

Quality Over Quantity: Law Commission Proposes Targeted Amendments to English Arbitration Act

The Law Commission's Final Report on the Arbitration Act 1996 makes a modest number of important recommendations for reform.

On 6 September 2023, the Law Commission concluded its review of the Arbitration Act 1996 (the Act), publishing a final report (the Report) of proposed reforms to ensure that the UK remains a global leader in international arbitration. The Report includes a draft bill reflecting the Law Commission's proposals, and the UK government has since confirmed that it will consider the proposed amendments to the Act.¹

The review began in 2021 at the request of the Ministry of Justice and involved two rounds of public consultations, in September 2022 and March 2023, with responses received from hundreds of stakeholders including academics, arbitral institutions, industry bodies, practitioners, and members of the judiciary.

The Law Commission noted from the outset that the Act continues to function successfully and that "root and branch reform" is therefore "not needed or wanted". As such, the Law Commission's proposals comprise a package of targeted tweaks, rather than wholesale transformation, and include recommendations for new rules on:

- determining the governing law of arbitration agreements;
- summary disposal in arbitration proceedings;
- challenges to awards for lack of jurisdiction under section 67 of the Act;
- arbitrators' duties of disclosure;
- arbitrator immunity; and
- court powers to support arbitration proceedings.

This Client Alert considers the Law Commission's key proposals in more detail below.

Notably, the Law Commission decided against changes in a number of areas, concluding that the current position is either satisfactory or that reforms would be disruptive in practice. For example, the Law Commission:

- declined to propose new anti-discrimination rules for the appointment of arbitrators amid fears that any changes would not in fact promote diversity and could give rise to satellite or tactical litigation over the validity of appointments;
- decided not to amend appeals on points of law under section 69 of the Act, concluding that, as section 69 is non-mandatory and is excluded by some institutional rules, the Act adequately balances the competing interests of finality of arbitration (by limiting appeals) and the correction of errors of law; and
- decided against a one-size-fits-all statutory rule on confidentiality, noting that this would not be sufficiently nuanced to capture the many ways in which confidentiality can arise in arbitration proceedings through agreement, under institutional rules, or through the application of English common law rules.

Governing Law of the Arbitration Agreement

Perhaps the most significant proposal is the Law Commission's recommendation for a new statutory rule on the deemed governing law of arbitration agreements. The Law Commission has proposed introducing a new section to the Act that provides that, in the absence of an express choice, an arbitration agreement will be deemed to be governed by the law of the seat.

This codification seeks to do away with the complexity of the English common law rules on the implied governing law of arbitration agreements following the (divided) UK Supreme Court's decision in *Enka v. Chubb*.²

In *Enka*, the Supreme Court set out a multi-stage test. In the absence of an express choice, the law governing the arbitration agreement is to be inferred from the parties' choice of governing law for the host contract. However, this presumption is subject to certain "additional factors" that may change the analysis (e.g., if a provision of the law of the seat requires a different outcome or the deemed governing law would render the arbitration agreement invalid).³ If the governing law of the host contract is also not expressly specified, the arbitration agreement is deemed to be governed by the law to which it is most closely connected (most likely the law of the seat).⁴

Despite a divergence of views among consultees on this issue, the Law Commission's proposal departs from the default position under *Enka* by looking to the parties' choice of seat alone — not the choice of governing law for the host contract — to establish the deemed governing law of an arbitration agreement.

This proposal promotes simplicity and certainty, and, if implemented, would eliminate the need for parties to litigate this issue. However, any new statutory provision would operate prospectively. Pending enactment, the common law rules under *Enka* would continue to apply to arbitration agreements across the board. After enactment, those rules would continue to apply to arbitration agreements entered into before the new statutory rule was introduced.

Power of Summary Disposal

The Act makes no express provision for arbitrators to dispose of issues or claims summarily (i.e., without a full hearing) for lack of merit. However, the Act arguably contains an implicit power of summary disposal under section 33(1)(b), which provides that arbitral tribunals must adopt procedures that will "avoid [...] unnecessary delay or expense". Moreover, the English courts have held that a full hearing of the merits may not be required in every case.⁵

Nevertheless, the risk that any resulting award may be challenged or not enforced — so-called “due process paranoia” — is thought to dissuade tribunals from disposing of cases on a summary basis.

In light of the disappointing rarity of summary disposal in arbitration, the Law Commission has proposed the introduction of an explicit statutory power to allow tribunals to issue summary awards on the application of a party. The proposed threshold for summary disposal mirrors the test for summary judgment in English civil proceedings — “no real prospect of success”⁶ — rather than the “manifestly without merit” test in various institutional rules (including ICSID, LCIA, and SIAC).

The new provision would be non-mandatory — meaning parties would be free to derogate from it through agreement — and would leave the precise procedure to be adopted to be determined by the tribunal.

Challenges to Awards on Jurisdictional Grounds

Under section 67 of the Act, parties can challenge awards on the basis that the tribunal lacked substantive jurisdiction. Since the UK Supreme Court’s decision in *Dallah v. Pakistan*,⁷ a section 67 challenge involves a full rehearing by the court — a *de novo* review — even if the tribunal has already determined its jurisdiction.

The Law Commission concluded that the current position is potentially inefficient and unfair, because *de novo* review entails the repetition of evidence (including cross-examination) and argument, and because the party challenging jurisdiction is allowed a second bite of the cherry.

The Law Commission has therefore proposed that, where a tribunal has already ruled on its jurisdiction and the party bringing a section 67 challenge has participated in the proceedings, the court’s role should be limited to reviewing the tribunal’s decision rather than conducting a rehearing. Under the proposed rules, the court would not rehear evidence except unless necessary in the interests of justice. Nor would the court permit new evidence or objections unless they could not with reasonable diligence have been put before the tribunal.

Instead of an amendment to the Act, the Law Commission recommends that these proposals be implemented by way of changes to the existing court rules, noting that they are procedural in nature and could be more easily updated should it be necessary to do so following practical experience.

Duty of Disclosure

At common law, arbitrators are subject to a continuing duty to disclose any circumstances that might reasonably give rise to justifiable doubts as to their impartiality. This duty of disclosure was recognized by the UK Supreme Court in *Halliburton v. Chubb*⁸ and is incidental to the express duty of impartiality that applies to arbitrators under section 33(1)(a) of the Act — proper disclosure being itself a facet of impartiality.

The Law Commission has proposed putting the existing duty of disclosure on a statutory footing. The codified duty would be broader than the existing English common law rules, applying not just to what the arbitrator knew at the relevant time but also to matters that they ought reasonably to have known — a question left open in *Halliburton*.

The Law Commission noted that a “constructive knowledge” test may require an arbitrator to make reasonable enquiries. Beyond this, the proposed statutory rule is not prescriptive as to what information would need to be disclosed, with the Law Commission noting that the necessary disclosures would vary based on the circumstances of the case.

Arbitrator Immunity

Under section 29 of the Act, arbitrators are immune from liability for any act or omission “in the discharge [...] of their functions as arbitrator”, except where they have acted in bad faith. However, the current position is that an arbitrator may still be liable for costs caused by their resignation (such as additional legal fees for appointing a replacement) or in relation to an application for their removal under section 24 of the Act.

The Law Commission has proposed extending arbitrator immunity to cover both scenarios: resignations, unless they are unreasonable, and removals under section 24, unless the arbitrator has acted in bad faith. These changes have been proposed to encourage robust decision making and to shield arbitrators from personal liability for resigning when doing so may be necessary (e.g., to comply with sanctions).

Court Powers in Support of Arbitral Proceedings

Under section 44 of the Act, the court has powers to grant interim relief if the tribunal is unable to act — including in relation to the preservation of evidence and various forms of injunctive relief. The case law is unclear as to whether such orders can be made against third parties.

The Law Commission has proposed amending the Act to ensure that such measures would bind third parties. To address the risk of injustice, the Law Commission’s proposals provide that an affected third party would be entitled to appeal without the permission of the decision-making court.

Separately, the Law Commission has proposed new court powers in support of emergency arbitrators — sole arbitrators appointed on an urgent and interim basis to decide applications before the tribunal is fully constituted. Emergency arbitration is provided for in some institutional rules but is an innovation which post-dates the Act. The Report therefore suggests bringing the Act up to date by giving emergency arbitrators the power to issue peremptory orders against non-compliant parties, a power already conferred on tribunals by section 41. Further non-compliance could then result in a court order against that party under an extended section 42.

Conclusion

Following an extensive and rigorous consultation process, the Law Commission’s proposed amendments seek to finesse, rather than overhaul, the Act to ensure that it remains “state of the art”. The limited number of proposals reflect the Law Commission’s overriding conclusion that the Act continues to operate effectively.

If implemented, the proposed amendments would address areas of uncertainty, remove some of the challenges and complexity introduced by recent case law, promote efficiency and finality, and bring the Act up to date with developments in arbitration practice. Although not all of the Law Commission’s recommendations garnered unanimous support, the proposals are pragmatic in nature and seek to address the evolving needs of arbitration users while avoiding reform for reform’s sake.

This Client Alert was prepared with the assistance of Aris Adamantopoulos in the London office of Latham & Watkins.

If you have questions about this Client Alert, please contact one of the authors listed below or the Latham lawyer with whom you normally consult:

Oliver Browne

oliver.browne@lw.com
+44.20.7710.1825
London

Robert Price

robert.price@lw.com
+44.20.7710.4682
London

Ram Mashru

ram.mashru@lw.com
+44.20.7710.4659
London

Matthew Unsworth

matthew.unsworth@lw.com
+44.20.7866.2760
London

Endnotes

- ¹ Law Commission, 'Improvements recommended to Arbitration Act 1996 to ensure UK position as international arbitration leader' (6 September 2023), available at <<https://www.lawcom.gov.uk/improvements-recommended-to-arbitration-act-1996-to-ensure-uk-position-as-international-arbitration-leader/>>.
- ² *Enka Insaat Ve Sanayi AS v. OOO Insurance Company Chubb* [2020] UKSC 38.
- ³ *Ibid*, para. 170 (vi).
- ⁴ *Ibid*, para. 170 (viii).
- ⁵ *Travis Coal Restructured Holdings LLC v. Essar Global Fund Limited (Formerly Known as Essar Global Limited)* [2014] EWHC 2510, a matter in which Latham & Watkins represented the successful Claimant / Applicant.
- ⁶ Civil Procedure Rules, Rule 24.2.
- ⁷ *Dallah Real Estate & Tourism Holding Co v. Ministry of Religious Affairs of the Government of Pakistan* [2010] UKSC 46.
- ⁸ *Halliburton Company v. Chubb Bermuda Insurance Ltd (Formerly known as Ace Bermuda Insurance Ltd)* [2020] UKSC 48.