Reform without Revolution: modernising the UK Arbitration Act

The Law Commission's review of the (English) Arbitration Act 1996 ("Act") has been the cynosure of all eyes in the international arbitration community. The Act served as the *beau idéal* of arbitration legislation for twenty-five years before the Law Commission set out in 2021 to assess the need for reform to ensure it stays "*state of the art*".[1]

Two consultation papers were published – one each in 2022 and 2023 – containing the Law Commission's provisional proposals for potential reform. This was followed by a final report released on 6 September 2023, containing the draft bill. The issues addressed in the consultation papers were trimmed and the final recommendations do not propose amendments on all issues under deliberation.

The arbitration world has been abustle with debate and discussions surrounding the draft bill, although it has yet to become law and it is for the UK Parliament to consider whether to legislate any of the recommended reforms. Whilst there are several crucial recommendations for amendment, some of them hold special significance for the stakeholders. We discuss five such issues below:

I. Limited review for Section 67 challenge

Section 67 of the Act permits a party to challenge an award of the arbitral tribunal as to its substantive jurisdiction. This provision applies to both affirmative and negative declarations of jurisdiction[2] and it empowers the English court to rehear the full evidence.[3]

The Law Commission recommends that where the party has participated in the arbitration and objected to the tribunal's jurisdiction, the challenge before English courts should ordinarily be by way of limited review and not a full rehearing.[4] Limited review entails that the court a) should not allow new grounds of objection or new evidence, unless despite reasonable diligence these could not have been raised before the tribunal; and b) should not rehear evidence unless exceptional circumstances require it to do so in the interests of justice.[5]

The proposed approach is in contrast to the position in major jurisdictions such as France, Singapore, Australia, Hong Kong and Canada that allow full and *de novo* review of issues of both fact and law when an award on jurisdiction is challenged.[6]

The Law Commission's recommendation seeks to strike a fine balance between the arbitral tribunal's competence to determine its own jurisdiction and the court's final say on the issue. However, the proposed reform may not result in a major departure from the current state of affairs, given that the English courts do not necessarily allow a full rehearing in Section 67 cases.

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[1] https://www.lawcom.gov.uk/project/review-of-the-arbitration-act-1996/ (last accessed 17:20, 14 September 2023)
[2] Although rare, an English court has overruled an arbitral tribunal's finding that it did not have jurisdiction over a claim: see *GPF GP Sarl v Poland* [2018] EWHC 409 (Comm).
[3] *Dallah Real Estate & Tourism Holding Co v Pakistan* [2010] UKSC 46.
[4] Review of the Arbitration Act 1996, Consultation Paper 258, March 2023, para 3.6.
[5] Review of the Arbitration Act 1996: Final Report, September 2023, Recommendation 11, para 9.97. ("Final Report")
[6] *Pyramids Case*, Cass. civ. 1ère, 6 January 1987; *S Co v B Co* [2014] 6 HKC 421; *Insigma v Alstom* [2009] SLRR 23; *Lin Tiger Plastering v Platinum Construction* (2018) 57 VR 576; *Russia v Luxtona Lta* [2021] OJ No. 3616.

Moreover, it is estimated that only 27 claims were issued under Section 67 of the Act in 2021-22 and 17 claims in 2020-21.[7] Not all claims proceed to trial. For instance, in one recent case, the English court dismissed the Section 67 claim on a summary basis, holding that there was no real prospect of success or any compelling reason for the matter to go to trial.[8]

Nevertheless, it may be helpful to clarify the procedure in the rules of court to ensure that duplicitous re-hearings are discouraged as a matter of course.

II. Law governing the arbitration agreement

Generally, the arbitration agreement is included as a clause in the matrix contract, however, it is relatively uncontroversial that the arbitration agreement and the matrix contract may be subject to different governing laws. These laws could be further different from the legal seat of the arbitration, which is the place where the arbitral proceedings are deemed to occur, even if they take place virtually or in any other part of the world.

The law governing the arbitration agreement is often not expressly identified. This means that where questions regarding the scope or validity of the arbitration agreement arise, there is no express choice of law to determine such questions. Recognizing this issue, the UK Supreme Court in *Enka v Chubb*[9] ruled that where there is no express choice of governing law, the law of the matrix contract will usually also govern the arbitration agreement, except in limited circumstances. Where there was no choice of law for the matrix contract, the Supreme Court proposed the test of closest connection to determine the law governing the arbitration agreement.

The Supreme Court's approach resulted in complexities and uncertainties, giving rise to disputes over the determination of the law governing the arbitration agreement. More recently, in the enforcement proceedings in *Kabab-ji v Kout Food Group,* the UK Supreme Court extended the *Enka* approach, affirming that the law of the matrix contract will also serve as the implied choice of law governing the arbitration agreement.[10] In the enforcement proceedings before French courts, the *cour de cassation* found that the law of the seat will govern the arbitration agreement.[11] As a result, this case further entrenched the difference between the English and the French approach to determine the law governing the arbitration agreement.

To avoid such unpredictability, the Law Commission has proposed a straightforward rule to determine the law of the arbitration agreement in the absence of express party choice: it would be the law of the seat.[12] It is proposed that this recommendation, if implemented, should have prospective effect, meaning it won't apply to arbitration agreements entered before the amendment comes into force.[13]

This risks creating a dual regime in England & Wales to determine the law governing the arbitration agreement, as arbitration agreements entered prior to any statutory amendment would still be subject to the rule in *Enka v Chubb.* Such duality based on an artificial distinction between agreements entered before and

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[7] The Commercial Court Report 2021–2022, p. 13 (March 2023), https://www.judiciary.uk/wp-content/uploads/2023/04/14.244_JO_Commercial_Court_Report_WEB.pdf. (last accessed 16:00, 19 September 2023)

[8] National Iranian Oil Company v Crescent Petroleum Company & Anr [2023] EWCA Civ 826.

[9] Enka Insaat Ve Sanayi AS v OOO "Insurance Company Chubb" & Ors [2020] UKSC 38.

[10] The Supreme Court read the law of matrix contract as an "indication" of the law chosen to govern the arbitration agreement, for the purpose of section 103(2)(b) of the Act, which imports into English law the provision under Article V(1)(a) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958; Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait) [2021] UKSC 48.

[11] Cass., 1ère ci., 28 Septembre 2022, n° 20-20.260.

[12] Final Report, Recommendation 19, para 12.77.

13 Final Report, para 12.78.

after the cut-off date may threaten to detract from the stated goals of erasing complexity and uncertainty in determining the law governing the arbitration agreement.

Whilst one hopes that good drafting will preclude any need for the default rule, it is a welcome development that may help bolster the predictability of the English arbitral system and enhance London's appeal as an arbitration hub.

III. Arbitrator's duty of disclosure

The Act is silent on the arbitrator's duty of disclosure. Although, under the rules of several arbitral institutions and English common law, there is a continuing duty of disclosure of any circumstances that may give rise to justifiable doubt as to an arbitrator's impartiality.[14] Impartiality relates to the arbitrator's ability to remain neutral. This is different from independence, which relates to any connections the arbitrator may have to parties or to the dispute. Notably, the duty of disclosure only encapsulates circumstances that concern the impartiality of the arbitrator; not his/her independence.

The Law Commission has recommended the codification of the general duty of disclosure under common law.[15] The duty extends to circumstances that the arbitrator reasonably ought to know and is not restricted to actual knowledge.[16] This means that an arbitrator is responsible for making disclosures measured against an objective standard that varies from case to case and is not limited to circumstances within their actual knowledge.

This is a welcome development that will enhance the integrity of the arbitral process, whilst providing the necessary leeway to interpret the ambit of the duty of disclosure in light of the specific facts and circumstances.

IV. Summary disposal

In litigation, the English court may determine a claim on a summary basis if there is no real prospect of success. This means that the case or a specific issue won't go to trial and it will be addressed through a summary judgment.

The Act does not expressly empower arbitrators to dispose claims summarily although there is an implicit power to do so under Section 33 of the Act, which imposes a duty on arbitrators to avoid unnecessary procedural delay and expense, whilst respecting the parties' reasonable opportunity to present their case. That said, there is a general perception against summary disposal in arbitration, fed by a fear of potential challenge proceedings, sometimes referred to as a 'due process paranoia'.

In fact, only recently did the major arbitral institutions introduce early or summary disposition,[17] and the statistics show that the parties and the arbitrators rarely resort to such procedure. For instance, from 2016 to 2022, only 56 early dismissal applications were filed in SIAC arbitrations and of that, only five were granted in full.[18]

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[14] Halliburton Co v Chubb Bermuda Insurance Ltd [2020] UKSC 48.
[15] Final Report, para 3.65, 3.66, 3.75.
[16] Final Report, para 3.95, 3.99.
[17] Rule 29 (Early dismissal of claims and defences) introduced in SIAC Rules 2016; Article 39 (Summary procedure) introduced in SCC Rules 2017; Article 43 (Early determination procedure) introduced in HKIAC Administered Arbitration Rules 2018; Article 22.1.(viii) (Early determination) introduced in LCIA Arbitration Rules 2020; In 2017, the ICC Court revised the practice note to include expedited determination of unmeritorious claims or defences.
[18] Singapore International Arbitration Centre, Annual Report, 2022, p. 21, https://siac.org.sg/wp-content/uploads/2023/04/SIAC_AR2022_Final-For-Upload.pdf. (last accessed 18:00, 19 September 2023)

It is welcomed that the Law Commission has recommended an express provision to empower arbitrators to grant an application for summary disposal, subject to party agreement.[19] The form of any procedure to determine such an application would be a matter for the arbitral tribunal, following consultation with the parties.[20]

The proposed threshold to determine summary disposal applications is the test of real prospect of success, which is followed in English court proceedings.[21] This is a departure from the test of "manifestly without merit", which is provided for in the rules of several arbitral institutions,[22] but it remains to be seen whether courts and tribunals discern any meaningful difference between the two standards.

If the recommendation is implemented, it is likely to be positively received by the arbitral community. An express summary disposal power will assuage any concern that arbitrators may possess and allow for efficient and expeditious resolution of disputes through a fast-track procedure, where warranted. Linking this to the standard test under English law for summary judgment will ensure that the parties and the arbitrators benefit from the available jurisprudence in interpreting the threshold.

V. Third party orders under Section 44

Section 44 of the Act empowers the English courts to make orders in support of arbitral proceedings. This could be in the form of freezing injunctions, orders for preserving evidence, sale of goods, appointing a receiver and so on. It is clear that Section 44 orders may be directed at parties to the arbitration. There is some uncertainty regarding whether such orders may be directed against third-parties i.e., those who are not parties to the arbitral proceedings.

The Law Commission aims to resolve this uncertainty by amending Section 44 to confirm that it extends to third-parties,[23] who would have full rights of appeal against any orders under the provision.[24] This clarification would reaffirm the court's power under Section 44 to make orders in relation to arbitration in the same manner as it can for the purpose of a civil suit.

If adopted, this clarification should dismiss any perception of a handicap upon English courts to act in full support of arbitration and reassure parties that the whole gamut of coercive powers in civil court proceedings are ordinarily available in arbitrations.

VI. Open issues

The Law Commission has proposed several key reforms to ensure that the Act remains "*fit for purpose*"[25] and promotes England's position as an arbitration hub. There are also several areas that the Commission has chosen not to reform and some of them are discussed below.

Confidentiality: The Act does not contain any provisions on confidentiality and the Law Commission does not recommend any reform on this point, leaving the issue to be addressed by the parties, arbitral institutions and where necessary, the English Court.[26] If parties require confidentiality they may

[19] Final Report, Recommendation 5, para 6.24.
[20] Final Report, Recommendation 6, para 6.34.
[21] Final Report, Recommendation 7, para 6.51.
[22] See, Article 22.1(viii) LCIA Arbitration Rules 2020; Rule 41 ICSID Arbitration Rules 2022; Rule 29 SIAC Rules 2016; Article 43 HKIAC Administered Arbitration Rules 2018; Rule 6.11(d) AMINZ Arbitration Rules 2022.
[23] Final Report, Recommendation 8, para 7.27.
[24] Final Report, Recommendation 9, para 7.40.
[25] Final Report, para 1.8.
[26] Final Report, para 2.21.

provide for it expressly, or by their choice of arbitral rules. The rules of some arbitral institutions already provide for a duty of confidentiality, which may be excluded by the parties.[27] On the other hand, there is a move towards transparency in arbitrations involving public interest, and the proposed new legislation would apply to arbitrations in a wide array of circumstances. As such, the Law Commission fairly considered it best to avoid a default rule on confidentiality that may necessitate multiple exceptions and may not be future-proof.

Appeal on a point of law: The Law Commission does not propose any reform to Section 69 of the Act. This provision allows court appeals against an arbitral award on a point of law upon party agreement or at the court's permission.[28] The parties may agree to disapply the provision and several arbitral rules, including the UNCITRAL Model Law on Commercial Arbitration exclude it.[29] In contrast, the London Maritime Arbitrators Association affirms the availability of Section 69 appeals in limited circumstances.[30] Although rare, there have indeed been cases where Section 69 appeals were successful.[31] Thus, Section 69 will continue to remain a useful recourse against awards in arbitrations seated in England.

Discrimination in arbitration: The Law Commission has not recommended reform on the question of applicability of discrimination laws to arbitration. The UK Supreme Court previously found that the Equality Act 2010 does not apply to the appointment of arbitrators as they are not employees or subordinates to the arbitrating parties,[32] triggering some requests for reform. However, considering that any provision prohibiting discrimination may trigger satellite litigation and unjustified challenges to awards, the Commission desisted from recommending one. This does not mean that diversity in arbitration is an unimportant issue. Rather, the Law Commission has recognized that this is not at the present time an appropriate issue for legislation.

Arbitration agreement in a trust deed: Lastly, another issue that generated a lot of interest but could not be included within this review process was that of enabling trust law arbitration.[33] The Law Commission has decided to conduct a bespoke review process for this issue, given that it may necessitate wider reforms to arbitration and trust laws with large-scale implications.

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to reach out to:

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[27] For instance, see Article 30 LCIA Arbitration Rules 2020.
[28] Final Report, para 10.1.
[29] See, Article 26.8 LCIA Arbitration Rules 2020; Rule 32.11 SIAC Rules 2016; Article 35(6) ICC Arbitration Rules 2021; Article 34 UNCITRAL Model Law on International Commercial Arbitration 2006.
[30] https://lmaa.london/appeals-challenges-and-precedents/ (last accessed 14:30, 15 September 2023)
[31] For example, see Tricon Energy Ltd v MTM Trading LLC; The MTM Hong Kong [2020] 2 All ER (Comm) 543.
[32] Haswani v Jivraj [2011] UKSC 40.
[33] Review of the Arbitration Act 1996, Consultation Paper 257, September 2022, para 1.8.

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