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UK Arbitration Review Makes Sensible Case For Status Quo

By **Ruth Byrne and Elysia-Elena Stellakis** (October 28, 2022, 8:39 AM EDT)

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A lot has changed in the world since the Arbitration Act 1996 came into force on Jan. 31, 1997. That landmark legislation imposed a sophisticated framework for arbitration, from selecting arbitrators to upholding arbitration agreements to provisions on ways to enforce an arbitral award.

For the last 25 years it has been the cornerstone of arbitration in England and Wales. Now, it is facing its first shake-up since its inception after the Law Commission on Sept. 22 announced a consultation on potential reforms to the act to ensure that it remains fit for purpose and, according to the consultation paper, "continues to promote the UK as a leading destination for commercial arbitrations."

In addition to more minor potential reforms, the consultation paper identifies eight specific areas on which the commission seeks feedback, namely:

1. Confidentiality;

2. Arbitrator independence and disclosure;

3. Discrimination;

4. Arbitrator immunity;

5. Summary disposal of weak claims;

6. Court powers in support of arbitral proceedings;

7. Jurisdictional challenges to awards; and

8. Appeals on a point of law.

Of these, a number of key points may prove of interest for arbitration practitioners and users alike, depending on the approach ultimately adopted by the commission.

Confidentiality Standards Should Continue to Derive From Case Law, Not Codes

Confidentiality is often cited as a main draw of commercial arbitration in London. Given the frequency with which this advantage is raised, arbitration users from other jurisdictions would be forgiven for assuming that the obligation to maintain the confidentiality of materials generated by or produced in arbitration was long the subject of legislation governing arbitration in this jurisdiction. Not so.

Instead, the principle that arbitrations in London are generally subject to a duty not only of privacy, in common with many other jurisdictions, but also, somewhat more unusually, of confidentiality, is a default term implied by law — even in the absence of express agreement by the parties in their arbitration agreements or choice of rules, such as the express confidentiality obligation in the London Court of International Arbitration's rules.

Those drafting the 1996 act opted against codifying this obligation on the basis that the exceptions to arbitral confidentiality were potentially myriad and unsettled in character. The clear preference, therefore, was to allow for the pragmatic development of the law in this area through court decision making.

There have been several cases on the question of arbitral confidentiality in the intervening years, most notably the 2008 decision from the Court of Appeal of England and Wales in the long-running dispute in Emmott v. Michael Wilson & Partners Ltd., in which the court held that the duty of arbitral confidentiality was "really a rule of substantive law masquerading as an implied term" and set out various exceptions to that duty.

While certain of those exceptions are unlikely to be in any doubt, e.g., where there is a contrary agreement of the parties or a disclosure requirement imposed by law, others are less certain. These more questionable exceptions might touch on the scope of their application, i.e., disclosure where it is, according to the consultation paper, "reasonably necessary for the protection of the legitimate interests of an arbitrating party," or their existence. i.e., disclosure in the public interest — something the Court of Appeal regarded as a maybe.

In its consultation paper, the Law Commission expresses a clear preference to maintain the status quo, allowing the law on arbitral confidentiality to continue to develop via case law only. The commission's reasoning has two main driving points:

- As was the case in 1996, codifying the exceptions to arbitral confidentiality remains inherently difficult when the law in this area continues to develop.

- No doubt marking a shift in attitudes in the last 25 years, the commission notes the trend toward greater transparency in certain kinds of arbitration, such as investor-state arbitration, or with respect to certain aspects of arbitration, such as the publication of awards.

These are good reasons against an attempt at codifying the contours of confidentiality. Is this a missed opportunity, however? Should international users of arbitration in this jurisdiction be expected to trawl through case law to understand their rights and obligations regarding confidentiality — case law that the commission itself acknowledges would take 30-plus pages to analyze?

Or would it be better to codify the basic default proposition of arbitral confidentiality and its main exceptions, while leaving scope for the courts to continue to develop those exceptions?

Moreover, is the commission's reference to an increased appetite for transparency a red herring?

Insofar as the investor-state context is concerned, much of that arbitration occurs under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, known as the ICSID Convention, to which the 1996 act simply does not apply in any event.

It could also be said that rules on transparency that are uniquely desirable for certain kinds of arbitration are best developed by the institutions dealing with those kinds of arbitration day to day. Equally, any amended act could provide for tribunals to have discretion to allow for greater transparency where that is supported by custom and practice in the type of arbitration — or industry sector — before them.

Tightening Arbitrators' Impartiality Obligations

The act deliberately does not impose a duty of independence on arbitrators, requiring only that they should act fairly and impartially toward the parties.

While again potentially surprising to international practitioners, the reasoning of the drafting committee in 1996 was that what matters is not complete independence from arbitrating parties, but that an arbitrator is impartial and seen to be impartial, noting that a significant lack of independence with respect to an arbitrating party could obviously draw the latter into question.

The commission's preference is, again, to maintain the status quo. Among other reasons, the commission notes that in some sectors complete independence is impossible, as the pool of professionals is limited and their degree of interconnection therefore inevitable.

While that is no doubt correct, many arbitral rules — including the International Bar Association Guidelines on Conflict of Interest in International Arbitration, often seen as the leading guidance in this area — speak of impartiality and independence without drawing significant distinctions between the two concepts.

The result is that by virtue of the rules incorporated by parties in their arbitration agreements or generally adopted as guidance, independence is a requirement imposed on arbitrators more often than not, even if the commission decides against codifying it.

Protection Against Discrimination

The commission points out that, while things have improved, arbitral appointments are still far from representative, citing, as one example only, that women are still around three times less likely to be appointed as arbitrators than men.

Arbitrators are also not granted certain protections against discrimination, stemming from the 2011 case of Jivraj v. Hashwani, in which the U.K. Supreme Court ruled that an arbitrator, although appointed under a contract, was not appointed under a contract of employment, so discrimination rules could not apply.

The commission considers that, while equality legislation therefore does not extend to arbitration as matters stand, that "must be questioned as a matter of policy." The consultation accordingly contains proposals that:

(1) The appointment of an arbitrator should not be susceptible to challenge on the basis of the arbitrator's protected characteristics; and

(2) Any agreement between the parties in relation to the arbitrator's protected characteristics 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.

The proposal would reflect the definition of protected characteristics under Section 4 of the Equality Act 2010, namely age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation.

Strengthening Arbitrator Immunity

Arbitrators are currently protected from liability under the 1996 Act for anything done in their function as an arbitrator unless done in bad faith. However, arbitrators can still incur liability for resigning and if removed by the court, with the commission receiving feedback that the related costs can be substantial and often not covered by professional indemnity insurance.

The commission sees these exceptions to immunity as potentially damaging to the finality of arbitration, as they create delays from parallel litigation, as well as potentially being a vehicle for parties to pressure arbitrators, in turn harming their impartiality.

The potentially problematic case law cited by the commission includes cases like Cofely Ltd. v. Bingham[1] in 2016, in which the High Court of Justice "agreed to remove an arbitrator after he responded inappropriately to one party's inquiries about his relationship with the other party's solicitor," indicating apparent, but not actual, bias. Subsequently, a costs order was made against the arbitrator for contesting the application.

The commission also cited C Ltd. v. D in 2020,[2] in which the High Court stated that it seems correct in principle that immunity under the 1996 act did not preclude an arbitrator from being ordered to pay costs in relation to a removal application that the arbitrator had resisted.

Another case mentioned was Halliburton Co v. Chubb Bermuda Insurance Ltd., also in 2020[3] in the U.K. Supreme Court, in which Judge Patrick Hodge remarked "that an arbitrator who breaches their duty of disclosure might incur the costs of an application to remove them, even if the challenge is ultimately unsuccessful."

Summary Judgments for Arbitrations

While the 1996 act requires the tribunal to adopt procedures that avoid unnecessary delay and expense, there is no express provision for the summary disposal of weak claims. The commission rightly suggests arbitrators are currently reluctant to deal with claims on a summary basis for fear of opening themselves to claims of acting unfairly or unreasonably and having a summary ruling challenged in court.

The paper suggests reassuring arbitrators by the enactment of a nonmandatory summary procedure that would safeguard procedural due process and set out a suitable threshold for disposing of issues or claims early. The sentiment is that time and costs can and should be saved by these means if the parties agree to it.

This is not a novel suggestion, and summary procedures have been adopted in many arbitral rules and regimes in the period since the act was enacted. Legitimate doubts remain as to the international enforceability of awards arising from summary processes. Time bought during the arbitration could be lost in needless battles enforcing in jurisdictions that are not always consistent in their approach to foreign awards.

With that said, if arbitrating parties are willing to contract into this risk when executing their arbitration agreements, clear codified guidance on how summary processes should be approached can only be a good thing.

Comment

The Law Commission's preference to maintain the status quo in several of the areas under review is understandable and very arguably right. London is one of the most popular seats, if not the most popular seat, for international arbitration, at least in the commercial sphere — strongly suggesting that it ain't broke.

However, the global landscape, both generally and with respect to international arbitration specifically, is vastly different now from what it was in 1996. Thoughtful forward-looking arbitration legislation and rules now exist in a plethora of jurisdictions. Similarly, courts in many of those jurisdictions are sophisticated in the way that they treat and support arbitrating parties' choice as to dispute resolution — very much as is the case with the English courts.

As practitioners, we owe it to ourselves and our arbitration-using clients to reflect carefully on the Law Commission's proposals, including those briefly summarized above, and respond by the commission's deadline of Dec. 15.

The more debate provoked, the better: If the status quo truly is preferable on some of the topics addressed, let that choice be made following robust comment from all with a stake in the future of arbitration in London.

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[1] [2016] EWHC 240 (Comm), [2016] All ER (Comm) 129.

[2] [2020] EWHC 1283 (Comm), [2020] Costs LR 955.

[3] [2020] UKSC 48, [2021] AC 1083.