England & Wales Law Commission Publishes Final Reform Recommendations for Arbitration Act 1996

4 October 2023

The Law Commission (the "Commission") recently published its long-awaited reform proposals regarding the UK's Arbitration Act 1996 (the "Act") and accompanying draft legislation. This follows a two-and-a-half-year review and consultation process that has been widely praised as robust and transparent.

Following detailed consultation papers (reported by us here), the Commission's final reform proposals seek to fine-tune rather than overhaul the existing legislation and will not come as a surprise to practitioners and stakeholders who have been involved in the process. The next step in the legislative process will be for the UK government to decide whether to table the draft legislation.

KEY TAKEAWAYS

- The Commission has recommended a number of changes to clarify certain powers and obligations of tribunals under the Act. This includes the power of tribunals to award summary judgment and make orders against third parties, as well as the duty on arbitrators to disclose circumstances they ought reasonably to be aware of which may affect their impartiality.

- The Commission now recommends to leave unchanged aspects of the law that had previously been mooted for reform, including confidentiality, appeals on points of law and arbitrator independence.

- Overall, the Commission's recommendations seek to increase certainty for users of the Act by making thoughtful updates rather than wholesale changes. This is generally in line with the Commission's assessment that the arbitration framework in England and Wales is fundamentally sound.

THE COMMISSION'S RECOMMENDATIONS FOR CHANGE

There are **six** major recommended reforms, which are summarised below:

Arbitrator Disclosure

The Commission has recommended that the Act should clarify that arbitrators have a continuing duty to disclose any circumstances which might reasonably give rise to justifiable doubts about their impartiality, which they: (i) are aware of; or (ii) ought reasonably to be aware of. The first limb of this test is already reflected in pre-existing case law. However, the Commission believes that legislative codification will make the law more accessible to users of arbitration, whilst maintaining flexibility for courts and tribunals to define in concrete cases which "circumstances" give rise to a justifiable doubt regarding impartiality.

Strengthening Arbitrator Immunity Regarding Resignations and Removal Applications

It is also recommended that the Act should clarify that an arbitrator is not liable for: (i) resigning from a tribunal unless their resignation is unreasonable; or (ii) the costs of an application to remove them from a tribunal, unless they acted in bad faith. These proposals aim to ensure that the arbitrator remains impartial, including by reducing the risk of arbitrators conceding to parties' demands out of fear of prompting removal applications and incurring associated costs.

Summary Awards

The Commission recommends that the Act should explicitly confirm that tribunals can make summary awards, provided this power is not disapplied or amended by the parties (e.g., through the adoption of arbitration rules providing for such disapplication). The proposal is that a tribunal should only make a summary award if it considers that a party has no real prospect of succeeding on the subject issue, although the specific procedure adopted should be a matter for the tribunal.

Clarification of Court Powers in Support of Arbitral Proceedings, Including Emergency Proceedings

It has also been recommended that the Act clarify that certain orders made by the tribunal (e.g., to grant an interim injunction or take witness evidence) can be made against third parties, and not just the parties to the dispute. Unlike the parties to the dispute, who can only appeal tribunal orders made pursuant to the Act with the tribunal's consent, third parties should have the right to appeal orders with the relevant appellate court's consent.

The proposals also argue that applications for third-party orders should be available to parties in emergency arbitrations. To enforce orders made in an emergency arbitration, parties would have the option of either applying to the emergency arbitrator for an immediate order (enforceable by the court) or applying directly to the court under section 44 of the Act. This reflects the options available to parties in regular arbitral proceedings.

Governing Law of Arbitration Agreements

The Commission's view is that the Act should include a new provision providing that the governing law of an arbitration clause is the law which: (i) the parties expressly agree applies; or (ii) if the parties do not agree, the law of the seat of the arbitration. This proposal comes in the wake of the Supreme Court's Enka v Chubb decision which generated uncertainty as to the governing law of an arbitration agreement under English law.

An Improved Framework for Challenges to Awards under Section 67 of the Act on the Basis That the Tribunal Lacked Jurisdiction

The Commission recommends an improved framework for a section 67 challenge. More specifically, in circumstances where:

- a party objects to a tribunal's jurisdiction; and
- the tribunal has ruled on its jurisdiction,

if a party makes a further jurisdictional challenge, the appellate court should:

- not permit new grounds of objection or new evidence, unless it could not with reasonable diligence have been presented to the original tribunal; and
- ensure that evidence will not be reheard, other than in the interests of justice.

This would narrow the present appeal mechanism, which allows a party to challenge a tribunal's ruling on its jurisdiction in an appellate court, provided the challenge is made promptly.

THE COMMISSION'S RECOMMENDATIONS FOR MAINTAINING THE *STATUS QUO*

There are **five** areas previously mooted for reform which the Commission now recommends should remain unchanged:

Confidentiality

The Commission has rejected the suggestion of a general statutory duty of confidentiality in arbitration which would codify and/or clarify the existing case law. As such, parties would remain bound by an implied common law duty of confidentiality in international arbitration. Parties would also remain free to agree specific confidentiality measures between themselves, including on the basis of arbitral rules.

Arbitrator Independence

A statutory duty of arbitrator independence was also deemed to be practically unworkable, given the frequent requirement for, and limited number of individuals with specialised expertise, and inevitable encounters between those individuals. The Commission suggests that the existing duty of impartiality encompasses independence and should provide sufficient protection for the parties.

Discrimination in Arbitration

The Commission concluded that the law should not impose a duty on parties to either: (i) avoid discrimination when appointing arbitrators; or (ii) avoid discrimination in arbitration more generally. This, the Commission has suggested, would reduce the scope for parties to cynically invoke discrimination allegations to seek to set-aside arbitral awards, and would reduce the risk of satellite litigation more generally. In making this recommendation, the Commission noted that various prohibitions on discrimination already apply to arbitral proceedings, for example, under the Equality Act 2002 and the professional conduct obligations of legal representatives acting in arbitration proceedings.

Appeal on Points of Law

Another recommendation is that the current "opt-out" mechanism for appeals on points of law should remain unchanged. Under the Act, parties may appeal arbitral awards on points of law, provided: (i) all parties consent; or (ii) the appellate court consents. The threshold for an appeal – which is very high – requires the appellant to show, among other things, that the tribunal's decision was obviously wrong, or the appeal raises a point of general public importance.

Clarification of Court Powers in Support of Emergency Arbitrators

Finally, the Commission's view is that emergency arbitrators should not be appointed by the courts, but only by the parties, where they have agreed to apply institutional rules or a separate scheme to administer the appointment. It has also rejected the suggestion that every reference in the Act to "arbitrator" or "tribunal" should not be interpreted as including "emergency arbitrator", given that the decisions of emergency

arbitrators can be reviewed by the full tribunal once established, which is itself governed by the full provisions of the Act.

REFLECTIONS

The Commission's reform proposals have generally been positively received. Industry stakeholders had advocated a minimalist approach to the reforms and for amended legislation that is clear, accessible to international users, and without undue complexity. A number of stakeholders have, however, criticised the Commission's recommendations to maintain the status quo in certain areas of the law, including in relation to:

- **Discrimination**: While the Commission had initially suggested that the Act should render contractual terms which allow for discriminatory arbitral appointments unenforceable, it has now abandoned that approach;

- **Arbitrator Independence**: Though the Commission considers that the existing duty of arbitrator impartiality is sufficient to ensure the absence of bias in arbitral adjudication, some industry stakeholders have questioned why the Act could not be amended to expressly require independence, which is a commonly accepted standard in arbitration; and

- **Confidentiality**: Users have criticised the decision not to recommend codification of the confidentiality of arbitral proceedings, including because this is already a major attraction of England and Wales compared to other seats.

Given that the Commission's recommendations do not transform the substantive provisions of the Act, if adopted, the direct implications for users of the Act are likely to be limited. However, the Commission's recommendations will simplify use of the Act and improve administrative coherence when conducting arbitrations in England and Wales. By bringing welcomed clarity to certain parts of the Act, these recommendations will continue to support England and Wales' position as a leading arbitration venue globally.

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