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A “state of the art” Arbitration Act: the Law Commission’s proposals

Start

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The Law Commission has recently conducted a review of the Arbitration Act 1996 (the Act) and has now published a consultation paper, setting out provisional proposals for reform and seeking comments on those proposals.

In preparing the consultation paper, the Law Commission spoke with a wide range of stakeholders and received feedback that the Act *“works well; root and branch reform is not needed or wanted.”* Therefore, the Law Commission’s aim is to update the existing framework to ensure that it remains *“state of the art”*, rather than to recommend fundamental changes to the Act, and to complete the project in a short timeframe so as to limit disruption to the arbitration community.

Whilst modest in some respects, the proposed changes are important because they reflect developments in arbitration practice and procedure since the Act came into force in January 1997.

Our commentary on the Law Commission’s main proposals can be read by following the links to the right.

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The main proposals

Challenging jurisdiction

Overview

Jurisdictional challenges under section 67 of the Act should no longer involve a complete "de novo" hearing (as is currently the case), where the challenging party has participated in the arbitral proceedings and has objected to the jurisdiction of the tribunal. Instead, the court should review the tribunal's award, as opposed to considering the issues afresh. In the Law Commission's view, this would be fairer and would avoid duplication and delay.

The current position under section 67 of the Act is that, where a party applies to the court to challenge the jurisdiction of an arbitral tribunal, the court will consider the issue afresh (or "de novo" in Latin), even where the tribunal has already ruled on the point in a contested hearing between the parties. In other words, the court proceedings will involve a complete rehearing, as opposed to a more limited review of the tribunal's decision. This means that, at least in theory, the party challenging jurisdiction can develop new arguments and adduce fresh evidence in the court proceedings, informed by the tribunal's response to its submissions in the arbitral hearing. The consultation paper suggests that this can result in the hearing before the arbitral tribunal becoming a "dress rehearsal" for the court application.

The Law Commission's provisional proposal is that this approach is both duplicative, thereby increasing time and cost, and unfair. It recommends that, where a party has participated in an arbitration and subsequently seeks to appeal the tribunal's award by way of a jurisdiction challenge under section 67 of the Act, the court application should take the form of an appeal and not a rehearing, meaning that the court would review the decision of the tribunal rather than consider the matter afresh. This would avoid the "double hearing problem" but would allow the court to retain the final say as to the jurisdiction of the arbitral tribunal.

We anticipate that a significant number of arbitration practitioners will respond to the Law Commission's proposal with relatively strong resistance. The Law Commission's approach risks conflating awards on merits (which of course cannot be subject to full re-hearings) with jurisdiction awards which should fall to be scrutinised in detail by the court to prevent over-reach by the arbitral tribunal. The court can use its case management powers to restrict the downside for parties at risk of prejudice due to the double hearing problem by managing the time and costs involved with the re-hearing (for example by prohibiting parties from introducing new evidence and delineating the extent to which evidence can be revisited).

Confidentiality

Overview

The rules on the confidentiality of arbitral proceedings should continue to be developed by the courts – and not be codified in the Act. The scope of the duty is a matter of ongoing debate and, in particular, the exceptions to it are difficult to articulate. The flexibility afforded by the common law is preferable to attempting to adopt a "one-size-fits-all" approach, especially as the Act applies to a wide range of different types of arbitration.

Confidentiality is one of the main attractions of arbitration for participants. The ability to keep the nature, existence and subject matter of disputes out of the public domain is a key distinguishing feature of arbitration, particularly in England & Wales where the concept of "open justice" is fundamental to the courts' approach to litigation.

The Act is silent on the question of confidentiality. Whilst it is clear that, as a matter of English law, arbitrations are private and confidential in general terms, the limits of the duty of confidentiality are unclear and there is a number of exceptions to it (which are themselves unclear).

Nonetheless, the Law Commission has provisionally decided against recommending that rules on confidentiality be codified in the Act. The consultation paper notes that the law of confidentiality is "complex, fact sensitive, and in the context of arbitration, a matter of ongoing debate." The difficulty lies not in stating the default rule, but in articulating the exceptions where the duty of confidentiality will not apply. Articulating the exceptions is particularly difficult in circumstances where the Act applies to a range of different types of arbitration. This means that a "one-size-fits-all" approach" is not appropriate, particularly where the Act needs to be "future-proof" to the extent possible. For these reasons, the Law Commission concludes that it is better to rely on the courts to develop this area of the law on a case-by-case basis.

We anticipate that arbitration practitioners will agree with the Law Commission that the status quo should be preserved when it comes to confidentiality in the Act. As the Law Commission concludes (albeit provisionally): the absence of codification on confidentiality is a strength of arbitration law in England and Wales.

The practical consequence of this is that parties should include confidentiality provisions in their arbitration agreements either expressly or by incorporating institutional rules which provide for levels of confidentiality suitable to their needs or should seek an early order from the arbitral tribunal.

Impartiality and duty to disclose

Overview

The Act should include an express provision imposing a continuing obligation on arbitrators to disclose circumstances which might give rise to a perception of a conflict of interest. Specifically, arbitrators would be required to disclose any circumstances which might reasonably give rise to justifiable doubts as to their impartiality. The Law Commission considers that this, combined with existing provisions on arbitrator impartiality in the Act, are sufficient to protect the integrity of the arbitral process. It is neither necessary nor practical to add a further requirement that arbitrators be independent (in the sense of them having no connection with any of the parties).

By way of context, the terms "independence", "impartiality" and "disclosure" have become inter-dependent in international arbitration. Borrowing the Law Commission's summary, impartiality is the idea that arbitrators are neutral between the parties, independence is the idea that the arbitrators have no connection to the parties and disclosure is the idea that arbitrators should reveal what connections they might have.

There is already an express duty of impartiality in sections 1 and 33 of the Act. The question for the Law Commission was whether equivalent duties should be codified in respect of the arbitrator's independence and duty to disclose.

The consultation paper proposes that the Act should include an express provision imposing a continuing obligation on arbitrators to disclose any circumstances which might reasonably give rise to justifiable doubts as to their impartiality. This would not produce a change in the law; rather it would codify existing case law. The test for impartiality, which would inform the arbitrator's decision whether or not to disclose, derives from case law and is: whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.

The consultation paper recognises that, when an arbitrator makes a disclosure, they do so out of a commitment to transparency – not because they consider themselves to have a conflict of interest. It is, in the Law Commission's words, a "demonstration of impartiality" so that the parties can consider the neutrality of their arbitrator.

The consultation paper reaches the provisional conclusion that it would be neither practical nor necessary to include an express duty of independence. In the Law Commission's view, what matters is that arbitrators are, and are seen to be, impartial, having disclosed any relevant connections to the parties. This goal is achieved by the duty of disclosure, combined with the existing provisions in the Act requiring the tribunal to be impartial.

The Law Commission left open the question of whether arbitrators' duty to disclose is or should be based on their actual knowledge only or whether it should also include what they ought to know after making reasonable enquiries. The Law Commission considers that this issue is better left to the courts so that the law can reflect developing standards and expectations, particularly in international commercial arbitration.

Given the Law Commission's proposals serve to codify case law, they will not be unduly surprising to the arbitration community. The Law Commission does not seek to meddle with the test for justifiable doubts as to impartiality and the recent line of case law culminating in Halliburton Company v Chubb Bermuda Insurance Ltd [2020] UKSC 48 on the subject of apparent bias. The Law Commission proposes that the Act should not be prescriptive in this level of technical detail, preferring to allow the courts to develop the common law as arbitral practice evolves. It will be interesting to see if any responses are received asking the Law Commission to go further.

Discrimination

Overview

Discriminatory terms in an arbitration agreement relating to the appointment of an arbitrator should be unenforceable and parties should not be able to challenge the appointment of an arbitrator on the basis of that arbitrator's "protected characteristics". There is an exception where an otherwise discriminatory provision (e.g. as to the nationality of an arbitrator) is a *"proportionate means of achieving a legitimate aim".*

Noting that diversity of arbitral appointments has improved, but not to parity, the Law Commission recognises that "arbitration benefits when free from prejudice".

Subject to an important exception, the Commission proposes that discriminatory terms in an arbitration agreement relating to the appointment of an arbitrator should be unenforceable and that parties should not be able to challenge the appointment of an arbitrator on the basis of that arbitrator's "protected characteristics" (age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation). This means, for example, that an arbitration agreement stipulating that an arbitrator must be a man would be unenforceable. Furthermore, it would not be possible to challenge the appointment of an arbitrator on the basis (for example) that she is a woman. According to the Law Commission, this would be "a world-leading initiative and send an important signal about diversity and equality".

The proposals would allow a limited exception to the above general rule, where requiring an arbitrator to have a particular protected characteristic is a "proportionate means of achieving a legitimate aim". This carve-out might be engaged, for example, where there is a requirement that an arbitrator has a different nationality from the parties to the dispute on the basis that this could be a proportionate means of providing the parties with reassurance that the arbitrator will be impartial.

The Law Commission notes that the approach may lead to parties seeking to avoid enforcement under the New York Convention on the grounds that the composition of the arbitral authority or arbitral procedure was not in accordance with the arbitration agreement. The Law Commission looked at this concern in some detail and concluded that, whatever the analysis, it is more important that the Act takes a stance against discrimination: parties should be free to agree how their disputes are resolved, subject only to safeguards in the public interest.

At the end of the day, a party that is concerned about enforcement risk is always free to take steps to appoint arbitrators in full compliance with the terms of the arbitration agreement such that in practice the risk posed by the Law Commission's proposal can be managed. It will be interesting to see if any responses are received which can explain a credible basis on which the Law Commission's proposal should be resisted. On its face, the proposal is welcome and necessary.

Arbitrator immunity

Overview

The immunity of arbitrators should be strengthened and case law which holds them potentially liable for the costs of court applications should be reversed.

The Act grants arbitrators immunity from suit (except where they can be shown to have acted in bad faith). Broadly, this is to ensure that arbitrators are not put under pressure by the threat of claims against them and to prevent parties, who are dissatisfied with the outcome of an arbitration, from bringing collateral claims against arbitrators and thereby undermining the finality of arbitration awards.

The Law Commission identifies two gaps in the general rule that arbitrators are immune from suit:

- The first is that arbitrators potentially retain liability when they resign, unless agreement can be reached with the parties or relief obtained from court. The Law Commission considers that this operates as a disincentive for arbitrators to resign, even when it would be appropriate for them to do so (for example, where they discover a conflict of interest). On the other hand, the consultation paper also recognises that "unreasonable resignation" should be discouraged. The Law Commission considers these competing considerations to be finely balanced and accordingly makes no recommendations one way or the other. Instead, the consultation paper seeks responses to the questions of whether arbitrators should incur liability for resignation at all and/or whether arbitrators should only incur liability where they resign unreasonably.
- The second exception to arbitrator immunity is that arbitrators can incur liability for the costs of an application to remove them, even when that application is unsuccessful. The consultation paper refers to a line of cases, which it describes as "problematic", where costs orders were made against arbitrators following applications to remove them. In the Law Commission's view, these decisions are contrary to the wording of the Act and the policy behind it. This is a particularly concerning issue in circumstances where there is no insurance available to arbitrators to cover such costs orders. Accordingly, the Law Commission recommends that arbitrators' immunity should extend to the costs of court proceedings against them and that the contrary line of authority should be reversed.

We would be interested to hear from anyone who disagrees with the proposal to right the wrongs of the problematic case law, in this area which seems regressive and to send the wrong message about England as a seat.

Summary disposal

Overview

The Act should contain a non-mandatory provision allowing for the summary disposal of claims or issues, which have no real prospect of success and where there is no compelling reason for a full hearing.

English courts have a well-established method of disposing of very weak claims or defences at an early stage, by making an order for summary judgment. This saves time and cost by removing the need for cases to go to full trial if they have no real prospects of success.

As the consultation paper recognises, the Act probably already confers sufficient powers on arbitrators to adopt a similar process. Nonetheless, many arbitrators are reluctant to adopt such a robust approach because of the perceived risk that their awards will be challenged on the basis, for example, that a party was prevented from presenting its case (a concern which is sometimes described as "due process paranoia"). This is sometimes identified as a disadvantage of arbitration as against litigation, particularly from the perspective of claimants.

In order to allay these concerns, the Law Commission proposes that the Act should be amended to expressly say that an arbitral tribunal may, on the application of a party, adopt a summary procedure to decide a claim or an issue, which has no real prospect of success and where there is no compelling reason for a full hearing. This would, in the view of the Law Commission, provide reassurance to arbitrators that summary disposal can be appropriate in the right case. It would also help to demonstrate to a foreign enforcing court that the tribunal has adopted a proper process.

It would be for the tribunal to decide the procedure to be adopted, in consultation with the parties, in a way that ensures parties are given a reasonable opportunity to put their case. The provision would be non-mandatory, meaning that parties could contract out of it if they wanted to do so.

It is not common for national arbitration laws to contain a mechanism for summary disposal of disputes and the UNCITRAL Model Law makes no such provision (although some institutional arbitration rules do so). The consultation paper states that this would be a "world-leading development" and notes that stakeholders and responses to significant surveys suggest that it would be a welcome innovation.

The proposal would certainly address a criticism that is frequently levelled against arbitration by users who opt for High Court litigation in their agreements based on the mis/pre-conception that summary disposal is not available in arbitration.

Court powers in support of arbitral proceedings

Overview

The Act should make it clear that the court's powers to make orders in support of arbitral proceedings are in principle available against third parties, not just the parties to the arbitral proceedings.

Section 44 of the Act gives the court the power to make certain types of interim order in support of arbitration proceedings in the same way that it could in court proceedings. The matters covered by this provision include (very broadly) orders for the obtaining of evidence (witness or documentary), securing and preserving assets and the making of interim injunctions (including freezing orders).

The case law does not take a consistent approach as to whether section 44 can be used to make an order against a third party (i.e. someone who is not a party to the arbitration agreement or the arbitral proceedings). The Law Commission considers that, on a proper analysis, the effect of section 44 is (and should be) to import the law from domestic civil proceedings into domestic arbitral proceedings, and into foreign-seated arbitral proceedings unless "inappropriate". This means that the "vexed question" of whether an order under section 44 can be made against third parties depends on the extent to which an equivalent order could be made in domestic civil proceedings. This will vary depending on the type of order sought. In other words, a "one-size-fits-all" approach does not apply to all types of order that can be made under section 44.

As to what "inappropriate" means, the Law Commission provides an example: if a New York seated arbitration wants deposition evidence from a witness in France, it is probably not the business of the English courts.

Despite being satisfied that the current drafting of the Act reflects this analysis, the consultation paper nevertheless seeks feedback on whether section 44 should be amended to state explicitly that orders can be made against third parties (to the extent that such orders would be available in court proceedings).

The consultation paper also proposes that, where an order is made against a third party, that party should be able to apply for permission to appeal from both the court that made the order and the court to which they would be appealing (and not just the former, which is the current position). This is on the basis that there is no reason why non-parties to the arbitration should have more restricted rights of appeal than they would have in other types of proceedings.

The improved clarity proposed by the Law Commission with respect to the reach of section 44 and third parties is welcome.

Emergency arbitrators

Overview

It should be clarified that the court can, in appropriate circumstances, make interim orders in support of an arbitration, notwithstanding the fact that the parties' arbitration agreement allows for the appointment of an emergency arbitrator with similar powers. This will remove confusion caused by the decision in *Gerald Metals v Timis* [2016] EWHC 2327 (Ch). Specifically, the consultation paper proposes that section 44(5) of the Act should be repealed.

The consultation paper considers various aspects of the appointment of emergency arbitrators, noting that this is a relatively recent development which post-dates the implementation of the Act.

The most interesting and long-awaited part of the discussion relates to the case of Gerald Metals v Timis [2016] EWHC 2327 (Ch) and its interrelation with section 44(5) of the Act.

Section 44(5) provides: "[i]n any case the court shall act only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively".

Gerald Metals has been interpreted by many as meaning that the court cannot exercise its powers under section 44 where the applicable institutional rules provide for the appointment of an emergency arbitrator. This position is based on the understanding that section 44(5) prevents the court from acting where an emergency arbitrator has been appointed and is capable of acting. In the view of the Law Commission, this is a misreading of what Gerald Metals said about section 44(5) of the Act. The Law Commission's opinion is that the effect of Gerald Metals has been exaggerated; an emergency arbitrator will not, for example, be in a position to "act effectively" where a party requires without notice relief or is seeking an order to bind third parties. The very possibility of the appointment of an emergency arbitrator will not, therefore, preclude recourse to the court under section 44.

The cure for the confusion, according to the Law Commission, is to repeal section 44(5). Whilst recognising that this provision has symbolic value, the Law Commission considers that it is redundant because other provisions in section 44 already limit the court's scope to interfere with the proper functions of the tribunal. Therefore, in the view of the Law Commission, there is no need for section 44(5) and, as it has caused confusion, it should be repealed.

We anticipate the arbitration community will welcome the Law Commission's proposed clarification to cure any misperceptions in the wake of Gerald Metals.

Appeals on points of law

Overview

The rules on appeals on a point of law should remain unchanged. Section 69 of the Act provides a satisfactory compromise between, on the one hand, ensuring the finality of awards and, on the other hand, enabling blatant errors to be corrected and encouraging the development of the law.

Under section 69 of the Act, a party to arbitral proceedings may appeal to the court on a point of law arising out of an award. It is a slightly unusual provision (albeit not unique) and, in particular, the UNCITRAL Model Law contains no equivalent rule. Section 69 is sometimes criticised for undermining the finality of arbitration awards and for allowing losing parties to adopt delaying tactics. On the other hand, supporters of allowing appeals on points of law consider that blatant errors of law should be corrected and that this is an important way of encouraging the development of the law. Proponents of this latter view argue that the regime should be liberalised so as to allow for more appeals.

The consultation paper provisionally concludes that the existing regime is a satisfactory compromise between these two competing views.

On the one hand, section 69 is non-mandatory and parties can opt out of it (and many institutional rules do so). Appeals on points of law can only be brought with the agreement of the other parties or the permission of the court (which will usually be considered on the papers and only granted in less than one third of applications). In practice, section 69 is only invoked in a "tiny minority" of arbitrations. Some parties value the possibility of an appeal on a point of law.

On the other hand, the Law Commission considers that concerns about the development of the law are misplaced. There are already plenty of cases before the Commercial Court and the Court of Appeal, meaning that "the development of English law is in fine health". Where parties want to ensure that they will have a right to appeal on a point of law, they can explicitly provide for this in their arbitration agreement, which will avoid the need subsequently to obtain the court's permission. Overall, the Law Commission has found no evidence to suggest that section 69 is problematic in practice despite often lively debate.

It is interesting to read the statistics arising from the English Commercial Court Report and supplied separately by the Commercial Court to the Law Commission in the course of the preparation of the consultation paper. The fact that the statistics suggest that section 69 is invoked in a tiny minority of cases and is only then successful in limited circumstances, suggests that any lively debate on the subject is perhaps not grounded in reality. That said, perhaps those statistics are not the right data to review when considering whether section 69 and its current operation is discouraging parties from choosing England and Wales as a seat in the first place.

Minor reforms and matters not shortlisted for review

Overview

The consultation paper considers various minor reforms and items not shortlisted for review. These include a discussion of the doctrine of separability. On a related point, the Law Commission has decided not to recommend that the rules on the governing law of an arbitration agreement should be reviewed, notwithstanding stakeholder concern about the Supreme Court decision in *Enka Insaat Ve Sanayi AS v. OOO Insurance Company Chubb* [2020] UKSC 38.

The Law Commission have made seven further minor proposals for reform. Of key interest to the international arbitral community is likely to be the discussion relating to the doctrine of separability. This is also linked to a stakeholder suggestion that was not short-listed for review in relation to the law governing the arbitration agreement.

In short, the doctrine of separability provides that an arbitration agreement can survive the demise of the main contract (for example, if the main contract is void for illegality) such that the dispute to determine the voidability of the main contract can be referred to arbitration. The doctrine is preserved in section 7 of the Act, but that section is non-mandatory (i.e. the parties can agree to disapply it). This is particularly relevant in circumstances where a different law governs the arbitration agreement to that which governs the main contract. If the law that governs the arbitration agreement is not English law, section 7 will be disapplied and thus the doctrine of separability may not apply (depending on whichever law governs the arbitration agreement).

The Law Commission has asked stakeholders for their views as to whether section 7 should be mandatory given its importance and utility.

This issue is connected with a matter that the Law Commission did not short-list for review, which is that of the law governing the arbitration agreement, in the wake of Enka Insaat Ve Sanayi AS v. OOO Insurance Company Chubb [2020] UKSC 38.

In Enka v Chubb, the UK Supreme Court held that an express or implied choice of law to govern the main contract will be an implied choice of law to govern the arbitration agreement. However, if there is no choice of law in the main contract, and no choice of law in the arbitration agreement, the arbitration agreement is governed by the law with which it is most closely connected, which is usually the law of the seat. Of course, parties are always free to expressly determine the law of the arbitration agreement in the arbitration agreement itself.

However, many in the arbitration community have been concerned by this judgment as a matter of policy (and not as a matter of law as the Law Commission paper suggests). Those stakeholders have said that the Act should provide that the default position is that the law of the seat will govern the arbitration agreement. In their view, this is preferable as most arbitration users would expect the choice of England and Wales as a seat to mean that all disputes arising in respect of the arbitration itself to be governed by English law irrespective of the governing law of the main contract. Importantly, the concern is that users might be unsettled by the idea that the law of the main contract might decide matters such as the scope of the arbitration agreement and the doctrine of separability and that they would prefer these issues to be resolved by reference to English law, which generally adopts an arbitration friendly approach. This development could deter users from selecting England and Wales as a seat. This, it is said, is a matter of policy which needs to be addressed to preserve England's status as a hub for international arbitration.

Given the strength of feeling and international interest in this subject, we would be surprised if this issue is not elevated to the status as a topic for review and potential reform.

The remaining minor reforms and matters not shortlisted for review are wide-ranging in topic and scope and give a sense of the enormity of the Law Commission's project.

Our views

The overall approach of the Law Commission is pragmatic, recommending codification where there is a clear case for it but also recognising that it is better to leave some issues to be considered by the courts so that the law can reflect and support modern practices and procedures as they develop. This is a strength of a common law system. To the extent that parties desire a more prescriptive framework, they are of course able to provide for more detailed rules in their arbitration agreement expressly or by incorporating institutional rules.

The Law Commission has made it clear that their proposals are provisional at this stage, and it will be interesting to see what feedback they receive. We envisage that the proposal to amend section 67 of the Act to provide for court hearings to take place as a review of the tribunal's decision, as opposed to a full rehearing, is likely to be the most controversial - not least because this would be a different approach from that taken in many other jurisdictions. We also consider that there is some force in the concerns that have been expressed about the Supreme Court decision in Enka v Chubb and that the rules on the governing law of an arbitration agreement at least merit further consideration.

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