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Don’t rock the boat: The Law Commission's limited reforms to the Arbitration Act will go before Parliament

The King's Speech delivered on 7 November 2023 confirmed that the Arbitration Bill which implements recommendations from the Law Commission's Review of the Arbitration Act 1996 (the "**Act**") will go before Parliament.

The Arbitration Bill was included in the suite of new legislation aimed at growing the economy with the government's briefing note reading: "*These new measures will bolster England, Wales and Northern Ireland's world-leading domestic and international arbitration sector with benefits for individuals and businesses seeking to resolve disputes, as well as boosting economic growth.*"[1]

While the announcement did not say whether all of the Law Commission's recommendations will be put before Parliament, the briefing note sets out all of the key areas of reform identified by the Law Commission's Final Report.[2] Each of these is considered below but, before delving into the detail of the recommended areas for reform, it is worth stating that the Act already functions well and is fit for purpose so only limited, focused reform has been proposed.

Empowering arbitrators to expedite decisions that have no real prospect of success

Arbitrators would be given an express power to dispose of a matter on a summary basis on the application of a party. While there is likely to already be an implicit power to do so under the tribunal's duty to avoid unnecessary delay or expense (section 33(1)(b) of the Act), the Law Commission found that it would be better to make this power explicit as it is rarely used as a result of "*due process paranoia*".

The threshold for a summary disposal would be the same as if being heard before a High Court judge, namely the party has no real prospect of success. The adoption of the familiar test is sensible, as is the preservation of party autonomy to disapply this provision and tribunal discretion to decide on the suitable procedure for the determination of any application.

Introducing a statutory duty on arbitrators to disclose circumstances which might give rise to justifiable doubts about their impartiality

The changes proposed would codify the common law position that arbitrators are under a duty to disclose any circumstances which might reasonably give rise to justifiable doubts as to their impartiality.[3] The proposed duty would be in respect of circumstances of which the arbitrator is aware or ought reasonably to be aware.

The Law Commission is clear that the codification is not intended to undermine the flexibility afforded by the common law, for example the normal practice of

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[1] The King's Speech Background Briefing Note
[2] Review of the Arbitration Act 1996: Final report and Bill

[3] Halliburton Company v Chubb Bermuda Insurance Ltd [2020] UKSC 48

overlapping appointments in commodity and maritime arbitrations. It did, however, clarify that a failure to disclose relevant circumstances can give rise to justifiable doubts about an arbitrator's impartiality.

Extending arbitrator immunity against liability for resignations, unless shown to be unreasonable, and the costs of the application to court for their removal, unless they have acted in bad faith

The aim of this change is to avoid the situation where an arbitrator resigns appropriately, for example to comply with sanctions following the outbreak of war, but remains personally liable including in relation to costs.

The reforms would provide that arbitrators incur no liability for resignation unless the resignation is shown to be unreasonable and no liability, including costs liability, in respect of an application for their removal unless they have acted in bad faith. Thus, the change also protects parties from wasted costs where an arbitrator resigns unreasonably or acts in bad faith.

Clarifying the law governing arbitration agreements, providing that the law applicable will be those of the legal location chosen for the arbitration unless parties expressly agree otherwise

This is an important area of reform because, as the Law Commission explain in their report, the English law position on the question of determining which law governs an arbitration agreement where there is no express choice divided the Supreme Court and produced a complex majority judgment in Enka v Chubb.[4]

The Law Commission's proposal is that the Act contain a default rule providing that the law which governs the arbitration agreement is the law the parties expressly agree applies to the arbitration agreement, or where no such agreement is made, the law of the seat of the arbitration in question. The purpose of this rule would be to provide (welcome) certainty, thereby avoiding satellite litigation, while retaining parties' autonomy to make express provision for the choice of law.

Simplifying the procedure for challenging arbitral awards on substantive jurisdiction by providing for rules of court that would mean these applications should contain no new evidence or new arguments

Following Dallah v Pakistan, applications under section 67 of the Act to challenge a tribunal's decision on its own jurisdiction in court constitute a full re-hearing.[5] The new proposal is to move away from that approach such that, if the party making the challenge has participated in the arbitration, the court will only permit new grounds of objection or new evidence where that party could not have put these before the tribunal without reasonable diligence.

This was one of the Law Commission's more contentious proposals, with strong views both for and against reform. The majority preferred reform in the interests of saving wasted time and costs, and not tipping the balance in favour of the losing party who is (under the current regime) effectively able to use the arbitration as a 'dress rehearsal' for its case on jurisdiction.

Interestingly, the Law Commission has said that this change is more appropriately made by changes to procedural rules rather that an amendment to the Act.

Empowering the court to make orders supporting those of emergency arbitrators

The report makes two proposals in order to give emergency arbitrators the same pathways to enforce their orders as normal arbitrators. The first is a scheme whereby if an emergency arbitrator makes an order which, if ignored, could lead to a peremptory order, which, if still ignored, can be enforced by the court. The second is to allow

[4] Enka Insaat Ve Sanayi A.S. v OOO Insurance Company Chubb [2020] UKSC 38

[5] Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan [2010] UKSC 46

emergency arbitrators to give permission for a party to apply to the court under section 44(4) of the Act.

Providing that the court can make orders in support of arbitral proceedings against third parties

This also involves changes to section 44 of the Act relating to the court powers exercisable in support of arbitral proceedings and confirms that the orders that may be granted under section 44(2) may be made against third parties. These include the taking of witness evidence, the preservation of evidence, orders in relation to property or the sale of goods and the granting of an interim injunction or the appointment of a receiver.

Additionally, the Law Commission proposes that the requirement for the court's consent to an appeal of a decision made under section 44 should not apply to third parties who should have the usual rights of appeal.

Comment

Innumerable commodity disputes are resolved through London arbitration, whether under trade association rules or institutional rules, so the progress of the proposed reforms will be of general interest. The targeted reforms proposed should enhance the experience of traders with arbitrations governed by English law while not being so wide-ranging that the familiar process of arbitrating in London feels different.

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