The Future of Arbitration in England: The Law Commission's Consultation on the English Arbitration Act 1996

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Over the past 25 years, the English Arbitration Act 1996 (the "1996 Act") has played a significant role in consolidating London's position as a leading arbitral seat. The passage of time, and rapid and successive revision of arbitration legislation in rival jurisdictions, have prompted users of arbitration to reflect critically on the efficacy of the legislative framework for arbitration in England and Wales. As part of this process, the Law Commission of England and Wales (the "Law Commission") launched a review of the 1996 Act earlier this year, with the stated aim of maintaining the attractiveness of London as an arbitral seat and the "*pre-eminence of English law as choice of law*".

Following an extensive review of the 1996 Act and pre-consultation discussions with stakeholders (including Debevoise & Plimpton), on 22 September 2022, the Law Commission published its formal consultation paper (the "Consultation Paper"; available here), inviting responses from stakeholders on key areas of the 1996 Act by 15 December 2022. Thereafter, the Law Commission will proceed to make formal recommendations to the UK government as to how to revise and update the 1996 Act. Users of international arbitration should therefore be mindful of the current consultation and reform process as it is likely to have important implications for the future operation of the arbitral regime in England and Wales.

Below, we identify key highlights from the Consultation Paper, including: (i) the specific areas identified by the Law Commissions for potential reform; (ii) those areas where the Law Commission has recommended that the *status quo* should be preserved or the law left for the courts to develop; and (iii) specific points on which the Law Commission has requested input from the broader legal community.

The Law Commission's Proposals for Change

There are **six** areas of reform that the Law Commission has provisionally identified at this stage:

Arbitrators' Duty of Disclosure and Impartiality

The 1996 Act provides that an arbitral tribunal must act fairly and impartially.[1] As such, a court may remove an arbitrator in the event of "*justifiable doubts*" as to their impartiality.[2] However, the 1996 Act is silent on an arbitrator's duty to disclose matters that could lead to such doubts. In 2020, the Supreme Court in *Halliburton v Chubb*, on which we reported here, held that an arbitrator has a legal duty to disclose matters that might "*reasonably give rise to the real possibility of bias*". Failure to disclose such matters may lead to justifiable doubts as to the arbitrator's impartiality.[3] Given the importance of this issue for ensuring the integrity of the arbitral process, the Law Commission has proposed to codify the case law that imposes a continuing duty on arbitrators to disclose circumstances that might reasonably give rise to justifiable doubts as to their impartiality.[4]

Non-Discrimination in Arbitral Appointments

The Law Commission has also taken account of the growing emphasis among users of international arbitration on issues of diversity and equality and the fact that much of the arbitral process sits outside the framework of UK equalities law.[5] It has, accordingly, made modest proposals for aligning the 1996 Act with non-discrimination legislation. The Law Commission has proposed that, where an arbitration agreement specifies criteria for the appointment of an arbitrator:

- The appointment should *not* be susceptible to challenge on the basis of the arbitrator's legally "*protected characteristics*" as defined under the Equality Act (*e.g.*, race, sex or religion); and

- Any agreement between the parties in relation to the arbitrator's protected characteristics should be unenforceable, unless, in the context of that arbitration, requiring the arbitrator to have that protected characteristic is a proportionate means of achieving a legitimate aim.[6] The Law Commission has indicated, for example, that it may be proportionate to require that the arbitrator be of a different nationality from the parties to the dispute.

Strengthening Arbitrator Immunity

The 1996 Act currently provides that arbitrators are immune from suit for anything done in the discharge of their functions as arbitrator. Nonetheless, arbitrators may still incur liability if they resign or are removed from the tribunal. To strengthen the position of arbitrators and provide further protection from vexatious litigants, the Law Commission has proposed to extend arbitrators' immunity by precluding

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1 Section 33 of the 1996 Act.

2 Section 24(1)(a) of the 1996 Act.

3 *Halliburton Company v Chubb Bermuda Insurance Ltd* [2020] UKSC 48.

4 The Law Commission, Review of the Arbitration Act, Consultation Paper, 3.51.

5 *Jivraj v Hashwani* [2011] UKSC 40.

6 The Law Commission, Review of the Arbitration Act, Consultation Paper, 4.36.

arbitrators' liability for court costs (*e.g.*, those arising out of court applications instituted by a party to remove an arbitrator).[7]

Summary Procedures

In light of growing concerns about the length and cost of arbitrations, a number of institutional rules have adopted express provisions to allow for summary dismissal of claims and defences.[8] The 1996 Act, however, does not contain an express provision to permit summary dismissal by a tribunal of unmeritorious claims or defences. It has been suggested that this silence has contributed to tribunals' reluctance to dismiss claims summarily. The Law Commission has proposed that the 1996 Act explicitly provide that an arbitral tribunal may adopt a summary procedure to dispose of claims and defences. Such a provision would not be mandatory, and parties would be able to opt out of this procedure in their arbitration agreement. The Law Commission has further proposed that the summary disposal should require an application by one of the parties and that the application be a matter for the arbitral tribunal to decide after hearing the parties. As for the legal test to be applied in summary dismissal proceedings, the Law Commission has identified two potential options: (i) where the claim/defence is shown to be "*manifestly without merit*", in line with arbitral institutional rules; or (ii) that the claim/defence has "*no real prospect of success,*" in line with the standard used in English court proceedings. The Law Commission has suggested that the latter standard would be a fair one to adopt.[9]

Section 44: Appeals by Third Parties and the Taking of Evidence

Historically, there has been debate as to whether section 44 of the 1996 Act enables the English courts to make orders against third parties in appropriate cases. Having reviewed the relevant case law and legislative history of the provision, the Law Commission has reached the view that section 44 does indeed enable court orders against third parties. Nonetheless, the Law Commission has proposed two clarifying amendments to section 44. First, that third parties be given a full right of appeal if such orders are made, rather than the usual restricted right of appeal that applies to arbitral proceedings and which requires prior judicial permissions.[10] The second amendment would clarify that the court's power to order that evidence be taken from foreign-based witnesses for use in an arbitration be amended to confirm that it relates to the taking of evidence of witnesses by deposition only.

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7 The Law Commission, Review of the Arbitration Act, Consultation Paper, 5.45.

8 *See, e.g.*, 2020 LCIA Arbitration Rules, Article 22.1; 2018 HKIAC Administered Arbitration Rules, Article 43.1; 2016 SIAC Arbitration Rule 29; 2017 SCC Rules, Article 39.

9 The Law Commission, Review of the Arbitration Act, Consultation Paper, 6.34.

10 The Law Commission, Review of the Arbitration Act, Consultation Paper, 7.22.

The Standard of Review for Section 67 Jurisdictional Challenges

Where a party challenges a tribunal's award on the basis of an excess of jurisdiction,[11] an English court will conduct a *de novo* review of jurisdiction, including by examining new evidence that was not adduced before the arbitral tribunal. The degree of intervention open to English courts under section 67 of the 1996 Act has been criticised as contrary to fundamental international arbitration principles, such as party autonomy, judicial non-intervention and finality. The Law Commission has proposed that, where a party: (i) has participated in arbitral proceedings; (ii) has objected to the jurisdiction of the arbitral tribunal; and (iii) has received an award on jurisdiction from that tribunal, any subsequent challenge by that party to the tribunal's jurisdiction under section 67 of the 1996 Act is to be by way of a review, rather than a full, *de novo*, rehearing of the issue of jurisdiction.[12] Further possible amendments include explicitly stipulating that the court has the power to declare an award to be of no effect upon a successful section 67 application to bring the provision in line with section 68 and allowing the tribunal to award costs where it rules that it did not have substantive jurisdiction.

The Law Commission's Decision to Maintain the Status Quo

There are **four** principal areas that were previously mooted for reform (including in pre-consultation discussions with the Law Commission) which it appears are now provisionally excluded from the reform agenda:

Appeals on Points of Law under Section 69

Under section 69, parties to arbitral proceedings can challenge an award in English courts based on an error of law. Such a provision is rarely included in modern arbitration legislation.[13] Indeed, section 69 has been criticised for undermining the principles of finality and party autonomy by substituting a court decision for that of the tribunal. Nevertheless, the Law Commission has determined that there is currently no need to reform section 69 (whether by repealing, or expanding the scope of, the provision). The Law Commission has justified this on the basis that parties can choose to waive the use of section 69, either in the arbitration agreement or by agreeing to certain institutional rules (for instance, the International Chamber of Commerce or London Court of International Arbitration). The Law Commission also noted that appeals under section 69 are relatively infrequent and rarely

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11 *See also* sections 82(1) and 30(1)(a)–(c) (substantive jurisdiction as to (i) whether there was a valid arbitration agreement, (ii) whether the tribunal was properly constituted or (iii) matters submitted to arbitration in accordance with the arbitration agreement).

12 The Law Commission, Review of the Arbitration Act, Consultation Paper, 8.46.

13 *See, e.g.*, Hong Kong Arbitration Ordinance, Schedule 2, Section 5.

successful, in part because the challenging party must obtain permission to appeal from an English court and satisfy certain strict criteria.[14]

Duty of Confidentiality

Commercial arbitration proceedings are ordinarily confidential, and parties are therefore duty-bound not to disclose details relating to, or information generated during, the arbitration. But unlike the position elsewhere, including in Hong Kong, Singapore, the UAE and New Zealand, the 1996 Act does not codify the duty of confidentiality. As a result, parties often provide for confidentiality expressly in their arbitration agreements or by reference to certain institutional rules. In the absence of such agreement, English common law implies the obligation of confidentiality into the arbitration agreement.[15] The Law Commission has provisionally concluded that it is presently preferable for the law of confidentiality to be developed by the courts. The Law Commission emphasised that not all types of arbitration are (or should be) by default confidential. In particular, investor-state arbitration has seen recent trends towards greater transparency in the proceedings. The Law Commission has expressed a reluctance to codify law that remains uncertain and wishes instead to ensure that the variation and nuance reflected in different arbitral rules and in existing case law are retained.

Arbitrators' Duty of Independence

The Law Commission has recommended that English law should not impose a duty of independence on arbitrators.[16] It reached this view on the basis that the duty of impartiality is already codified in section 33 of the 1996 Act, and codifying an additional duty of independence is unnecessary. The Law Commission took the view that requiring an arbitrator to be independent if they are biased would be superfluous. Further, English law already recognises that an arbitrator must be free from bias, and arbitrators can be removed pursuant to section 24 of the Act if there are justifiable doubts regarding their impartiality.

Emergency Arbitrators

Where an arbitration agreement exists, an English court may order interim relief, including to preserve evidence or assets. Since the enactment of the 1996 Act, however, most major arbitral institutions have adopted provisions that allow parties to obtain urgent interim relief through arbitration even prior to the constitution of a tribunal. In 2016, the High Court suggested in *Gerald Metals v Timis* that English courts do not have the power to grant urgent interim relief under section 44 of the 1996 Act where applicable arbitral rules allow a party to obtain urgent relief from an

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[14] Specifically, the challenging party must show that the decision of the tribunal on an issue (i) was obviously wrong or (ii) of general public importance, and the tribunal's decision on the issue is open to serious doubt.

[15] *See Ali Shipping Corp v Shipyard Trogir* [1998] 2 All E.R. 136; *Emmott v Michael Wilson & Partners* [2008] EWCA Civ 184.

[16] The Law Commission, Review of the Arbitration Act, Consultation Paper, 3.44.

emergency arbitrator.[17] This development caused many parties to expressly exclude emergency arbitration in their agreements so as to retain the right to have recourse to the courts of the seat for judicial assistance. Following its review, the Law Commission has provisionally recommended that all parties should have the ability to seek urgent judicial relief under section 44 regardless of whether emergency arbitration is available to them.[18] However, the Law Commission does not consider that this clarification requires any amendments to the 1996 Act.

Issues on Which the Law Commission Has Specifically Requested Stakeholder Input

While the Law Commission has solicited public input on the full range of issues identified on its reform agenda, it has specifically requested responses on the following **four** issues under the 1996 Act:

Enforceability of Orders by Emergency Arbitrators

As a general matter, the Law Commission concluded that the 1996 Act should not apply to emergency arbitrators. However, the Law Commission was cognisant of the role played by emergency arbitrators and that parties may refuse to comply with an interim order issued by such an arbitrator. At present, section 44(4) of the 1996 Act allows courts to intervene in non-urgent circumstances only with "*the permission of the tribunal*". The Law Commission has identified two ways in which the 1996 Act could be amended to deal with the legal uncertainty around the enforceability of interim orders issued by emergency arbitrators. First, the 1996 Act could expressly vest the court with the power to order compliance with a peremptory order of an emergency arbitrator. Alternatively, section 44(4) could be amended to allow emergency arbitrators to grant permission for parties to seek judicial assistance before the constitution of the full tribunal. The Law Commission has sought public input as to the approach that would be preferable.[19]

Whether the Court's Ability to Make Orders against Third Parties under Section 44 Should Be Explicitly Codified

At present, the Law Commission is of the view that the courts are empowered to make orders under section 44 against third parties in appropriate cases. The Law Commission has asked for public input on whether this power needs to be made explicit in the Act.[20]

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17 *Gerald Metals v Timis* [2016] EWHC 2327 (Ch).

18 The Law Commission, Review of the Arbitration Act, Consultation Paper, 7.48, 7.51.

19 The Law Commission, Review of the Arbitration Act, Summary of Consultation Paper, 7.97.

20 The Law Commission, Review of the Arbitration Act, Consultation Paper, 7.36.

Whether Arbitrators Should Incur Liability for Resigning

At present, section 25(1) of the 1996 Act leaves it to parties to agree with the arbitrator as to the consequences of an arbitrator's resignation and as regards the arbitrator's fees and "*any liability thereby incurred*". Relief from any liability may be granted if it was reasonable for the arbitrator to resign, but there is a paucity of case law as regards the scope of the "reasonableness" standard. The Law Commission is seeking input as to whether arbitrators should incur liability for resignation at all or perhaps only if their resignation is shown to be unreasonable.[21]

Whether Section 44(5) of the Act Should Be Repealed[22]

Section 44(5) of the 1996 Act provides that the courts will act only if a tribunal has no power or is unable to act effectively. The Law Commission has queried whether the provision is redundant in view of sections 44(3) and 44(4), which stipulate that the courts may only preserve the *status quo* (and not usurp the role of arbitrators).

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Please do not hesitate to contact us with any questions.

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[21] The Law Commission, Review of the Arbitration Act, Summary of consultation paper, 5.23-5.24.

[22] The Law Commission, Review of the Arbitration Act, Consultation Paper, 7.87.