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UK: Trends and Developments

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UK

Trends and Developments

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Introduction

The UK is globally recognised as a premier hub for arbitration, and its popularity among arbitration users continues to rise. To take just one metric, the number of arbitration referrals made to the London Court of International Arbitration (or the LCIA) in the last quarter of 2022, surpassed the referrals made in 2018, 2019 and 2021.

While much remains the same in UK arbitration, a stability that users have come to prize over the years, this is a moment of change and development. The Law Commission of England and Wales (the "Law Commission") has sought comment on and published initial proposals for potential reforms to the Arbitration Act 1996 (the "Act"), thus starting the ball rolling on what, if enacted, will be the first amendments to the Act. While any such amendment of the Act remains some way away, the Law Commission's areas of focus signal important (if sometimes subtle) changes in the offing. They also embrace procedural innovations – such as summary judgment and emergency arbitration – that are becoming mainstays of the UK and global arbitration scene. This short essay examines these trends and developments, at once local and global, in arbitration in the UK.

This article was written before the Law Commission of England and Wales released its final report and proposed amendments in the form of a draft bill on 6 September 2023.

The Law Commission's Recommendations

In September 2022, the Law Commission published its initial proposals for potential reforms to the Act. This was a momentous occasion for the arbitration world, as it constituted the first consultation and review of the law governing arbitration proceedings seated in England, Wales and North Ireland since it was enacted in 1996. The public consultation closed in December 2022. Various consultation events and 118 consultee responses later, the Law Commission published its second consultation paper on the Act in March 2023. The second-round public consultation closed in May 2023.

In this section, we first summarise the key proposed reforms identified by the Law Commission, and then analyse in further detail three key proposals that in our view will be of particular interest to commercial parties who regularly arbitrate in the UK.

The Law Commission's proposals

In the first consultation paper published in September 2022, the Law Commission addressed a plethora of issues related to arbitration, with a wide focus. Their proposals spanned important procedural mechanisms (such as summary disposals of meritless issues) to significant anti-discrimination protections (such as rendering unenforceable, as a general matter, any agreement related to an arbitrator's protected characteristics). The key proposed reforms included the following.

Independence of arbitrators and disclosure

The Law Commission proposed "that the Act should be amended to provide that arbitrators have a continuing duty to disclose any circumstances which might reasonably give rise to justifiable doubts as to their impartiality."

Discrimination

The Law Commission proposed that "(i) the appointment of an arbitrator should not be susceptible to challenge on the basis of the arbitrator's protected characteristics; and (ii) any agreement between the parties in relation to the arbitrator's protected characteristics should be unenforceable, unless in the context of that arbi-

tration, requiring the arbitrator to have that protected characteristic is a proportionate means of achieving a legitimate aim." "Protected characteristics" are those identified in section 4 of the Equality Act 2010: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation.

Immunity of arbitrators

The Law Commission was of the view that "the immunity of arbitrators should be strengthened and, in particular, that the case law which holds them potentially liable for the costs of court applications should be reversed." The Law Commission also asked "consultees whether they consider that arbitrators should incur liability for resignation at all, or perhaps only if their resignation is shown to be unreasonable."

Summary disposal of issues that lack merit

The Law Commission proposed that "the Act should provide explicitly that an arbitral tribunal may adopt a summary procedure to dispose of a claim or defence", where such a provision's application will be non-mandatory – "the parties should be able to agree to opt out from it in their arbitration agreement." The Law Commission suggested that such a procedure "would require an application by one of the parties, and that the summary procedure to be adopted would be a matter for the arbitral tribunal, in the circumstances of the case, in consultation with the parties."

Interim measures ordered by the court in support of arbitral proceedings (section 44 of the Act)

The Law Commission made two key proposals in relation to interim measures. First, in regard to such interim measures against parties not in the arbitration, the Commission recommended such "third parties should have the usual full right of appeal, rather than the restricted right of appeal which applies to arbitral parties" because "arbitral parties have agreed to arbitration, so it is fair to limit their access to the court, whereas third parties have not agreed to arbitration or to limit their recourse to court." Second, in relation to section 44's current grant of authority to permit "the taking of evidence of witnesses," the Law Commission recommended clarifying that such evidence would be by deposition only "to preclude any confusing overlap with section 43, which relates to witness summonses."

Jurisdictional challenges against arbitral awards (section 67)

The Law Commission proposed that "where a party has participated in arbitral proceedings, and has objected to the jurisdiction of the arbitral tribunal, which has ruled on its jurisdiction in an award, any subsequent challenge under section 67 should be by way of an appeal and not a rehearing." Further, it also proposed that "section 67 should be amended to include the further remedy that the court may declare the award to be of no effect" and "that an arbitral tribunal should be able to make an award of costs in consequence of an award ruling that it has no substantive jurisdiction."

But the Law Commission did not see cause for reform everywhere it looked. It found that the Act did not need to make further provision for arbitration mainstays, including confidentiality and emergency arbitration.

Confidentiality

The Law Commission concluded "that the Act should not seek to codify the law of confidentiality, and that the law of confidentiality is better left to be developed by the courts."

Emergency Arbitration

The Law Commission was of the view that "that the provisions of the Act should not apply generally to emergency arbitrators" and "that the Act should not include provisions for the court to administer a scheme of emergency arbitrators." The Law Commission thought that such a provision "would involve a level of direct management in the arbitral proceedings which is not suited to the courts."

Appeals on a point of law (section 69)

The Law Commission also found that no reforms to section 69 were needed. The Act currently provides that a party to arbitral proceedings can appeal to the court on a question of law arising out of an award under section 69. The current approach, the Law Commission explained, is based on "two competing motivations. One is to ensure the finality of arbitral awards. Another is to ensure that errors of law are corrected, so that the law is applied consistently and in common to everyone".

Second consultation paper

On 27 March 2023, the Law Commission published its second consultation paper on the review of the Arbitration Act 1996. Based on the responses and inputs received during the first consultation, the Law Commission in the second round addressed the following areas.

Proper law of the arbitration agreement

The Law Commission proposed that "a new rule be introduced into the Act to the effect that the law of the arbitration agreement is the law of the seat, unless the parties expressly agree otherwise in the arbitration agreement itself." It was of the opinion that a "default rule in favour of the law of the seat would see more arbitration agreements governed by the law of England and Wales, when those arbitrations are also seated here."

Challenges to awards under section 67 on the basis that the tribunal lacked jurisdiction

The Law Commission updated its proposal to account for the criticism the first proposal received for using the language of "appeal". The updated proposal states "(1) the court should not entertain any new grounds of objection, or any new evidence, unless even with reasonable diligence the grounds could not have been advanced or the evidence submitted before the tribunal; (2) evidence should not be reheard, save exceptionally in the interests of justice; and (3) the court should allow the challenge only where the decision of the tribunal on its jurisdiction was wrong." The Law Commission was also of the view that "these particularised limits to a challenge under section 67 should be adopted in rules of court, rather than enshrined in the Act."

Discrimination in the context of arbitration

The Law Commission, while retaining its initial proposal, has also sought further responses to whether "discrimination should be generally prohibited in the context of arbitration" and what remedies would be appropriate where it occurs.

The proper law of the arbitration agreement

What law governs an arbitration agreement when the arbitration agreement does not expressly set out an explicit (or implicit) choice of substantive law? Two popular answers have developed in the literature: the first is that the law of the main or "matrix" contract should govern the arbitration agreement as well, and the second is that the law of the seat should govern the substantive law of the arbitration agreement. As has been widely covered in the legal literature, the UK Supreme Court answered this question in the seminal 2020 case of Enka v. Chubb [2020]

UKSC 38. The Supreme Court came down on the side of the first camp: the governing law of the matrix contract is presumptively the governing law of the arbitration agreement unless there are factors rebutting this presumption. Where neither the matrix contract nor the arbitration agreement provide a choice of law, the arbitration agreement will be governed by the law that it is most closely connected with.

While the Supreme Court in Enka invoked common business sense as one of the rationales for its ultimate decision, commentators have noted that the decision itself can lead to perhaps unintended results. For example, where (i) the matrix contract is governed by a foreign law, (ii) the arbitration agreement is silent on choice of substantive law, and (iii) the seat is in England and Wales, under Enka, the applicable foreign law will govern any disputes relating to the scope and effect of the arbitration agreement. Regular business users – and not arbitration lawyers – may not anticipate that outcome when they agree to a contract that says all arbitrations will take place in (say) London. Additionally, where the non-mandatory elements of the Act are substantive rather than procedural, the implied choice of a foreign law to govern the arbitration agreement will have the effect of disapplying those requirements, in accordance with section 4(5) of the Act.

The Law Commission took stock of the post-Enka landscape and saw troubles ahead. It noted that the test for the law of the arbitration agreement in Enka is complex and may lead to unexpected and unpredictable results. To continue with the example above, in crucial areas, including separability, arbitrability, breadth, and confidentiality, the application of foreign law instead of English law would, the Law Commission worried, "oust" English and Welsh law.

Ultimately, the Law Commission decided that the second camp (favouring the law of the seat) has the better argument. It recommends amending the Act to add the following new statutory rule: "The law of the arbitration agreement is the law of the seat, unless the parties expressly agree otherwise in the arbitration agreement itself."

The Law Commission's proposed reform has the advantages of simplicity and certainty, as stated in its consultation document. What its ultimate impact will be, if adopted, remains to be seen, particularly since it would undo the settled understanding that has now taken shape post-Enka and one that will continue to be judicially developed until the enactment of any proposed revisions.

Procedure for jurisdictional challenges to awards under section 67

Section 67 of the Act allows parties to challenge an arbitral award on the grounds that the tribunal lacked substantive jurisdiction. Section 67 is a particularly potent provision because, as the Supreme Court clarified in Dallah v Pakistan, a challenge under this section results in a "de novo" or full rehearing.

In the Law Commission's first consultation paper, it proposed revising section 67 to make clear that an application under that section would be by way of "appeal" and not a full rehearing. The responses to this initial proposal were strongly divided. In consideration of those responses, in its second consultation paper, the Law Commission stated that its view of the matter had "evolved" and proposed "softer" changes to be implemented through court rules rather than modifying the Act itself. In particular, the Law Commission clarified that its usage of the word "appeal" meant that the court "would not ordinarily receive oral evidence, or new evidence

which was not before the tribunal". The Commission's ultimate proposal, set out above, seeks to restrict the nature of a section 67 hearing without explicitly saying so in the text of the Act.

Summary judgment

The Law Commission has proposed giving arbitral tribunals the explicit authority to summarily dismiss meritless claims. Given the current commitment of the arbitration community to cut time and costs through procedural efficiency, the Law Commission's interest in reform in this area is welcome though not unexpected. Summary procedures are currently included in the arbitration rules of the majority of important arbitral tribunals. However, most significant international arbitration jurisdictions do not explicitly provide for summary disposition in their arbitration laws. The Law Commission's proposal – and its subsequent implementation in England and Wales – could usher in more far-reaching changes in arbitration legislation across the world.

According to the Law Commission's proposal, the Act should state that arbitral tribunals have the authority to use summary procedures to resolve a claim or an issue, provided that the parties have consented to such methods. The Law Commission's proposal tackles both the inefficiency and the "due process paranoia" that often beset arbitration reform.

Although it is arguable whether sections 33 and 34 of the Act currently give tribunals with jurisdiction in England and Wales the authority to adopt summary procedures, it is likely that the openness of the issue to questioning serves to limit the number of such applications that are even sought, let alone considered and granted.

A clear and express summary disposition provision's adoption and application could result in significant time and expense savings, especially when one party uses a so-called "guerrilla strategy" by litigating unjustified claims or defences.

By placing a heavy emphasis on the tribunal's decision and the parties' preferences, the Law Commission's approach strikes a compromise between enhanced efficiency and maintaining flexibility. The specific summary process used in a given case will vary depending on, among other things, the gravity and intricacy of the question(s) at hand. A more prescriptive approach to summary procedures would likely have invited additional unnecessary back and forth, and such developments are better left to time and practice.

Notably, the LCIA Rules regarding such summary procedures also give arbitrators a broad discretion to choose the best course of action in each case – an approach that aligns with the Law Commission's proposal. Other significant arbitral organisations, on the other hand, have chosen more explicit provisions with deadlines.

Conclusion

The Law Commission's initial consultation paper's key message was that "root and branch" revision was unnecessary because the Act is functioning as intended. It is difficult to disagree. Regardless of how the consultations turn out, the Law Commission has generally taken a stance that inspires confidence in the process, which will only further guarantee that domestic arbitrations continue to be conducted in accordance with "state of the art" standards, and bolster England and Wales' position as one of the world's leading jurisdictions for international arbitrations.

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