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If it ain't broke, don't fix it? The Law Commission recommends only limited reform of the Arbitration Act 1996

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Concluding a process (led by Prof Sarah Green and former Quadrant member Dr. Nathan Tamblyn) that began in March 2021 and included consultation with 100s of stakeholders, the Law Commission has this week (September 2023) issued its final report on its review of the Arbitration Act 1996 (the "Act").

The report recommends only limited amendments to the Act, shelving a number of potential changes that were explored through the consultation process. Happily, the 3 changes that we both wanted are included. The full report and draft bill can be found at https://www.lawcom.gov.uk/project/review-of-the-arbitration-act-1996 but below is a synopsis of what we think are the most significant proposals:

1. The introduction of a new rule on the governing law of the arbitration agreement

How to determine the law which governs an arbitration agreement split the Supreme Court in the well-known case of Enka v Chubb. Whilst the majority ruling provided a degree of certainty for users of arbitration, it has drawn criticism for being "complex and unpredictable". In short, the current common law position is that the law governing the arbitration agreement will be the law chosen by the parties. If (as is often the case) there is no choice of law specific to the arbitration agreement, then the law chosen to govern the matrix contract will be taken as the implied choice of law to govern the arbitration agreement, unless this might render the arbitration agreement invalid, in which case another law could be deemed to govern. Where there is no choice of governing law in the matrix contract, the arbitration agreement will be governed by the law with which it is most closely associated (usually the law of the seat of the arbitration).

In rejecting the argument that the law of the seat should be taken as the applicable law, the majority concluded that "The provisions of the Arbitration Act 1996 … do not justify any general inference that parties who choose an English seat of arbitration thereby intend their arbitration agreement to be governed by English law.

The Law Commission proposes that the Arbitration Act should now explicitly so provide and that the several step Enka analysis be replaced by a much simpler rule: where there is express agreement as to the law governing the arbitration agreement, that law will apply, otherwise the law of the seat will apply.

This clear rule, affording certainty and minimising the opportunity for satellite litigation, is a welcome and much needed reform.

2. The introduction of a power for arbitrators to make an arbitral award on a summary basis

The proposed changes in this area would introduce an explicit power for arbitrators to dispose of matters before them on a summary basis. Parties are free to opt out or set limits to this power if they wish, but otherwise the report proposes that arbitrators should be able to summarily dispose of matters before them on the same basis as an English judge – that a party has no real prospect of success of succeeding on that issue.

The Law Commission suggests that arbitrators already have an implicit power to dispose summarily of disputes since arbitrators are under a duty to avoid unnecessary delay and expense and have the power to decide procedural and evidential matters (subject to any party agreements on these matters that restrict those powers). However, if there is such an implicit power, it is rarely used.

As the report acknowledges, there has been "due process paranoia" – the concern that an award will be overturned or enforcement refused if a party argues that it was not afforded due process in the arbitration proceeding.

Whilst it may be unlikely that a Tribunal will determine the entire claim by way of summary disposal, the express power summarily to determine issues is a welcome change that will hopefully lead to an early weeding out of hopeless points. Increased spurious section 68 challenges should be kept in check by implementation of the report's exhortation that a tribunal should consult with the parties to ensure that they feel that they have had a reasonable opportunity to put their case and by the adoption of the High Court test which is well understood.

3. No second bites at the cherry under section 67 of the Act (lack of jurisdiction)

Section 67 allows a party to challenge a tribunal's own ruling on jurisdiction through the courts and, in Dallah v Pakistan, the Supreme Court indicated that any challenge under section 67 would be by way of a full rehearing. To our mind, whilst the annual number of such re-hearings are not huge, the repeat cross-examination of witnesses and experts and the losing party's ability to have a second bite are unfair and wasteful of time and costs.

This was a contentious matter with, the report explains, strong views both for and against reform but with the majority preferring reform. The Law Commission therefore proposes moving away from the Dallah approach such that where a party making a 67 challenge has participated in the arbitration proceedings in question, the court will not entertain any new grounds of objection or any new evidence (unless it could not with reasonable diligence have been put before the tribunal), and that evidence would not be reheard, save in the interests of justice.

The Law Commission proposes that this change be made by way of procedural rules rather than by an amendment to the Act. Various reasons for this are given including an acknowledgement that this would make subsequent amendment of the new rules easier should experience show that to be necessary.

The report also proposes amending the Act in the following areas:

4. Strengthening arbitrator immunity

Arbitrator immunity is proposed to be strengthened so that:

- An arbitrator would incur no liability for resignation unless the resignation is shown to be unreasonable; and
- An arbitrator would incur no costs liability in respect of an application for their removal unless an arbitrator has acted in bad faith.

The proposed reform would avoid the situation where an arbitrator resigns appropriately (in the example given by the Law Commission, to comply with sanctions) but could still incur liability for the consequences of that resignation, but would also discourage unreasonable resignations that generate cost and delay for the parties to the proceedings.

Where a party to an arbitration applies for removal of an arbitrator under section 24 of the Act, the arbitrator is joined as a party to the application and could potentially incur liability for costs, which could be significant and in respect of which consultees suggested insurance may not always be available. The proposed reform would ensure that the arbitrator would not be at any costs risk, unless he or she has acted in bad faith.

5. Codification of the duty of disclosure

The Law Commission proposes changes that would codify the common law position on arbitrator disclosure, which is to the effect that arbitrators have a continuing duty to disclose circumstances that might reasonably give rise to justifiable doubts as to their impartiality. The proposed formulation requires disclosure of matters within the arbitrator's actual knowledge and also what the arbitrator ought reasonably to know.

6. Clarifying court powers in support of arbitral proceedings

The report proposes clarifying the powers available vis a vis third parties under section 44 of the Act. The proposal is to confirm explicitly that orders can be made against third parties and that where an order is made against a third party that there be no requirement for the court's consent to an appeal of that decision by the third party.

But No Changes To...

The following topics have not made our headline list above because the report proposes no changes.

1. The extent and nature of the powers available under section 44
2. Confidentiality;
3. The independence of arbitrators;
4. Prohibiting discrimination in the appointment of arbitrators; and
5. Appeal on a point of law under section 69 of the Act.

Conclusion

The extensive and thorough consultation process has led to a balanced and welcome set of recommendations. Change where change is needed but not for change's sake with arbitral autonomy and party choice remaining key.

The one real surprise is the lack of any provision prohibiting discrimination in the appointment of arbitrators. We share the report's concern that arguments of discrimination could be mis-used by a disingenuous arbitral party. However, in our view, this is an area where a risk of "mis-use" should be tolerated in order to avoid the bigger picture abuse. This was a missed opportunity to say "no" to discrimination in black and white.

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"Her advice is concise and commercial, and she is extremely responsive." (Chambers UK, 2023)

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'Claire Stockford puts in the hours to get the job done and leaves no stone unturned.' Legal 500, 2023

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