THE LAW COMMISSION REVIEW OF THE ARBITRATION ACT 1996

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International Arbitration Alert

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INTRODUCTION

The Law Commission of England and Wales has published a Consultation Paper (the Paper) setting out its provisional proposals to update the Arbitration Act 1996 (the Act), applicable to arbitrations seated in England, Wales, and Northern Ireland, to ensure that it remains “state of the art." The Paper is the result of the Law Commission's own research and conversations with stakeholders. Responses to the Paper are open until 15 December 2022 and can be submitted via an online form.

It is reported that the Law Commission and the stakeholders it consulted agree “the Act works very well, with major reform neither needed nor wanted." However, a number of areas have been identified for potential development.

ARBITRATOR INDEPENDENCE AND IMPARTIALITY

The Paper considers whether the Act should impose an explicit duty on arbitrators to be independent. However, the Law Commission decided a duty of independence is “not practicable” in many areas of arbitration and it is more important for arbitrators to be impartial. The Act already contains, at Section 33, a duty of impartiality on arbitrators, and under English common law, arbitrators have a duty to disclose any matters that might reasonably give rise to justifiable doubts as to his or her impartiality (as was confirmed by the Supreme Court in Halliburton Co v Chubb Bermuda Insurance Ltd [2020] UKSC 48, in which K&L Gates acted for the appellant). The Law Commission proposes to codify this key case law by imposing an explicit continuing duty on arbitrators to disclose to the parties any information that may reasonably give rise to justifiable doubts as to their impartiality (although, in her judgment in the Halliburton decision, Lady Arden considered whether the law might be better able to keep pace with change if the courts were left to develop the law in this respect).

The Law Commission specifically invites responses from stakeholders on whether the Act should specify the state of knowledge required of an arbitrator's duty of disclosure and if so, whether this should be based upon an arbitrator's actual knowledge, or also upon what they ought to know after making reasonable inquiries. The Paper does not, however, get into whether the proper assessment of the duty of disclosure is by reference to the so called 'fair-minded and informed observer,' or alternatively by reference to matters that may give rise in the mind of any party to any justifiable doubts as to the arbitrator's impartiality, which is the formulation used in some rules of arbitration (for example LCIA Rules Art 5.4).

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IMMUNITY OF ARBITRATORS

The Paper stresses the importance of strengthening the immunity of arbitrators in order to support impartiality. The Paper notes that the impartiality of arbitrators may be undermined if they are concerned about personal challenges by parties dissatisfied with their judgments. Further, the Paper considers some “problematic” case law that holds that arbitrators may be liable for the costs of applications to remove them, even where applications are unsuccessful. The Law Commission proposes that case law holding arbitrators potentially liable for the costs of court applications should be reversed.

The Paper invites responses on whether arbitrators should incur liability for resignations at all or only if resignation is seen to be unreasonable.

SUMMARY DISPOSAL

The power to summarily dispose of issues is not explicitly available for arbitrations under the Act. Some arbitration rules now contain an explicit summary disposal procedure, often stated to be in respect of claims/defences which are manifestly without merit. Whilst the Act requires the arbitral tribunal to adopt procedures to avoid unnecessary delay or expense, it also requires the tribunal to give each party a reasonable opportunity to state their case. This has led to arbitrators being reluctant to summarily dispose of issues for fear of the award being challenged for procedural irregularity. Therefore, the Law Commission proposes to amend the Act to expressly allow arbitrators to summarily dispose of a claim or defence in order to save on time and expenses of arbitration. The provision would be non-mandatory, allowing parties to opt out of it in their arbitration agreements.

ENFORCEMENT OF ORDERS OF EMERGENCY ARBITRATORS

The Act does not provide clear remedies for when a party ignores an emergency arbitrator's interim order. The Law Commission proposes two ways to amend the Act to address this issue. One would be to allow an emergency arbitrator to issue a peremptory order in accordance with Section 41(5) of the Act. This provision gives a tribunal the power to act in the event of non-compliance, including by dismissing a claim or applying to the court for an order for compliance. The Law Commission's proposal would give an emergency arbitrator similar powers to fully constituted arbitral tribunals where a party does not comply with an order. A second proposal is to extend Section 44 of the Act, allowing courts to make orders (e.g., interim orders) in support of arbitral proceedings. Currently, for non-urgent applications under this provision, the permission of a fully constituted tribunal or arbitral parties is needed.

The Law Commission invites responses from stakeholders regarding which option should be implemented to improve the enforceability of orders by emergency arbitrators.

CONFIDENTIALITY

The Law Commission notes that the Act does not explicitly contain provisions on confidentiality. However, as noted by the Supreme Court in Halliburton, features of privacy and confidentiality are assumed to be implicit in arbitrations seated in England. Nevertheless, the Law Commission is not persuaded that confidentiality should be

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the default presumption in all arbitrations, as in some type of arbitrations (e.g., investor-state arbitrations), the default favours transparency.

Whilst the Law Commission is reluctant to propose explicit provisions in the Act in respect of confidentiality, the Paper states that parties seeking confidentiality should ensure their arbitration clauses refer to arbitral rules which provide for schemes of confidentiality (e.g., the LCIA rules).

APPEALS ON JURISDICTION

Currently, applications to the court to challenge arbitral awards on jurisdictional grounds may involve a full rehearing. The court can rehear the evidence and arguments on jurisdiction, and the tribunal's decision is given no weight. The Paper notes the potential unfairness of a full rehearing. This is because a party can make a jurisdictional challenge before a tribunal and receive comments on the deficiencies of their evidence and arguments. The party can then challenge the award before the court and develop new arguments with new evidence at the rehearing.

The Law Commission proposes that, where a party challenges a tribunal's award on jurisdiction in the court, this should be by way of an appeal and not a rehearing. This means that the court would be unable to hear oral or new evidence and be limited to reviewing the tribunal's ruling.

APPEALS ON POINTS OF LAW

The Act currently allows for parties to challenge the validity of arbitral awards where they believe the tribunal erred on a question of law. The Law Commission rejects calls for this ground of challenge to be repealed on the basis that it would aid the finality of arbitral awards. The Paper explains that the relevant section in the Act (Section 69) is relied on sparingly in applications for permission to appeal (in less than 1% of cases seated in England), but enough meritorious appeals arise to warrant the availability of such a challenge. Further, the parties can opt out of this non-mandatory provision in their arbitration agreements, including through incorporation of arbitral rules which exclude appeals on a point of law.

CONCLUSION

Overall, the limited number of changes proposed in the Paper show that the Act, issued over 25 years ago, has stood the test of time very well. Some of the more significant proposed adjustments have focused on aspects which have come into particular focus in recent years, around arbitrator impartiality, summary disposal of issues, and emergency arbitrator procedures, with the aim of maintaining London's position as one of the most preferred seats globally for international arbitration.

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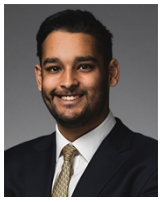

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