LAW COMMISSION PUBLISHES FINAL REPORT AND DRAFT BILL FOLLOWING ITS REVIEW OF THE ARBITRATION ACT 1996

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INTRODUCTION

On 6 September 2023, the Law Commission of England & Wales (the "Law Commission") published its final report and draft bill following its review of the Arbitration Act 1996 (the "Act"). The review was initiated by the UK Ministry of Justice in 2021, in order to ensure that the Act was still fit for purpose and continued to promote England & Wales as a leading centre for commercial arbitration.

The Law Commission's report considered many aspects of arbitration practice, including confidentiality in arbitration proceedings, independence and disclosure by arbitrators, summary disposal of disputes, appeals on a point of law, powers of courts and emergency arbitrators, and the governing law of the arbitration agreement. Overall, the Law Commission concluded that large scale reform was unnecessary and recommended only limited amendments to the Act.

This article summarises two of the more significant amendments proposed by the Law Commission, as well as two notable areas where the Law Commission concluded that no amendments to the existing provisions of the Act are required.

PROPOSALS TO AMEND THE ACT

"If adopted, the default rule applying the law of the seat will be different to the approach taken in other major arbitration venues such as Hong Kong or Singapore."

a) Governing law of the arbitration agreement

Current law

The Law Commission has proposed amending the Act to resolve one of the most controversial issues in current arbitration jurisprudence concerning the governing law of the arbitration agreement. This issue most often arises where there is no express choice by parties regarding the governing law of the arbitration agreement.

In *Enka v Chubb,*[1] the UK Supreme Court (the "Supreme Court") established a set of principles for determining the governing law of an arbitration agreement. In many instances, applying these principles, the governing law of an arbitration agreement will follow the governing law of the main contract. However, other factors may imply that the arbitration agreement should be governed by the law of the seat. These include, for example: 1) if the seat's legislation provides that the arbitration agreement should be governed by the law of the seat; or 2) if applying the governing law of the contract will cause the arbitration agreement to be invalid, or mean that the dispute is not arbitrable.[2] Finally, the principles in *Enka v Chubb* provide that in the absence of an express or implied choice of law, the governing law of the arbitration agreement should be the legal system it has the closest connection with.

Many stakeholders consider that the principles in *Enka v Chubb* are problematic and too easily lead to the application of foreign law to an arbitration agreement, even though the parties have agreed England & Wales as the seat of arbitration.

Proposed amendment

In its report, the Law Commission proposes amending the Act to clarify the position, so that the governing law of the arbitration agreement is:

"The challenging party will no longer be entitled to re-litigate the tribunal's jurisdiction under Section 67 of the Act."

- the law that the parties expressly agree applies to the arbitration agreement; or
- in the absence of any express agreement, the law of the seat of arbitration.

Comment

This proposal is a welcome amendment which, if accepted, will substantially streamline the search for the governing law of the arbitration agreement. It will ensure that party autonomy is respected without being undermined by an implied choice of foreign governing law which could give rise to difficulties with arbitrability, scope, or separability of the arbitration agreement.

If adopted, the default rule applying the law of the seat will be different to the approach taken in other major arbitration venues such as Hong Kong or Singapore, where the presumption remains that the governing law of the main contract is the implied choice of law for the arbitration agreement.[3]

b) Section 67 of the Act (challenging an award: substantive jurisdiction)

Current law

Section 67 of the Act allows a party to challenge an arbitral award before the English court on jurisdictional grounds. The basis for a tribunal's jurisdiction involves an interplay between a valid arbitration agreement, the proper constitution of the tribunal, and the subject matter of the dispute which is to be determined under the arbitration agreement

In *Dallah v Government of Pakistan,* the Supreme Court held that a challenge to a tribunal's jurisdiction under Section 67 should involve a full rehearing of the question of the tribunal's jurisdiction by the court, notwithstanding any jurisdictional challenge which has already been considered by the tribunal. In practice, this means that a party challenging jurisdiction under Section 67 is given "a second bite at the cherry", by litigating the matter of the tribunal's jurisdiction before the court, even when it has already been adjudicated by the tribunal.

Proposed amendment

In its report, the Law Commission proposes amendments to the court rules, rather than the Act, in order to avoid this issue. If accepted, this will mean that in cases where the tribunal has already ruled on its own jurisdiction, and the party challenging jurisdiction took part in those proceedings, the challenging party will no longer be entitled to re-litigate the tribunal's jurisdiction under Section 67 of the Act. The Law Commission also proposes an exception to this principle, such that a new ground for jurisdictional challenge may still be raised if the challenging party could not have known about the ground for challenge, with reasonable diligence, at the time when objections were first raised before the tribunal.

Comment

This is a welcome proposal which shows that the Law Commission is seeking to strike a balance between the interests of both parties, by ensuring that a party challenging jurisdiction may not misuse the provisions of the Act by rearguing the same jurisdictional arguments over again, including by raising new grounds. Since the proposed changes are arguably procedural, the bill refers to inserting new Rules of Court to address the changes, which will presumably be found in Part 62 of the Civil Procedure Rules.

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NOTABLE AREAS WHERE THE LAW COMMISSION HAS DETERMINED THAT NO AMENDMENTS TO THE ACT ARE NECESSARY

a) Confidentiality

Current law

While there was considerable discussion of this issue, the Law Commission's view was that there is no requirement for a statutory provision amending the current principles relating to confidentiality. This also reflects the Departmental Advisory Committee's report on this issue, prior to the creation of the Act.

In situations where parties agree contractually to have confidential proceedings, they already have recourse to the maximum protection available under the laws of England & Wales. Thus, the need for a default rule of confidentiality does not arise. It is important to note, however, that in some cases, notably investor-state disputes, the default rule is that of transparency and not confidentiality. Further, confidentiality is also addressed in different ways by the various institutional rules which may be chosen by parties to administer an arbitration. Given these differences in approach, the Law Commission considered that confidentiality could not be addressed by a "one size fits all" approach and concluded, *"we do not think that a statutory rule on confidentiality would be sufficiently comprehensive, nuanced or future-proof."*

Comment

While the diffidence expressed by the Law Commission is valid, it arguably fails to consider the lack of any statutory rule of confidentiality. At present, a party seeking to deploy commercial arbitration material (such as evidence given in an arbitration or an arbitral tribunal's findings) would need to rely on an exception to the common law rules on confidentiality, such as one of the categories identified in *Emmot v Wilson & Partners Limited.*[4] However, there are various circumstances when those exceptions might not be available, when there would appear to be utility in permitting rights or findings contained in one arbitration to be relied on in another.[5] The Privy Council in *Aegis v European Reinsurance Company of Zurich*[6] was rightly concerned by the need to rely on exceptions to confidentiality or implied terms.

"It should be noted that in practice, parties often do not opt-out of provisions such as Section 69, thereby leaving open a window of appeal."

It is interesting to note that some jurisdictions have gone down the road of creating specific terms and exceptions to confidentiality, such as the Arbitration Ordinance in Hong Kong.[7] Likewise, some institutional rules also fill the gap by providing express confidentiality provisions with exceptions, such as the LCIA (Rule 30.1), SIAC (Rule 39), and HKIAC (Rule 45).

b) Section 69 of the Act (Appeal on a point of law)

Current law

Section 69 of the Act allows a party to challenge an arbitral award before the English court on a point of law. The agreement of all the parties to the arbitration or the permission of the court is required as a prerequisite to any Section 69 appeal. In practice, the court will only hear an appeal under Section 69 if the decision of the tribunal is considered wrong or open to serious doubt on a question of general public importance. Section 69 is also an "opt-out" provision, i.e., if the parties wish, they may choose to opt-out of Section 69 and provide finality to the award. The Law Commission did not include a proposal to amend Section 69 in its final report, stating that Section 69 provides a compromise between the finality of an award and correcting blatant errors of law.

Comment

It should be noted that in practice, parties often do not opt-out of provisions such as Section 69, thereby leaving open a window of appeal (subject to the court's discretion). While the Law Commission believes that the provision in its current form allows for a balance between having the right to appeal and the finality of an award, the alternate view would be to make Section 69 an "opt-in" provision. Such a change would ensure that parties consciously decide, by opting-in, to preserve the possibility of appealing on a point of law.

CONCLUDING REMARKS

The exercise undertaken by the Law Commission was not an easy one, but the final report is well thought out and thorough on the issues that it touches upon. While not all the issues have received a unanimous approach in terms of agreement or disagreement towards a reform, the proposed amendments would be mostly welcome, conditional on them being incorporated. As to the effect of the proposals in practice, subject to their acceptance into the legislation or court rules, we will need to wait to see the consequence of the reforms in the coming years.

The relatively minimal changes are a testament to the thoroughness and thought that went into the Act in the first place and how well it has stood the test of time, given the considerable changes in arbitration practice since the Act was enacted, and the complexity of modern disputes.

FOOTNOTES

[1] [2020] UKSC 38

[2] See the approach in *Anupam Mittal v Westbridge Ventures II Investment Holdings* [2023] SGCA 1

[3] See *Klockner Pentaplast GMBH & Co KG v Advanced Technology (H.K.) Company Limited HCA* 1526/2010 and *BNA v BNB* (2019) SGCA 84

[4] [2008] 1 Lloyd's Rep 616 i.e., (1) Consent (2) Leave of Court (3) Protecting the legitimate interests of an arbitrating party; and (4) Public interest

[5] One such example would be the utility of a contractor relying on an award obtained in an arbitration against its employer, in separate arbitral proceedings against its subcontractor.

[6] [2003] UKPC 11

[7] Section 18 Arbitration Ordinance (Cap. 609)

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