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Law Commission of England and Wales proposes refresh rather than overhaul of Arbitration Act 1996

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Introduction

The Law Commission of England and Wales has released provisional proposals for updates to the Arbitration Act 1996 covering issues including jurisdictional challenges to awards, summary disposal of a claim or defence and availability of court-ordered interim relief in support of arbitral proceedings. The proposals seek to refresh rather than overhaul legislation that has helped London to be considered widely as one of the world's most popular seat of arbitration. The Law Commission seeks responses to its consultation paper from a range of stakeholders, including users of London arbitration, by 15 December 2022. This article comments on the most notable proposals.

Confidentiality

The Act currently does not contain an explicit reference to confidentiality and, while case law has established that the obligation of confidentiality is implied into an arbitration agreement governed by English law, the scope of the obligation is not clear. Some commentators have argued that an express obligation of confidentiality should be introduced into the Act, bringing it in line with arbitration legislation in several other seats of arbitration (eg, Scotland and New Zealand).

The Commission proposes that the Act should not codify the law of confidentiality and that the law is better left to be developed by the courts. It asserts that not all types of arbitration should, by default, be confidential and that codifying the exemptions to any default rule of confidentiality would be inappropriate in circumstances where the case law on such exceptions is not certain. The Commission's view that "in practice the current regimes [on confidentiality] usually work well" is one that is shared by many users of London arbitration.

Arbitrator independence and duty of disclosure

Currently the Act does not impose a duty of independence on arbitrators, but it does impose a duty of impartiality (section 33). The Commission's provisional conclusion is that no duty of independence should be introduced. To codify case law, however, the Commission proposes that the Act be amended to provide that arbitrators shall have a continuing duty to disclose any circumstances which might reasonably give rise to justifiable doubts as to their impartiality (for further details please see "Supreme Court clarifies test of arbitrator impartiality and arbitrators' duty of disclosure"). The Commission seeks input from stakeholders on whether the Act should specify the state of knowledge required of an arbitrator's disclosure, in order that arbitrators know precisely what is expected of them. If so, the Commission questions whether the duty should be based upon an arbitrator's actual knowledge or, in addition, upon what they ought to know after making reasonable queries.

Summary disposal of claims and defences

The procedural rules of a number of major institutions, including those of the Singapore International Arbitration Centre and the London Court of International Arbitration (LCIA), empower tribunals to issue a summary order or award in respect of matters that are, for example, manifestly outside the jurisdiction of the tribunal, inadmissible or manifestly without merit.[(1)]

The absence of an equivalent provision in the Act can leave London-seated tribunals not conducted under such institutional rules reluctant to issue awards on a summary basis or to strike out meritless claims or defences due to concerns around possible challenges to awards. This contrasts with the position in the English courts, in which summary judgment is widely used.

The Commission proposes that the Act should contain an explicit, non-mandatory provision that a tribunal may adopt a summary procedure to dispose of a claim or defence. The Commission's preferred threshold is the test of "no real prospect of success", as applied in English court proceedings. Overall, the proposed introduction of an explicit summary dismissal provision will be well received.

Court orders in support of arbitral proceedings

Section 44 provides that the court can make orders in support of arbitral proceedings, including those relating to the taking or preservation of evidence. Currently there remain questions as to whether section 44 allows the court to make orders against third parties and whether the section is available when parties have recourse to an emergency arbitrator.

Orders against third parties

The Commission's view is that, under section 44, the court can make orders against third parties, in appropriate circumstances, to the

extent that the court is able to grant the same relief in domestic court proceedings. It asks consultees whether this needs to be made explicit in the Act.

The Commission proposes further that where orders are made against a third party, the third party should have the usual full right of appeal and not the restricted right of appeal which applies to parties to the arbitration.

Emergency arbitrators

The Commission suggests that a court can make interim orders in support of an arbitration even if the parties have agreed that an emergency arbitrator will have the power to do the same. To resolve the ambiguity in this area, the Commission proposes that section 44(5) might be repealed. Section 44(5) provides that the court will act only if the tribunal has no power or is unable for the time being to act effectively. While the purpose of the section is to prevent the court from overstepping into the tribunal's domain, the Commission's provisional view is that the requirement may be redundant as other provisions in section 44 already provide appropriate safeguards.

A further proposal is that the Act should make provision for when an emergency arbitrator issues an interim order which a party to the arbitration ignores. The first of two alternative proposals to deal with this scenario is that the Act could empower the court to order compliance with a peremptory order of an emergency arbitrator. The second proposal is that an emergency arbitrator be empowered to consent to a party making an application to court for an interim order.

More broadly, the Commission suggests that the provisions of the Act, such as the section 16 mechanism for appointment by the court of an arbitrator, should not apply generally to emergency arbitrators.

Challenges to tribunal's jurisdiction

A challenge to an award on jurisdictional grounds under section 67 of the Act requires the court to conduct a de novo enquiry, hearing afresh all evidence on jurisdiction, including cross-examination of witnesses. Further evidence not put before the tribunal may be admitted. This procedure can be expensive and cause delays to enforcement.

The arbitration legislation in a number of major seats places greater restrictions on a party's ability to relitigate jurisdictional issues that have been determined by a tribunal (eg, any review is limited to the documents and evidence heard by the tribunal save in exceptional circumstances).

The Commission proposes that where a party has participated in an arbitration and has objected to the tribunal's jurisdiction, and the tribunal has ruled on its jurisdiction in an award, any subsequent section 67 challenge should be by way of an appeal and not a rehearing. This seeks to avoid a situation in which a party that loses in the arbitration can, in light of the tribunal's award, seek to obtain new evidence and develop new arguments before the court.

The Commission's proposal still leaves the courts as the final arbiter of the tribunal's jurisdiction and represents a pragmatic approach that should in certain cases bring about significant savings in costs and delays. The Commission also seeks views on whether a similar approach should be taken to section 32 of the Act, under which the court may determine a preliminary point of jurisdiction.

Appeals on point of law

Section 69 is a non-mandatory provision of the Act and in limited circumstances allows a party to appeal to the court for the court to reconsider a contested question of law. Some argue that section 69 should be repealed to increase the finality of awards and bring England in line with a number of other popular seats which do not permit such appeals. Others suggest that section 69 should be expanded to bring even more contested points of law before the English courts and promote the development of the common law.

The Commission does not propose any reform to section 69, concluding provisionally that the Act already strikes an appropriate balance between these two positions.

Other proposals

Other proposals put forward by the Commission include making section 7 (separability of arbitration agreement) mandatory, confirming that an appeal is available from a decision of the court under section 9 (stay of legal proceedings) and enhancing the immunity of arbitrators.

No proposals have been put forward in respect of the arbitration of trust law disputes, which is not possible under the current law and has been raised in responses to previous of the Commission's consultations. However, the Commission notes that it intends, during the course of its current programme of law reform, to consider the scope for introducing trust law arbitration.

Comment

The Law Commission's proposals are a carefully considered attempt to enhance the Act, keeping in place the fundamentals that have contributed to London's success as a seat of arbitration, while refining certain aspects with a focus on efficiency and user experience. Parties to arbitration in England will likely welcome a streamlining of the procedure for jurisdictional challenges under section 67 as well making explicit tribunals' power to dismiss claims and defences summarily where appropriate.

Responses to the Law Commission consultation should be submitted by 15 December 2022. Consultation responses will inform the policy development stage of the Law Commission's review, which may include the release of issues papers and consultation on a draft Arbitration Bill.

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Endnotes

(1) See, for example, LCIA Rules 2020, article 22.1(viii).