Reform of the UK Arbitration Act

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On 6 September 2023, the Law Commission published the long-awaited final report of its review of the UK Arbitration Act 1996 (the "Act") and a draft bill setting out the recommended amendments to the Act. The upshot is that the Act works well and root and branch reform is not necessary or desired, but that after 27 years there are some areas where the text can be improved. The key reforms that are likely to be of most interest to users of international arbitration concern moves to improve the cost and time efficiency of English arbitration. In particular, it is proposed that tribunals be given the express power to dismiss a claim or an issue at an early stage if it has "no real prospect of success". This would bring the Act into line with a number of institutional rules, and reflects London's concern to meet users' demands.

The other main recommendations include:

1. New restrictions on how the jurisdiction of the arbitral tribunal may be challenged before the court (section 67 of the Act), which should avoid delay, increased costs and potential unfairness.
2. The law governing the arbitration agreement will by default be the law of the seat, a much simpler test to apply than the current complex process under *Enka v Chubb*.
3. New clarification that the court has powers against third parties (under section 44 of the Act), bringing clarity and avoiding unnecessary litigation on the point.
4. Codifying a duty for arbitrators to disclose what they actually know and what they ought reasonably to know, which should reassure users as to the arbitrators' impartiality.
5. Strengthening arbitrators' immunity in relation to resignations and costs, which should boost users' confidence in the robustness and impartiality of the arbitration process.

Details of the Major Changes and Their Impact

Express Provision for Summary Disposal of Claims or Issues

Summary judgment, in English court proceedings, may be granted where the court decides a claim or issue without trial, when it considers that a party has no real prospect of success and there is no other compelling reason why the issue should be heard at a full-fledged trial.

While arbitral tribunals in England typically already have power to grant similar early determination and other summary processes in appropriate cases, there has been a sense that it is not exercised as frequently as it might be due to a concern that it may expose awards to challenge. Certain arbitral institutions have sought to address this by expressly providing such powers in their rules (such as the London Court of International Arbitration (LCIA), International Chamber of Commerce (ICC), Singapore International Arbitration Centre (SIAC), Hong Kong International Arbitration Centre (HKIAC) and International Centre for Settlement of Investment Disputes (ICSID)). The Law Commission recommends that the Act be amended to follow suit. This may further reduce the number of

claims with no real prospect of success continuing through to a full final hearing, and so reduce unnecessary cost and delay.

The procedure will only be available on the application of a party and the tribunal will have a discretion whether to entertain such an application. A claim or an issue can be dismissed if they have "no real prospect of success". This threshold for the default position (as opposed to "manifestly without merit", for example) is sensible because it is the same threshold as in English court proceedings and benefits from a raft of case law explaining its meaning. Parties can still agree alternative thresholds through adopting arbitral rules.

Restrictions on Challenges to the Arbitral Tribunal's Jurisdiction Before the Court (Section 67 of the Act)

Under the current section 67 of the Act (where the parties have not agreed to disapply that provision), a party can challenge the tribunal's jurisdiction, and if it is not satisfied with the tribunal's ruling can ask the court to re-hear that question. The court can currently re-hear the evidence on jurisdiction as well as the arguments, which likely means delay and increased costs. There is also potential unfairness, because a party that has challenged jurisdiction before the tribunal and has received an award dismissing its challenge can consider the tribunal's reasons for the dismissal and seek new evidence and develop new arguments for its challenge before the court.

These potential pitfalls are addressed through the proposed amendment to the Act. A party who has participated in the arbitration and objected to the tribunal's jurisdiction, and subsequently obtained a ruling on jurisdiction from the tribunal, will now only be able to challenge that ruling without new arguments, without new evidence and without rehearing of evidence. Certain limited exceptions apply, including where it is in the interests of justice or where even with reasonable diligence the new evidence or new grounds of objections could not have been put before the tribunal.

Default Position That the Law Governing the Arbitration Agreement Is the Law of the Seat

Following the judgment of the United Kingdom Supreme Court in *Enka v Chubb* (*Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38, see our alert **here**), the process for deciding the governing law of an arbitration agreement is complex. The Law Commission felt that the process may increase delay and costs, because it may result in many more arbitration agreements being governed by non-English law which in turn may lead to an increased need for parties to present expert evidence on how such law governs the arbitration agreement. The Law Commission also thought that that there was a connected risk of losing the benefits of English law in relation to, for example, separability of the arbitration agreement, broad concept of arbitrability and confidentiality.

The proposed amendment means that unless the parties expressly agree otherwise, the arbitration agreement will be governed by the law of the seat. Although the arbitration community has been divided as to whether this is a positive amendment, the predominant view is that it has the virtues of simplicity and certainty and therefore is of help to users of international arbitration.

Clarification That the Court Has Powers Against Third Parties (Section 44 of the Act)

Under the current section 44 of the Act, the court has powers to make orders for the taking of witness evidence, preservation of evidence, in relation to relevant property, sale of goods, interim injunctions and the appointment of a receiver. Conflicting case law has created uncertainty as to whether those orders can be made against third parties (as opposed to arbitral parties).

Section 44 of the Act will now be amended to clarify that those court orders can be made against third parties and that such third parties will have the usual rights of appeal to the court. Overall, the amendment is welcome as it brings clarity and avoids unnecessary litigation on the point.

Express Statutory Duty for Arbitrators to Disclose What They Actually Know and What They Ought Reasonably to Know

Arbitrators are under a continuing duty as a matter of English common law to disclose any circumstances which might reasonably give rise to justifiable doubts as to their impartiality, as recently summarised by the United Kingdom Supreme Court in *Halliburton v Chubb* (*Halliburton Co v Chubb Bermuda Insurance Ltd* [2020] UKSC 48, see our alert **here**). The arbitrators' duty of impartiality is already codified in section 33 of the Act. The Law Commission recommends that the common law duty of disclosure should also be put on a statutory footing.

The express recognition of the duty of disclosure in the Act is welcome. The amendment confirms the extension of the duty to pre-appointment discussions and the relevant state of knowledge. It will be clarified that arbitrators are obliged to disclose what they actually know as well as what they ought reasonably to know, which should reassure users as to the arbitrators' impartiality.

Strengthening Arbitrators' Immunity in Relation to Resignations and Costs

Under the current Act, arbitrators generally have immunity, but can incur certain liability, in particular for resigning and possibly for the costs of even unsuccessful applications for their removal. For example, if an arbitrator resigns, the current provisions allow the arbitrator to apply to court and seek relief from any liability incurred by reason of the resignation; the relief does not extend automatically. The Law Commission considered that further strengthening of arbitrator immunity would be important in order to support, first, the making of robust and impartial decisions without fear that a party might sue the arbitrator, and, second, the finality of the dispute resolution process by preventing a losing party from bringing further proceedings against an arbitrator.

The new provisions will state that an arbitrator should incur no liability for resignation unless the resignation is shown to be unreasonable. In addition, an arbitrator will not incur costs liability in an application for their removal unless the arbitrator has acted in bad faith. These amendments should further boost users' confidence in the robustness and impartiality of the arbitral dispute resolution process.

Next Steps

The UK government will now decide whether the draft bill should be introduced into parliament. In light of the broad consensus following the consultations carried out by the Law Commission, we anticipate that it will do so in substantially the terms recommended by the Law Commission.

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