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Client Alert

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UK launches review of the Arbitration Act 1996 to ensure a 'state of the art' system

Last week, the Law Commission published a consultation paper regarding the Arbitration Act 1996 (the "**Act**"), which is the key piece of legislation that regulates arbitration in England and Wales. The consultation paper starts by acknowledging that "*Arbitration is a major area of activity*", both domestically and internationally, noting a 26% growth in international arbitration between 2016 and 2020, with London as the most popular chosen seat and contributing approximately £2.5 billion to the economy annually.

The Law Commission, on the 25th anniversary of the Act coming into force, "*seeks to ensure that the Act remains state of the art, both for domestic arbitrations, and in support of London as the world's first choice for international commercial arbitration.*" The specific areas of reform discussed in detail in the consultation paper, are summarised below.

INSIGHT 1: CONFIDENTIALITY

The Law Commission will consider whether the Act should explicitly address the confidentiality of arbitrations. The current position is that arbitrations seated in England and Wales are subject to confidentiality implied at law, but this is not codified in the Act. Whether confidentiality is an express obligation (either in an arbitration agreement or in any revised Act), or a term implied by law, it cannot be an absolute obligation and must always be subject to exceptions.

After detailed discussion, the Law Commission provisionally concludes that the law on arbitral confidentiality currently operates effectively and should remain as is – *i.e.,* developed by the courts. The primary reason for this is the difficulty in codifying exceptions to the duty of confidentiality, which would be at "*such a high level of generality as to provide little concrete guidance.*"

INSIGHT 2: INDEPENDENCE OF ARBITRATORS AND DISCLOSURE

The independence of arbitrators is fundamental in ensuring that the panel members do not have any prior or existing connection to the arbitrating parties and, if they do, disclosure requires the arbitrators to reveal any such connections. The Law Commission will consider whether the Act should impose express duties of independence and disclosure on arbitrators, in addition to the statutory duty of impartiality. Impartiality is distinct to independence: it requires the arbitrators to be neutral as between the parties, but not necessarily to be independent of them.

The Law Commission provisionally concludes that no new express duty of independence is required as it is not practicable in many areas of arbitration and independence is not a virtue in itself. In contrast, a duty of disclosure is undoubtedly a part of the law of England and Wales and should be codified within the Act by means of provision "*which requires an arbitrator to disclose circumstances which might reasonably give rise to justifiable doubts as to their impartiality*."

INSIGHT 3: DISCRIMINATION

The Law Commission discusses the use of gendered language in the Act and considers whether the Act should prohibit discrimination in the appointment of arbitrators. Central to this is the belief that arbitration benefits when free from prejudice.

An arbitration agreement often specifies who can be appointed as arbitrator, using terms that could be interpreted as discriminatory. The Law Commission proposes that discrimination should be addressed explicitly, including by providing as follows:

- the appointment of an arbitrator should not be susceptible to challenge on the basis of the arbitrator's protected characteristic(s); and
- 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.

INSIGHT 4: IMMUNITY OF ARBITRATORS

In summary, section 29 of the Act provides arbitrators with immunity from liability for any acts done in the discharge of their functions as an arbitrator, however, liability can still be incurred for resigning from an appointment, as demonstrated by case law. The Law Commission will consider whether arbitrators should be entirely immune from liability for resignation, or partially immune upon resignation, unless their resignation is shown to be unreasonable.

The Law Commission proposes to strengthen arbitrator immunity and to exclude liability for court costs, on the basis that these measures would support the finality of arbitral awards by discouraging '*satellite litigation*' against arbitrators and encouraging arbitrator impartiality.

To achieve that end, the Law Commission proposes to reverse the line of case law that says that arbitrators can incur liability for the costs of applications to court, and expressly to confirm in the Act that arbitrator immunity extends to the costs of court proceedings arising out of the arbitration.

INSIGHT 5: SUMMARY DISPOSAL OF ISSUES WHICH LACK MERIT

The consultation paper also deals with whether the Act should include explicit provisions for arbitrators to adopt a summary procedure to resolve issues which are clearly without merit.

The Law Commission provisionally proposes that the Act should include a non-mandatory provision which will empower the arbitrators to adopt a summary procedure to decide issues which do not have any real prospect of

success, nor any compelling reason to proceed with a full hearing. The Law Commission believes that such a provision will provide arbitrators with the necessary support to manage arbitral proceedings in an efficient, fair, and cost-effective manner.

INSIGHT 6: INTERIM MEASURES ORDERED BY THE COURT IN SUPPORT OF ARBITRAL PROCEEDINGS

In accordance with section 44 of the Act, the court has power to make orders in support of arbitral proceedings. The Law Commission will consider whether orders under section 44 might be made against third parties and how the provision interacts with wider emergency arbitrator provisions across arbitral rules.

With regard to third parties, the Law Commission proposes that orders under section 44 should be available against third parties and to clarify that in the Act as amended. However, the Law Commission also believes that third parties should have the usual rights of appeal against orders affecting them, instead of the narrower rights of appeal that are available to arbitrating parties.

INSIGHT 7: JURISDICTIONAL CHALLENGES AGAINST ARBITRAL AWARDS

Section 67 of the Act provides for a party to arbitral proceedings to apply to the court to challenge an award of the tribunal, on the basis that the tribunal lacks substantive jurisdiction. The Law Commission will consider whether any such challenge should be approached as a full re-hearing (the current approach as developed in case law) or by way of a review.

The consultation paper proposes that:

- where a party has participated in arbitral proceedings, and has objected to the jurisdiction of the arbitral tribunal; and
- the tribunal has ruled on its jurisdiction in an award, then any subsequent challenge under section 67, should be conducted by way of a review only (and not a full re-hearing).

The Law Commission also proposes amendments to the language of the provision to clarify the remedies available, including in particular to empower a tribunal to issue a costs order despite a lack of jurisdiction.

INSIGHT 8: APPEALS ON A POINT OF LAW

In chapter nine of the consultation paper, the Commission provisionally rejects the idea of repealing section 69 of the Act, which allows for appeals on a point of law, on the basis that section 69 is a "*defensible compromise between securing the finality of arbitral awards and ensuring that blatant errors of law are corrected. It is a non-mandatory provision; arbitral parties and institutions have long settled on their preferred relationship with it, and we currently see no need to unsettle that*."

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While the central provisions of the Act will remain unchanged, a number of the suggested improvements stand good prospects of further enhancing the efficiency of arbitration in London and ensuring that the provisions in the Act maintain pace with developments in international arbitral practice more generally.

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