

ARBITRATION BILL

EUROPEAN CONVENTION ON HUMAN RIGHTS MEMORANDUM

A. Summary of the Bill

1. This memorandum addresses issues arising under the European Convention on Human Rights (**ECHR**) in relation to the Arbitration Bill (**the Bill**). Lord Ponsonby of Shulbrede, Parliamentary Under-Secretary of State for Justice, has made a statement under section 19(1)(a) of the Human Rights Act 1998 that, in his view, the provisions of the Bill are compatible with the Convention rights.
2. The Bill gives effect to the recommendations from the Law Commission's report of their review of the Arbitration Act 1996 (**the 1996 Act**). The 1996 Act sets out the law relating to arbitration in England and Wales and Northern Ireland. The Ministry of Justice asked the Law Commission of England and Wales to conduct their review and this was ultimately comprised of two consultations (one in 2022 and one in 2023).
3. The Bill delivers targeted amendments to the 1996 Act to update the legislative framework in line with international good practice. It will modernise the legislative framework governing arbitration and codify case law to clarify the legislative environment. In particular, the Bill will:
 - codify an arbitrator's duty of disclosure;
 - strengthen arbitrator immunity around resignation and applications for removal;
 - introduce a power for arbitrators to dispose summarily of issues which have no real prospect of success;
 - revise the framework challenges alleging that the arbitral tribunal lacked jurisdiction);
 - clarify the law applicable to arbitration agreements; and
 - clarify court powers in support of arbitral proceedings, and in support of emergency arbitrators.

B. ECHR considerations

Article 6 (right to a fair trial)

8. The starting point is that European Court of Human Rights (**ECtHR**) has stated that Article 6 does not preclude the establishment of arbitral tribunals and that arbitration does not offend in principle the ECHR (*BEG S.P.A. v Italy*¹).

¹ (2021) ECHR 5312/11

9. Furthermore, both domestic case law and case law from the ECtHR makes clear that arbitration proceedings can engage Article 6 rights (*Mutu and Pechstein v. Switzerland*²) and indeed, in certain arbitration proceedings, arbitrators could be determining an individual's "civil rights and obligations" (*Stretford v Football Association*³).
10. It is on this basis that Government assumes that it is possible that Article 6 is engaged throughout an arbitration process but whether *in fact* Article 6 is engaged at any particular stage of the process depends on the particular case and the decision in question.
11. The 1996 Act, which would be amended by this Bill, governs arbitrations whose seat is England & Wales or Northern Ireland. The 1996 Act places arbitral tribunals under certain mandatory obligations (e.g. the tribunal must be impartial). There are also non-mandatory obligations and parties to the arbitration may agree amongst themselves whether their particular arbitration agreement will contain such obligations.
12. The Court of Appeal has stated that the mandatory obligations under the 1996 Act ensure that arbitrations are compliant with Article 6 (*Stretford v Football Association*⁴). In particular, sections 67 and 68 of the 1996 Act allow parties to apply to the court to challenge an arbitral award on grounds of substantive jurisdiction or serious irregularity. These provisions mean that where parties believe their Article 6 rights have been breached in the arbitral proceedings, they are able to seek redress from the court.
13. The Bill will introduce one mandatory provision and amend an existing mandatory provision:
 - a) Clause 2 introduces a mandatory duty of disclosure so that arbitrators must disclose to the parties of the arbitral proceedings matters that might reasonably give rise to doubts as to the arbitrator's impartiality; and
 - b) Clause 11 amends the current power in section 67 of the 1996 Act for a party to arbitral proceedings to apply to the court challenging an arbitral award on grounds of substantive jurisdiction. Clause 11 will permit rules of court to make provision in relation to the procedure of those challenges.

² (2018) ECHR 40575/10 & 67474/10

³ (2007) EWCA Civ 238

⁴ (2007) EWCA Civ 238

14. Given the extent of the two provisions above, the Ministry of Justice considers that the provisions in this Bill do not alter the position as regards Article 6 in respect of the Arbitration Act 1996, if amended. The Ministry continues to believe the arbitral regime that exists at present, and the framework that would exist if the Bill comes into force, is in compliance with the Government's Article 6 obligations.

Article 1 of Protocol No. 1 (A1P1)

15. ECtHR case law suggests that where it is impossible to secure enforcement of an arbitration award, it is possible that there is a breach of A1P1 (*Stran Greek Refineries and Stratis Andreadis v. Greece*⁵).

16. Given this context, the Government accepts that in principle A1P1 could be engaged in arbitration proceedings, depending on the facts in question.

17. Section 66 of the 1996 Act provides that an award made by an arbitral tribunal may be enforced in the same way that a judgement of a court (provided the court provides permission). This Bill does not alter that position and therefore the Ministry of Justice believes that if A1P1 was to be found to be engaged in this way, there would be no breach of A1P1 in respect of the Arbitration Act 1996, if amended.

**Ministry of Justice
July 2024**

⁵ (1993) ECHR 13427/87