1].

27 Per Lord Clarke at [70].

28 Law Commission Paper, paragraphs 4.19 and 4.36. To an extent, the Commission's proposal seems to adopt concepts from the law on indirect discrimination (such as the proportionality of the legitimate aim) and transposes them into the context of direct discrimination when under the Equality Act 2010, the "*proportionate means of achieving a legitimate aim*" is a defence to direct discrimination where the protected characteristic is age: section 13(2) of the Equality Act 2010.

22. Section 4 of the Equality Act lists the 'protected characteristics' as follows: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, sexual orientation. The effect of the Commission's proposal would be that (as set out in one of its examples at paragraph 4.20) where a party appointed a female arbitrator in the context of an arbitration agreement which provided that the "*arbitrator must be a man*", a challenge by the opposing party based on the gender of the arbitrator *per se* would not be possible.

23. From the Chancery perspective, the Commission's proposal engages issues about the proper dividing line between freedom of disposition and concerns as to equality.[29]

24. Traditionally, English law has been tolerant towards private trusts "*whose objects are persons identified by name or ascertainable by reference to a described class*"[30] to the extent that courts have refused to invoke principle or public policy in their response, and have been more "*willing to interfere with such trusts where their discriminatory terms take the form of uncertain conditions*".[31] Indeed, there are various examples of English authorities where the relevant settlement specifically envisaged individuals with a certain protected characteristic taking an active role in the resolution of issues arising in the administration of the trust.

25. The best-known example is *Re Tuck's Settlement Trusts* [1978] Ch. 49,[32] in which the trust deed provided that, in order to benefit, descendants of the settlor had to marry an "*approved wife*" defined as a "*wife of Jewish blood by one or both of her parents and who has been brought up in and has never departed from and at the date of her marriage continues to worship according to*

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29 See Harding, '*Charitable Trusts and Discrimination: Two Themes*' [2016] 2(1) CJCCL 227.

30 Ibid. at 231.

31 Ibid. at Fn. 11. Earlier in the article Harding cites *Blathwayt v Baron Crawley* [1976] AC 397 where the relevant clause of the will stated that if any person should become entitled as tenant for life or tenant in tail male to possession of the estate should (where material): "*be or become a Roman Catholic … the estate hereby limited to him shall cease and determine and be utterly void and my principal estate shall thereupon go to the person next entitled*". Lord Wilberforce held at 424: "*Clauses relating in one way or another to the Roman Catholic Church, or faith, have been known and recognised for too many years both in Acts of Parliaments … and in wills and settlements for it now to be possible to avoid them on this ground*".

32 See also for reference *Re Tepper's Will Trusts* [1987] Ch. 358.

the Jewish faith".[33] A further clause provided that "*As to which facts in case of dispute or doubt, the decision of the Chief Rabbi in London of either the Portuguese or Anglo German Community (known respectively as the Sephardim and the Ashkenazim Communities) shall be conclusive*".[34] The Court of Appeal upheld the provision which had been challenged on the grounds, *inter alia*, that the referral to the Chief Rabbi rendered the clause too uncertain. Lord Denning MR[35] in particular saw no issue in having the Chief Rabbi determine any dispute in these circumstances:

"*But if the appointed person is ready and willing to resolve the doubt or difficulty, I see no reason why he should not do so. So long as he does not misconduct himself or come to a decision which is wholly unreasonable, I think his decision should stand. After all, that was plainly the intention of the testator or settlor. He or his advisers knew that only too often in the past a testator's intentions have been defeated by various rules of construction adopted by the courts: and that the solution of them has in any case been attended by much delay and expense in having them decided by the courts. In modern times the courts have been much more sensible. Ever since Perrin v. Morgan [1943] A.C. 399 and In re Jebb, deed. [1966] Ch. 666. But still the testator may even today think that the courts of law are not really the most suitable means of deciding the dispute or doubt. He would be quite right. As this very case shows, the courts may get bogged down in distinctions between conceptual uncertainty and evidential uncertainty: and between conditions subsequent and conditions precedent. The testator may want to cut out all that cackle, and let someone decide it who really will understand what the testator is talking about: and thus save an expensive journey to the lawyers and the courts. For my part, I would not blame him. I would give effect to his intentions. Take this very case. Who better to decide these questions of "Jewish blood" and "Jewish faith" than a Chief Rabbi? The settlor mentions two Chief Rabbis. It is not necessary to ask both of them. Either one will suffice. I venture to suggest that his decision would be much more acceptable to all concerned than the decision of a court of law. I would let him decide it.*"

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33 Per Lord Denning MR at 58D.

34 Per Lord Denning MR at 58E.

35 Much of whose judgment was obiter but whose comments in this regard were not rejected by the majority.

26. It might be thought that this position is in favour of the approach set out by the Supreme Court in *Hashwani* and *prima facie* against the Commission's proposals, which might be characterised in turn as potentially limiting freedom of disposition. As *Re Tuck's Settlement Trusts* might indicate, it may be thought that there could be cases in the trust context where the parties have sought it desirable that there be a particular characteristic. Moreover, opponents of the Commission's proposals may say that arbitrations are a consensual process whereby the parties already have considerable freedom to structure the proceedings as they want, and that there should therefore be no further interference in the manner in which the parties select those who are to resolve their dispute.

27. However, in our view, the Law Commission's proposals should be embraced rather than rejected.

28. First, the proper scope of the Law Commission's suggestion should be appreciated. If this proposal were to be applied in the context of a trust arbitration for instance, it is clear that any intrusion on settlor freedom would be limited as it merely seeks to address the choice of the *arbitrator* of any such dispute: it does not prohibit a settlor setting particular conditions as to the identity of the trustee or the nature of the object.[36]

29. Secondly and relatedly, the Law Commission's proposal would not lose whatever utility[37] may be had from specifying a particular characteristic for an arbitrator as long as such an exercise would be legitimate and relevant to the dispute at hand (perhaps as envisaged by Lord Denning MR in *Re Tuck's Settlement Trusts*[38]). It would not preclude the analysis conducted by the Supreme Court in *Hashwani* where (for instance) it was considered both legitimate and justified to require all arbitrators be respected members of the Ismaili community as the "*parties could properly regard arbitration before three Ismailis as likely to involve a procedure in which the*

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[36] Indeed, as the authors of Lewin on Trusts, 20th Edn note at 49-006, citing *Re Tuck's Settlement Trusts*, that arbitration clauses should "*be distinguished from provisions which merely enable particular contentious facts, or matters on which the trustees cannot agree, to be referred to a third party*".

[37] See Russell on Arbitration, 24th Edn (2015) at 4-016: "*It is frequently of fundamental importance to parties that they are able to select arbitrators based on certain personal characteristics (such as nationality, cultural background, or other personal or geographical qualities)*".

[38] The reasoning of Lord Denning MR was anyway primarily focused on whether the provision was sufficiently certain and met the requisite standard.

parties could have confidence and as likely to lead to conclusions of fact in which they could have particular confidence"[39]. What the proposal *would* eliminate however is arbitrary discrimination which can have no justification.

30. Thirdly, making this limited inroad into freedom of disposition has the wider advantage of updating this area of law in conformity with recent trends in other jurisdictions. For instance, as has been noted by Harding[40], in Canada and South Africa a different approach has been taken to the dividing line between equality and settlor freedom with much greater emphasis being placed on the former. An example cited in the Canadian context is the decision in *Canada Trust Co v Ontario (Human Rights Commission)* [1990] 69 DLR (4th) 321 (Ont CA)[41] where Robins JA noted: "[t]*he freedom of an owner of property to dispose of his or her property as he or she chooses is an important social interest that has long been recognised in our society and is firmly rooted in our law … That interest must, however, be limited in the case of this trust by public policy considerations*"[42]

31. Fourthly, it is anyway wrong to presuppose that parties have an untrammelled right to specify in their arbitration agreements their choice of arbitrator or that there is anything necessarily objectionable with regulating these private choices. As the authors of Russell on Arbitration, 24th Edn (2015) note:

"*The law does not impose general restrictions on who may be appointed an arbitrator. The authority of the arbitral tribunal arises from the parties' contract, and the law generally allows contracting parties complete freedom to choose their tribunal*"[43] … "*This freedom may not be without limitation. Arbitration Act 1996 s. 1(b) provides that the parties are free to agree how their disputes are resolved subject only to such safeguards which are necessary in the public interest*"

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39 Per Lord Clarke at [70].

40 Harding, '*Charitable Trusts and Discrimination: Two Themes*' [2016] 2(1) CJCCL 227 at 232.

41 As set out at ibid. at 232 – 235.

42 *Canada Trust Co v Ontario (Human Rights Commission)* [1990] 69 DLR (4th) 321 (Ont CA) at 334.

43 At 4-011.

32. For all of the above reasons, we agree with the Law Commission's proposal as set out above: to the extent that it could or would be applied to trust disputes if they were arbitrable under the Arbitration Act 1996, we believe it would make a small inroad into settlor freedom in order to safeguard against arbitrary and unjustifiable discrimination.

Consultation Questions 18 and 19: Emergency arbitrators

33. As the Commission notes, an increasing number of arbitral institutions' rules provide for the appointment of an emergency arbitrator to hear applications for interim relief before the arbitral tribunal that will hear the dispute itself is constituted.

34. There is clearly demand for such emergency arbitration provisions. This is shown both by the tendency for arbitral institutions to adopt them and by survey evidence. The 2015 International Arbitration Survey conducted by Queen Mary University of London indicated that 93% of arbitration users favoured the inclusion of emergency arbitrator provisions in institutional rules.[44]

35. The importance of emergency arbitrators should not, however, be overstated. In the same survey, only 29% of respondents said that they would prefer to seek interim relief from an emergency arbitrator, as against 46% who would look to the domestic courts.[45] As the Commission notes, the courts of England and Wales can act much more quickly than can any existing emergency arbitrator scheme. They also offer considerable advantages, including the possibility of applying for relief *ex parte*, direct enforceability of their orders by proceedings for contempt, and the possibility of making orders that bind third parties.

36. Many of these advantages would be particularly salient if trust arbitration were to be introduced. In the large number of trust disputes where some form of fraud is alleged, it will often be vital to act speedily, without notice to the other side, and in such a way that third parties will be bound

[44] Queen Mary University of London, *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration*, available at https://arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf, page 3.

[45] Ibid., page 27.

by the order. A freezing injunction granted by the courts is and will likely remain the only way to obtain the relief required. That said, there is a large number of cases in which the possibility of seeking relief from an emergency arbitrator would be a useful additional tool for parties seeking to preserve the status quo in advance of arbitral proceedings.

37. In such cases, the enforceability of the orders of emergency arbitrators will be of prime importance. It is true that the experience of emergency arbitrators to date indicates that almost all parties comply with their orders without any need for coercive measures, not least in view of the fact that most arbitral institutions' rules permit the arbitral tribunal to penalise noncompliance with interim orders made either by the tribunal itself or by an emergency arbitrator.[46] Nonetheless, parties considering the use of an emergency arbitrator clearly take the view that it is important that their decisions should be enforceable in the last resort. The 2015 International Arbitration Survey indicated that the enforceability of the decisions of emergency arbitrators was by far the most important factor influencing parties' decisions whether to seek interim relief from an emergency arbitrator or from the courts.[47] Similarly, in the 2021 QMUL International Arbitration Survey, 39% of respondents indicated that the ability to enforce emergency arbitrators' decisions or interim measures ordered by arbitral tribunals would make a given seat more attractive to arbitration users.[48] There is no reason to think that this would be any less true in relation to chancery claims than in the commercial sphere.

38. We therefore welcome the Commission's desire to take account of the position of emergency arbitrators in any reforms to the Arbitration Act 1996. In particular, we concur with the Commission's provisional views on Consultation Questions 18 and 19. Although the Singapore example of including emergency arbitrators in the definition of "the arbitral tribunal" is interesting and has the virtue of simplicity, we agree that large sections of the Arbitration Act could not

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46 International Chamber of Commerce, *ICC Commission Report: Emergency Arbitrator Proceedings*, 2019, available at https://iccwbo.org/content/uploads/sites/3/2019/03/icc-arbitration-adr-commission-report-on-emergency-arbitrator-proceedings.pdf, page 200.

47 At page 27.

48 Queen Mary University of London, *2021 International Arbitration Survey: Adapting arbitration to a changing world*, available at https://arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf, page 8.

appropriately be applied to emergency arbitrators. Similarly, we see no basis for the court to administer a scheme of emergency arbitrators: this would be both superfluous and out of line with the principle that the court should seek to interfere as little as possible in the arbitration process.[49]

Consultation Question 20: Repeal of section 44(5) of the Arbitration Act 1996

39. We agree with the Commission's provisional view on the repeal of subsection 44(5) of the Arbitration Act 1996. Although, as the Commission notes, Leggatt J in *Gerald Metals v Timis*[50] did not in fact hold that the mere availability of an emergency arbitrator procedure made recourse to the courts impossible under subsection 44(5) of the 1996 Act, it does seem that some stakeholders have understood the decision in this way.[51] Given the proliferation of emergency arbitrator provisions and the importance that most arbitration users attach to the possibility of seeking interim relief from the courts, this could undermine the attractiveness of London as a seat.

40. This would be still more important if trust arbitration were introduced, given that interim relief from the courts rather than an emergency arbitrator is likely to remain necessary in many trust cases, for the reasons stated at paragraph 35 above. Since section 44(5) appears redundant and could potentially be off-putting to arbitration users, we support its repeal.

Consultation Question 21: ways of accommodating the orders of an emergency arbitrator

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49 As Lord Thomas of Cwmgiedd put it extrajudicially in 2017, "*The position of every Commercial Court towards arbitration can be summarised as 'Maximum support. Minimum interference'.*": Lord Thomas of Cwmgiedd, "Commercial Dispute Resolution: Courts and Arbitration", 6 April 2017, National Judges' College, Beijing, available at https://www.judiciary.uk/wp-content/uploads/2017/04/lcj-speech-national-judges-college-beijing-april2017.pdf, at paragraph 25.

50 [2016] EWHC 2327 (Ch)

51 See for example Victoria Clark and Nadia Hubbuck, "The emergency arbitrator is officially a teenager", *Practical Law Arbitration Blog*, 5 April 2020, available at http://arbitrationblog.practicallaw.com/the-emergency-arbitrator-is-officially-a-teenager/: "*The effect of this provision* [ie s 44(5)] *is that, where relief is sought against a party to an arbitration clause (and concerns about the time it would take to constitute the tribunal are the basis of the application), the fact that the parties have adopted arbitration rules that offer emergency arbitrator proceedings are likely to result in the English court having no jurisdiction to act*".

41. We disagree with the provisional view expressed by the Commission and prefer the first proposed option, "*a provision which empowers an emergency arbitrator, whose order has been ignored, to issue a peremptory order, which, if still ignored, might result in the court ordering compliance*".

42. This question is clearly one of significance, in light of the importance attached by users to the enforceability of emergency arbitrators' decisions; and also one where England and Wales may be well placed to set a global lead, given that the number of jurisdictions which have made express provision in their domestic arbitration laws for the enforcement of emergency arbitrators' decisions remains very limited.

43. We are aware of four jurisdictions which have so far made such provision: Singapore, Hong Kong, New Zealand and the Netherlands. There are, broadly speaking, two models: to assimilate the emergency arbitrator to the arbitral tribunal (with the effect that the provisions of the arbitration law relating to the enforcement of interim orders by fully constituted tribunals apply); or to assimilate the interim order of an emergency arbitrator to an award.

44. Thus in Singapore and New Zealand, the definition in the local arbitration law of "arbitral tribunal" has simply been widened to encompass emergency arbitrators.[52] Their interim orders are therefore enforceable on the same terms as those of fully constituted arbitral tribunals.

45. In Hong Kong, on the other hand, special provisions have been introduced to the effect that the interim relief awarded by an emergency arbitrator is enforceable on the same basis as an interim order of the court, provided the court's leave is obtained. This is identical to the basis on which an arbitration award can be enforced.[53] Similarly, the Netherlands Code of Civil Procedure, while

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[52] Singapore International Arbitration Act, s 2(1): "*'arbitral tribunal' means a sole arbitrator or a panel of arbitrators or a permanent arbitral institution, and includes an emergency arbitrator appointed pursuant to the rules of arbitration agreed to or adopted by the parties including the rules of arbitration of an institution or organisation*"; New Zealand Arbitration Act 1996, s 2(1): "*'arbitral tribunal'... includes any emergency arbitrator appointed under—(i) the arbitration agreement that the parties have entered into; or (ii) the arbitration rules of any institution or organisation that the parties have adopted*".

[53] Arbitration Ordinance (Cap 609), s 22B(1): "*Any emergency relief granted, whether in or outside Hong Kong, by an emergency arbitrator under the relevant arbitration rules is enforceable in the same manner as an order or direction of the Court that has the same effect, but only with the leave of the Court*". Cf. s 84: "*Subject to section 26(2), an award,*

it does not refer to emergency arbitrators by name, makes provision for interim relief to be awarded by "*an arbitral tribunal separately appointed for that purpose*", provided that the parties authorise it to do so. [54] A decision by such a tribunal to grant interim relief constitutes an arbitral award which may be enforced under the provisions of the Code of Civil Procedure.[55]

46. We agree with the reasoning of the Commission that neither of these models is appropriate. Including emergency arbitrators within the definition of the arbitral tribunal is likely to have unwanted consequences without substantial redrafting of the Arbitration Act; and, as the Commission states, it is probably inappropriate to provide for judgment to be entered on an order that is by nature provisional and reversible.

47. We nonetheless think that some express provision ought to be made for the enforcement of peremptory orders made by emergency arbitrators and that leaving the work to section 44 is undesirable, for three reasons.

48. First and most importantly, leaving the work to section 44 does not achieve the objective of allowing enforcement of the orders of emergency arbitrators. A party having obtained an order from an emergency arbitrator and needing to enforce it would have to make a new application to the court under section 44 for what would – at least in form – be a new order. Even if, in practice, the court would probably be guided by the order already granted by the emergency arbitrator, this

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whether made in or outside Hong Kong, in arbitral proceedings by an arbitral tribunal is enforceable in the same manner as a judgment of the Court that has the same effect, but only with the leave of the Court."

[54] Netherlands Code of Civil Procedure, art. 1043b(2): "*Bij overeenkomst kunnen de partijen een afzonderlijk daartoe te benoemen scheidsgerecht, binnen de grenzen gesteld bij artikel 254, eerste lid, de bevoegdheid verlenen, ongeacht of het arbitraal geding ten gronde aanhangig is, op verzoek van een der partijen, een voorlopige voorziening te treffen, met uitzondering van bewarende maatregelen als bedoeld in de vierde titel van het Derde Boek*." [By agreement, the parties may authorise an arbitral tribunal separately appointed for that purpose, irrespective of whether the arbitral proceedings on the merits are pending within the limits set by Article 254(1), to grant provisional relief at the request of any of the parties, except for conservatory measures as referred to in the Fourth Title of the Third Book.]

[55] Ibid., art. 1043b(4): "*Tenzij het scheidsgerecht anders bepaalt, geldt een uitspraak van het scheidsgerecht over het verzoek een voorlopige voorziening te treffen als een arbitraal vonnis; daarop zijn de bepalingen van de derde tot en met de vijfde afdeling van deze titel van toepassing*." [Unless the arbitral tribunal determines otherwise, a decision by the arbitral tribunal on the request to grant provisional relief shall constitute an arbitral award to which the provisions of Sections Three to Five inclusive of this Title shall be applicable.]

would involve considerable duplication of effort and open the way for the party against which relief was being sought to have a second bite of the cherry. Further, it would not be in line with the general principles of the 1996 Act. Parties which opt for arbitral rules which provide for an emergency arbitrator should be entitled to rely on orders made by the emergency arbitrator without having to argue the matter fully again in court.[56] Similarly, the court ought to support the interim orders of an emergency arbitrator rather than supplanting them (even if only in form). In our view, the fact that the Commission's first proposal "*maintains the primacy of the arbitral regime*" ought to be decisive.

49. Second, the Commission's first proposal is also more compatible with many arbitral institutions' rules, which usually aim for parallelism between the interim relief granted by an emergency arbitrator and the interim relief granted by a fully constituted tribunal. For example:

    a. The ICDR's International Arbitration Rules provide at Art. 7(4) that "*Any interim award or order shall have the same effect as an interim measure made pursuant to Article 27 and shall be binding on the parties when rendered*".

    b. The LCIA Rules provide at Art. 9.8 that "*The Emergency Arbitrator may make any order or award which the Arbitral Tribunal could make under the Arbitration Agreement*".

50. It follows in our view that the procedures for enforcing an interim order of an emergency order should resemble as much as possible those for enforcing an interim order of an arbitral tribunal.

51. Third, survey evidence suggests that arbitration users themselves favour direct enforceability of emergency arbitrators' decisions: in the 2015 QMUL International Arbitration Survey, 78% of respondents were in favour of decisions rendered by emergency arbitrators being enforceable in the same way as arbitral awards.

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[56] Consider for example the speech of Lord Fraser of Carmyllie QC in the House of Lords during the passage of the Arbitration Bill: "*We started from the principle that if parties have chosen arbitration rather than the courts to resolve their dispute, this decision must be respected. We propose therefore to curtail the ability of the court to intervene in the arbitral process except where the assistance of the court is clearly necessary*" (HL Deb 18 Jan 1996 vol 569 col 760).

52. We therefore support the proposal that peremptory orders of an emergency arbitrator be enforceable in the same way as peremptory orders of an arbitral tribunal.

Consultation Questions 22 – 25: Section 67: Rehearing or Appeal

53. In Chapter 8 paragraphs 8.1 – 8.46, the Commission considers modifying the procedure concerning challenges to a tribunal's substantive jurisdiction under section 67 of the Arbitration Act 1996. The current law (as per the Supreme Court in *Dallah Real Estate & Tourism Holding Co v Pakistan* [2011] 1 AC 763[57]) is that section 67 challenges involve a *de novo* hearing rather than an appeal. The Commission's proposal is that:

"*(1) where a party has participated in arbitral proceedings, and has objected to the jurisdiction of the arbitral tribunal; and*
(2) the tribunal has ruled on its jurisdiction in an award,
then any subsequent challenge under section 67 of the Arbitration Act 1996 should be by way of an appeal and not a rehearing".[58]

54. The Commission sees this as striking a balance between retaining the supervisory court's ability to have the final say as to jurisdiction, while avoiding the "*double hearing problem*"[59] where parties effectively have two bites of the cherry and may improve their evidential position in the substantive challenge in the Court following a review of the tribunal's conclusions as to substantive jurisdiction.[60]

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57 See per Lord Mance at [30]: "*the nature of the present exercise is, in my opinion, also unaffected where an arbitral tribunal has either assumed or, after full deliberation, concluded that it had jurisdiction. There is in law no distinction between these situations. The tribunal's own view of its jurisdiction has no legal or evidential value, when the issue is whether the tribunal had any legitimate authority in relation to the Government at all. This is so however full was the evidence before it and however carefully deliberated was its conclusion. It is also so whatever the composition of the tribunal – a comment made in view of Dallah's repeated (but no more attractive for that) submission that weight should be given to the tribunal's "eminence", "high standing and great experience*".

58 Consultation Paper, paragraph 8.46.

59 Consultation Paper, paragraph 8.43.

60 Consultation Paper, paragraph 8.31.

55. Whilst the Commission acknowledges that there may be little practical need for such a reform given the small percentage of cases (at least in England and Wales) in which a section 67 challenge is made,[61] the proposed amendment is likely to be welcomed by practitioners and we agree with it.

56. The conventional argument in favour of a *de novo* hearing for a party which has had full participation in the proceedings has been criticised by a number of commentators.[62] The Commission's proposal does not detract from the core principle that the tribunal cannot be the final arbiter of its own jurisdiction, but it avoids the unfortunate and costly scenario in which arguments on substantive jurisdiction are effectively heard and determined twice.

57. In this context, one issue of particular interest to Chancery practitioners is the impact of the Commission's proposal on third parties. If legislation to facilitate trust arbitration is recommended by the Commission, the requirement to have a *de novo* hearing would be of real benefit to a beneficiary (in particular a minor beneficiary) who may not have been involved in the original arbitration, but who may nevertheless seek to challenge the tribunal's substantive jurisdiction at a later point. The Commission's proposal does not however affect that possibility: it allows beneficiaries who have not been party to the arbitration themselves to challenge it later and limits

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61 Consultation Paper, paragraph 8.33.

62 For examples, see for instance Handbook of UNCITRAL Arbitration, 3rd Edn at 1-37: "*In English law, jurisdictional issues, including those relating to the scope of the arbitration agreement are reviewed de novo by the courts. This de novo review includes review of the underlying factual findings of the Tribunal. This position was confirmed by the UK Supreme Court in the Dallah Real Estate case … For the author, the de novo review of the legal analysis relating to jurisdiction is understandable. However, the review of the factual basis as if there had been no arbitration is difficult to justify where both parties have participated in the arbitration. In such a case, the parties have had an opportunity to set out the factual basis for their jurisdictional claims. Permitting the parties to in essence re-run the factual basis for jurisdiction is not only wasteful but also potentially detrimental*"; Joseph KC, Jurisdiction and Arbitration Agreements and their Enforcement, 3rd Edn at 13-51: "*There is therefore as a matter of English law no difference between a situation where the Tribunal has assumed it has jurisdiction and the result of a fully contested hearing at which all relevant evidence is called. This is said to be the case because a Tribunal cannot finally determine the issue of jurisdiction but only give its ruling. This last conclusion, however, is debatable as it ignores that a party has chosen to call evidence in order to support or establish a position with regard to jurisdiction. The concept of two evidential bites at the cherry does not appear to have much to be said in its favour. It is also suggested that it is not a conclusion demanded by the Arbitration Act or the similar concepts underlying the Model Law.*"

the 'appeal' to those who have fully participated in the proceedings and thereby seek to have two attempts at challenging jurisdiction.[63]

Consultation Question 27: Appeals

58. At paragraphs 9.1 – 9.53, the Commission considers the position with respect to appeals on a point of law. Having reviewed the historical context of section 69 of the Arbitration Act 1996,[64] the Commission proposed *not* to amend the current provision dealing with appeals on points of law which broadly requires either party consent or permission from the court.[65]

59. The Commission sees this as striking the appropriate balance[66] between the competing concerns as to the "*finality of arbitral awards* … [which] *tends towards limiting appeals*"[67] and the view that appeals are necessary in order to ensure that the law is consistently applied "*so that everyone has the same rights and duties* … [and it is] *undesirable if there are pockets of activity where the law does not apply, or is applied incorrectly*".[68]

60. From a Chancery perspective, the Commission's decision to recommend keeping the current formulation in section 69 is likely to be considered favourably by practitioners and we support it.

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63 In this sense it may accord with part of the reasoning in *Dallah Real Estate & Tourism Holding Co v Pakistan* [2011] 1 AC 763 per Lord Mance at [26]: "*An arbitral tribunal's decision as to the existence of its own jurisdiction cannot therefore bind a party who has not submitted the question of arbitrability to the tribunal. This leaves for consideration the nature of the exercise which a court should undertake where there has been no such submission and the court is asked to enforce an award. Domestically, there is no doubt that, whether or not a party's challenge to the jurisdiction has been raised, argued and decided before the arbitrator, a party who has not submitted to the arbitrator's jurisdiction is entitled to a full judicial determination on evidence of an issue of jurisdiction before the English court, on an application made in time for that purpose under s.67 of the Arbitration Act 1996, just as he would be entitled under s.72 if he had taken no part before the arbitrator*" (emphasis added)

64 Consultation Paper, paragraphs 9.3 – 9.14.

65 Consultation Paper, paragraph 9.53: "*We provisionally conclude that section 69 of the Arbitration Act 1996 strikes the right balance between competing interests in respect of the ability to appeal an arbitral award on a point of law. We do not therefore propose any reform to section 69*"

66 Consultation Paper, paragraph 9.50.

67 Consultation Paper, paragraph 9.48.

68 Consultation Paper, paragraph 9.49.

61. At the outset, it is worth noting that the main arguments in favour of reform and the criticism of section 69[69] were also considered and rejected by the Departmental Advisory Committee more than 25 years ago:

"*We received a number of responses calling for the abolition of any right of appeal on the substantive issues in the arbitration. These were based on the proposition that by agreeing to arbitrate their dispute, the parties were agreeing to abide by the decision of their chosen tribunal, not by the decision of the Court, so that whether or not a Court would reach the same conclusion was simply irrelevant …*
[285] *This proposition is accepted in many countries. We have considered it carefully, but we are not persuaded that we should recommend that the right of appeal should be abolished. It seems to us, that with the safeguards we propose, a limited right of appeal is consistent with the fact that the parties have chosen to arbitrate rather than litigate*"[70]

62. If legislation is introduced to facilitate trust arbitration, the notion that there would be no further review or oversight from the supervisory court is deeply unattractive. Indeed, the theoretical context in English law (against which trust arbitrations would take place in England and Wales) is the fundamental principle "*to the law of trusts that the court has jurisdiction to supervise and if appropriate intervene in the administration of a trust, including a discretionary trust*".[71]

63. Retaining an ability to appeal on a point of law for trust disputes would also be consistent with the approach advocated in the Trust Law Committee's 2012 paper,[72] as well as the approach taken in some other offshore jurisdictions which specifically provide for appeals on a point of law: for example, see section 91 of the Bahamian Arbitration Act 2009 and the supplementary provisions at section 92 or section 64 (and the supplementary provision at section 65) of The Arbitration (Guernsey) Law, 2016 which also frames the right in a similar way to England and Wales:

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69 Consultation Paper, paragraph 9.27.

70 Departmental Advisory Committee on Arbitration Law Report on The Arbitration Bill, February 1996, Chairman: The Rt Hon Lord Justice Saville at [284] – [285].

71 *Schmidt v Rosewood Trust Ltd* [2003] UKPC 26 per Lord Walker at [36].

72 Trust Law Committee, 'Arbitration of trust disputes', 1 April 2012, see [50(f)] and [39]: "*We acknowledge that some right of appeal is necessary and may be significant*".

"*64. (1) Unless otherwise agreed by the parties, a party may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings. An agreement to dispense with reasons for the tribunal's award shall be considered an agreement to exclude the court's jurisdiction under this section*"[73]

64. Of course, the importance of the role of the supervisory court and the ability to oversee the proper administration of trusts and disputes in relation to them does not preclude the parties from deciding themselves, mutually, that there should be no further right of appeal.

65. However, the current formulation of section 69 strikes this balance well: it is, as the Commission notes,[74] not mandatory and parties are free to structure the procedure of their dispute as they see fit (within certain parameters) and provide for the arbitral tribunal's decision to be final even if the panel were to commit an error of law. For similar reasons, it is suggested that the Commission's rejection of the suggestion that "*appeals from arbitral awards should go only as far as the High Court, with no further right of appeal, to increase the finality of arbitral awards*"[75] is also correct.

<u>Consultation Question 36: Domestic arbitration</u>

66. In respect of the Commission's proposal to use the powers in section 88 of the 1996 Act to repeal sections 85 to 87, we consider that it is useful to distinguish between the effects of section 86 and those of section 87.

67. If those sections were ever to be commenced, their effect in relation to arbitrations where all parties were nationals of and resident in the United Kingdom would be:

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73 The Arbitration (Guernsey) Law 2016, section 64.

74 Consultation Paper, paragraph 9.32.

75 Consultation Paper, paragraph 11.149.

a. to provide additional grounds under which the court may decline to stay legal proceedings in favour of an arbitration under section 9 of the 1996 Act (section 86); and,

b. to make an agreement to exclude the jurisdiction of the court under sections 45 and 69 of the 1996 Act unenforceable unless made after the commencement of the arbitral proceedings (section 87).

68. We do not think it would be useful to have different rules for the staying of legal proceedings in domestic arbitration cases. Although the argument that such distinctions would be precluded by European law is unlikely any longer to be relevant following the UK's withdrawal from the European Union, making such distinctions based on the nationality and residence of the parties still seems to us undesirable in principle. Section 86 of the 1996 Act should therefore in our view be repealed.

69. There might, on the other hand, be grounds for retaining the provision in section 87, especially if trust arbitrations were to be introduced. As Lord Thomas of Cwmgiedd CJ observed extra-judicially in his 2016 Bailii Lecture, the more restrictive test for appeals from arbitration awards on points of law applied by section 69 of the 1996 Act, coupled with the right of parties to contract out of section 69 entirely, has substantially reduced the number of appeals on points of law as compared with the situation before the passage of the Arbitration Act 1979.[76] That has in Lord Thomas's words, "*reduce[d] the potential for the courts to develop and explain the law*".[77]

70. The development of the law of trusts in England and Wales is at least as driven by case law as is commercial law. If trust arbitration were introduced, a similar effect as that observed by Lord Thomas in areas such as shipping and insurance law might also be seen in trust law.

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[76] Lord Thomas of Cwmgiedd, "Developing commercial law through the courts: rebalancing the relationship between the courts and arbitration", *The Bailii Lecture 2016*, 9 March 2016, available at https://www.judiciary.uk/wp-content/uploads/2016/03/lcj-speech-bailli-lecture-20160309.pdf.

[77] Ibid. at paragraph 22.

71. It might, therefore, be prudent to retain the possibility of making some distinction between domestic arbitrations (that is, those where all the parties are nationals of and resident in the UK and where the underlying trust instrument is governed by English law) and trust arbitrations where the parties have no strong connection with the UK and the proper law of the trust is not English law. In the former case, there may well be a stronger case for restricting parties' ability to exclude recourse to the courts on a point of law so as to maintain the ability of the courts of England and Wales to develop the jurisdiction's trust law.

72. For that reason, while it is obviously unattractive in principle to maintain uncommenced provisions on the statute book indefinitely, and while we agree that the 1996 Act appears to have functioned well without those provisions in force over the last 25 years, we would have reservations about the repeal of section 86 before a clearer view is available of the impact of the introduction of trust arbitration.

Consultation Question 37: Do you think that any of the suggestions discussed in Chapter 11 needs revisiting in full, and if so, why?

(1) Law governing the arbitration agreement

73. Opinions vary as to the correctness of the Supreme Court's decision in *Enka v Chubb*[78] that an express or implied choice of law in relation to a contract carries across as an implied choice of law to govern an arbitration agreement ancillary to that contract. We make no submission on the point generally.

74. We would, however, suggest that the Supreme Court's decision may apply with less force in relation to trust instruments, should trust arbitration be introduced. The factors that settlors of

[78] [2020] UKSC 38.

trusts may have in mind when selecting a proper law for the trust are likely to be different from those which guide commercial parties in selecting a proper law for their contract. Settlors frequently select proper laws because they offer features for the trust they intend to create which are not available in other legal systems (for example, the validity of non-charitable purpose trusts or the absence of a perpetuity period), or even for fiscal reasons. Further, many international trusts contain clauses permitting (or in some cases even requiring) the trustees to vary the proper law of the trust for a variety of reasons, including amendments to local trust law, political instability or fiscal changes.

75. Where a settlor drafts a trust instrument providing for the trust to be governed by the law of jurisdiction X and incorporating an arbitration clause providing for arbitration in London, there may thus be considerably weaker grounds for considering that the proper law of the trust should prevail as the law of the arbitration clause. The proper law of the trust may not reflect the settlor's original intention at all (if it has changed) and, even if it does, that intention may not have been based on a preference for a given legal system in the round, but simply on some aspect of its trust law that meets the needs of that particular settlor.

76. In addition, since trust arbitration is a relatively new phenomenon and is not provided for in the laws of many trust jurisdictions, applying the law of the trust as the law of the arbitration clause might make numerous arbitration clauses unenforceable. Although in such cases the law of the seat might prevail under the validation principle set out by the Supreme Court majority,[79] it would be desirable to avoid such uncertainty by providing that, where a trust instrument contains an arbitration clause with a choice of seat in favour of England and Wales, the governing law of the arbitration clause is also English law.

Commission Question 38: Additional topics for review and reform

77. We turn finally to the topic of trust arbitration in its own right.

[79] At paragraphs 95 – 97 of *Enka* (*supra*).

78. Notwithstanding the fundamental and growing importance of arbitration in respect of the resolution of commercial disputes, it remains the case that arbitration is an underutilised process in respect of Chancery work. The principal reason for this is simple: the Arbitration Act 1996 is not well-suited to the resolution of disputes involving trusts.

79. The trust – and analogous concepts of the administration of (solvent or insolvent) funds – is central to Chancery practice. Trusts and administered funds are a feature of the English law of property (jointly owned property being held through a trust of land); succession (the devolution of estates being via will trusts and statutory intestacy trusts); charity (many charities being structured as trusts or funds); pensions (many pension schemes being structured as trusts or funds); and tax (with legitimate tax planning regularly conducted via family settlements).

80. We note that, at paragraph 1.8 of the Consultation Paper, the Commission records that:

"*Separately, responses to previous programme consultations have argued for the introduction of trust law arbitration, which is not possible under the current law. The Law Commission intends during the course of the 14th programme to consider the scope for introducing trust law arbitration, alongside wider work on modernising trust law.*"

81. Respectfully, we suggest that the lack of any provision for trust arbitration should be considered as perhaps the most significant current lacuna in the arbitration law of the United Kingdom.

82. The introduction of legislation to facilitate trust arbitration is an issue which could properly be addressed as part of the Commission's current consideration of the Arbitration Act 1996. We therefore respectfully advocate that the Commission use the opportunity of the current Programme of Law Reform to consider the introduction of new sections of the Arbitration Act 1996, facilitating the arbitration of trust disputes in the United Kingdom.

83. Therefore, in response to Consultation Question 38 ("*Is there any significant topic within the Arbitration Act 1996, not addressed in this consultation paper, which you think is in need of*

review and potential reform? If so, what is the topic, and why does it call for review?"), we recommend that the Commission propose legislation to facilitate the arbitration of trust disputes.

84. The conceptual difficulties with trust arbitration are well-known and much discussed in the academic literature. The starting point for the consideration of the topic is a 2008 paper produced by John Wood, David Brownbill KC, and Christopher McCall KC on behalf of the Trust Law Committee.[80]

85. The primary conceptual difficulty identified by Wood, Brownbill and McCall is a concern that trust disputes are inherently non-arbitrable, on the basis that, "*the trust concept is itself the creature of the courts (historically the courts of equity), exercising judicial discretions as described by the Privy Council in Schmidt v Rosewood Trustees [2003] 2 AC 709* [sic], *so that the legal rights of beneficiaries and trustees can validly be determined only by the courts*"[81].

86. In addition to this fundamental conceptual issue, there are real difficulties in adapting the provisions of the Arbitration Act to the trust context. In particular:

    a. There is some doubt as to whether a unilateral instrument such as a trust deed (or other unilateral instrument, such as a will) is capable of constituting an 'arbitration agreement' for the purposes of s.6(1) of the Arbitration Act 1996, in circumstances in which it cannot be said that beneficiaries who take rights under that instrument are 'parties' to the document for the purposes of s.82 of the Arbitration Act 1996. Similarly and without further clarification, there may be some doubt as to the extent to which a bilateral document which is not a synallagmatic contract (such as a pension deed) could constitute an arbitration agreement.

    b. The position of minor, unborn, unascertained, and incapable beneficiaries presents a particular difficulty, since it is difficult to see how such beneficiaries could have their rights adjudicated upon by an arbitral tribunal in circumstances in which they cannot participate in

80 'The Arbitration of Trust Disputes' (2012) 18(4) Trusts & Trustees 296.

81 Ibid., page 300.

the arbitral process. Put simply, the consensual process of arbitration under the Arbitration Act 1996 is particularly ill-suited to the position of such beneficiaries.

c. Finally, the Arbitration Act 1996, designed as it is to cater primarily for commercial disputes, does not on its face provide the breadth of remedies exercised by the Court under its equitable jurisdiction: the powers of the arbitrator at s.48 of the Arbitration Act 1996 do not, for example, permit the tribunal to appoint a replacement trustee of a trust.

87. In order to resolve the conceptual uncertainties surrounding trust arbitration, in 2011 the Trust Law Committee promoted to the Law Commission the prospect of amending the Arbitration Act 1996. In response, in its Final Report on the 11th Programme of Law Reform dated 27th May 2011, the Law Commission said as follows:

"***Trust law arbitration***

Project in brief

3.66 Arbitration is a method of settling legal disputes privately, without going to court. The parties are bound by the arbitrator's decision, with only limited rights of appeal, and usually cannot otherwise take the dispute to court.

3.67 Some trust disputes may be suitable for arbitration. At present two or more people can enter into a valid arbitration agreement. However, any award that is made will not bind other interested parties, such as other beneficiaries (who may be under-age and therefore not able to enter into a binding arbitration agreement).

3.68 This means that it is not feasible for those who create trusts governed by the law of England and Wales to require that trustees and beneficiaries have resort to arbitration to resolve their differences, rather than litigation. However, other jurisdictions such as Guernsey and the state of Florida have enacted legislation that enables binding trust law

arbitration. Practitioners and other stakeholders interested in this area of law have argued that it would be beneficial for this jurisdiction also to introduce such reforms.

Support for the project

3.69 This project was proposed by the Trust Law Committee, a group of academics and practitioners in the field of trust law. The Department for Business, Innovation and Skills supported the Law Commission conducting research and consultative work investigating the feasibility of extending the legislative framework for arbitration to cover disputes concerning trusts.

3.70 The Law Commission recognises the great importance of the trust industry, and that work in this area would have the potential to generate a range of benefits. The technical nature of the work makes it suitable for the Law Commission. The project has not been taken forward solely on the grounds that the Commission does not have the capacity to include this work in its Eleventh Programme."

88. Since the conclusion of the 11th Programme of Law Reform, further jurisdictions have enacted statutory reform to facilitate trust arbitration by addressing the conceptual difficulties summarised above. The most significant such reform is perhaps that enacted by The Bahamas, which on 30th December 2011 enacted the Trustee (Amendment) Act 2011, *inter alia* making provision for trust arbitration in that jurisdiction. It does so via new sections 91A – 91C and the new Second Schedule to the Trustee Act of The Bahamas. The full text of these provisions is set out at the Appendix to this paper.

89. In broad terms, the approach under the Bahamian legislation is as follows:

    a. S.91A(2) of the Trustee Act contains a deeming provision, deeming a trust instrument containing an arbitration clause to have effect as if it were an arbitration agreement and as if the parties to the trust were parties to that agreement.

b. S.91A(3) applies the Second Schedule, which modifies the provisions of the Bahamian Arbitration Act for the purposes of trust arbitration.

c. S.91B(2) confers the Court's supervisory powers over trusts on the arbitral tribunal in a trust arbitration.

d. S.91B(3)–(9) enables the trust instrument or the tribunal to appoint persons to represent the interests of minor, unborn, unascertained, or incapable beneficiaries in respect of a trust arbitration.

90. These provisions have been in force for over 10 years, and there are now cases in The Bahamas dealing with the application of these provisions: see in particular *Volpi v Delanson Services Ltd*, 7th August 2019 (in which the Bahamian Supreme Court stayed a breach of trust action in The Bahamas in favour of an arbitration pursuant to a clause in the trust instrument) and 13th June 2022 (addressing *inter alia* an application to stay an arbitration pending a challenge and appeal to an arbitral award which had been issued in the ensuing arbitration). It is clear that the statutory ability in The Bahamas to include binding arbitration clauses in trust instruments is being put to use by settlors in that jurisdiction.

91. We would respectfully suggest that the Bahamian Trustee (Amendment) Act 2011 – which was drafted with the assistance of members of the Trust Law Committee[82] – provides an extremely helpful template and starting point for the consideration of trust arbitration legislation in this jurisdiction.

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[82] We are aware that David Brownbill KC assisted in the drafting of the Act.

Appendix

Sections 91A – 91C and the Second Schedule of the Trustee Act of The Bahamas

91A. Arbitration of trust disputes.

(1) The object of this section is to enable any dispute or administration question in relation to a trust to be determined by arbitration in accordance with the provisions of the trust instrument.

(2) Where a written trust instrument provides that any dispute or administration question arising between any of the parties in relation to the trust shall be submitted to arbitration ("a trust arbitration"), that provision shall, for all purposes under the Arbitration Act, have effect as between those parties as if it were an arbitration agreement and as if those parties were parties to that agreement.

(3) The Arbitration Act shall apply to a trust arbitration in accordance with the provisions of the Second Schedule to this Act.

(4) The Minister may by order amend the Second Schedule.

91B. Powers of the arbitral tribunal.

(1) This section shall apply except to the extent otherwise provided in the trust instrument.

(2) The arbitral tribunal (hereinafter referred to as "the tribunal") may, in addition to all other powers of the tribunal, at any stage in a trust arbitration, exercise all the powers of the Court (whether arising by statute (including this Act), under the inherent jurisdiction of the Court or otherwise) in relation to the administration, execution or variation of a trust or the exercise of any power arising under a trust.

(3) Without prejudice to subsection (2), and to any provisions made pursuant to subsection (4), the tribunal has the same powers to appoint one or more persons to represent the interests of any person (including a person unborn or unascertained) or class in a trust arbitration as the court has under Order 15 rule 14 of the Rules of the Supreme Court in relation to proceedings before the court.

(4) The terms of a trust may provide for the appointment of one or more persons to represent the interests of any person (including a person unborn or unascertained) or class in a trust arbitration.

(5) Where an appointment is made under subsection (3) or (4) -

(a) the approval of the tribunal is required in relation to a settlement affecting the person or class represented;

(b) the tribunal may approve a settlement where it is satisfied that the settlement is for the benefit of the person or class represented;

(c) any award given in the trust arbitration shall be binding on the person or class represented by the person or persons appointed.

(6) A person under a disability may not -

(a) bring or make a claim in a trust arbitration except by his next friend;

(b) defend, make a counterclaim or intervene in a trust arbitration except by his guardian ad litem ; or

(c) take any step in a trust arbitration except by his next friend or guardian ad litem, unless otherwise ordered by the tribunal.

(7) The terms of a trust may provide for the appointment of a next friend or guardian ad litem, for the cessation of an appointment, and for the service of documents upon a person under a disability.

(8) Subject to subsection (7), the tribunal may appoint a suitable person to be a next friend or guardian ad litem, may terminate an appointment, and may give directions for the service of documents upon a person under a disability.

(9) Where a next friend or guardian ad litem has been appointed under subsection (7) or subsection (8), no settlement affecting the person under a disability shall be valid, without the approval of the tribunal.

(10) Notwithstanding subsection (1), subsections (5), (6) and (9) shall apply irrespective of any provision in the trust instrument.

(11) The Minister may make regulations to extend or clarify the powers of the tribunal in relation to trust arbitrations.

91C. Interpretation for sections 91A, 91B and the Second Schedule.
For the purposes of sections 91A, 91B and the Second Schedule -

"administration question" means any relief or question in respect of which an action, application or other reference to the court could, subject to section 91A and the Arbitration Act, be brought or made under Order 74 of the Rules of the Supreme Court under this Act or under the Purpose Trusts Act;

"beneficiary" includes an object of a power, whether or not ascertained or in existence and a charity;

"dispute" includes a difference;

"power holder" means any person holding a power in relation to a trust (including any power of appointment, consent, direction, revocation or variation, and any power to appoint or remove trustees or power holders) and includes a person in the position of a protector;

"the parties in relation to the trust" means any trustee, beneficiary or power holder of or under the trust, in their capacity as such.

…

SECOND SCHEDULE

(section 91A)

APPLICATION OF THE ARBITRATION ACT

The Arbitration Act shall apply and be construed with respect to a trust arbitration, as stated hereunder-

1. The Arbitration Act shall apply and be construed with respect to a trust arbitration, as stated hereunder.

2. In the Arbitration Act, "dispute" includes an administration question.

3. Section 3(b) of the Arbitration Act shall apply as if it read-

"(b) the settlor should be free to determine (by provision in the trust instrument) how, in relation to a trust, disputes are resolved, subject only to such safeguards as are necessary in the public interest;".

4. Other than in sections 42, 43, 73 and Part XII, where in the Arbitration Act reference is made to a matter agreed between the parties to an arbitration agreement (including a matter which may be authorised, chosen, conferred, designated, nominated or vested by the parties) that matter shall (except where no effective provision is made) be determined as provided in the trust instrument.

5. Neither section 7 of the Arbitration Act nor any rule of law or construction treating an arbitration agreement separate to any agreement of which it is a part shall apply in relation to a trust arbitration.

6. The term "legal proceedings" in sections 9 and 10 of the Arbitration Act includes an application or other reference to the court concerning an administration question which the trust instrument requires to be submitted to arbitration and a stay of that application or other reference may be sought by any of the parties in relation to the trust, whether or not a party to that application or other reference.

7. In any application or other reference to the Court referred to in paragraph 6, the court may stay the proceedings on its own volition unless all parties in relation to the trust affected by the application are before it or are represented by persons before it.

8. The reference to "contemplation of the parties" in section l2(3)(a) of the Arbitration Act shall apply as if it were a reference to the "contemplation of the settlor".

9. Section 83 of the Arbitration Act's shall apply as if it included the following subsection -

"(3) Where a person is or has been a party to a trust arbitration in the capacity of trustee he shall, unless the tribunal otherwise orders, be entitled to the costs of the arbitration, in so far as they are not recovered from or paid by any other person, out of the fund held by the trustee; and the tribunal may otherwise order only on the ground that the trustee has in substance acted for his own benefit rather than for the benefit of the fund.".

10. Section 85(5) of the Arbitration Act16 shall apply as if it included the following paragraph-

"(c) Where a person is or has been a party to a trust arbitration in the capacity of trustee and is entitled to be paid his costs out of the fund held by the trustee any doubt as to whether costs were reasonably incurred shall be resolved in favour of the trustee. Costs shall be presumed to have been unreasonably incurred if they were incurred contrary to the duty of the trustee.".

11. For the purposes of enforcing an arbitral award under section 88 of the Arbitration Act

(a) section 91A shall have effect for the purposes of section 5 and 6 of the Arbitration (Foreign Arbitral Awards) Act, 2009 as it does for the purposes of the Arbitration Act;

(b) section 6(2)(a) of the Arbitration (Foreign Arbitral Awards) Act, 2009 which provides for the refusal of enforcement of an arbitral award against an incapacitated person) shall apply subject to the provisions of section 91B;

(c) section 6(2)(d) of the Arbitration (Foreign Arbitral Awards) Act, 2009 which provides for the refusal of enforcement of an arbitral award that deals with a difference not contemplated by or not falling within the terms of the submission to arbitration), the term "difference" includes an administration question.