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Law Commission Review of the Arbitration Act: Substantive Changes to Appeals and Challenges?

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The Law Commission of England and Wales announced in November last year that it will be conducting an 18-month review of the English Arbitration Act. Ever since, there has been much speculation as to what changes the Law Commission might recommend.

The Law Commission has announced some broad areas of potential focus. Whilst some of these areas appear intended to clarify the existing position and put it on statutory footing, there are two particular areas that arguably have the potential to bring about the greatest substantive change. These are (i) the procedure for challenging a jurisdiction award and (ii) the availability of appeals on points of law. This blog post will explore why the Law Commission is considering these two areas and suggest some potential outcomes that could result from the review.

Background to the Review of the Arbitration Act

While the 18 month review is still in its infancy, the Law Commission has been very clear that there is no risk of a major overhaul. Instead, the aim is to ensure that the Act is "*as effective as possible*" so that "the UK *remains at the forefront of international dispute resolution*". The Law Commission has announced that possible areas of review include (but are not limited to):

- the power to summarily dismiss unmeritorious claims or defences in arbitration proceedings;
- the courts' powers in support of arbitration proceedings;
- the procedure for challenging a jurisdiction award;
- the availability of appeals on points of law;
- the law concerning confidentiality and privacy in arbitration proceedings; and
- electronic service of documents, electronic arbitration awards, and virtual hearings.

Of these potential areas, some appear to be intended to simply put the existing position on statutory footing. For example, most practitioners are agreed that English-seated tribunals already have the power to summarily dismiss claims and defences,

but would welcome codification in order to reassure and encourage tribunals to exercise this power. Similarly, an implied duty of confidentiality already applies to English-seated arbitrations, even if the exact parameters of the duty are not set out in statute.

However, there is greater potential for substantive change with regard to the review of Sections 67 and 69, as explained below.

Procedure for Challenging an Award on Jurisdiction– Section 67 and Beyond

There are currently multiple potential pathways available to a party who objects to the jurisdiction of the arbitral tribunal – whether they participate in the arbitration or not. These include the ability to seek a ruling from the court at various stages of the arbitration (whether under section 32, 72 or 67, or at the enforcement stage). This position stems from the underlying principle of the Act that the court rather than the tribunal has the last word on jurisdiction. In practice, this means that a claimant party may be faced with a multitude of unwanted applications, both within the arbitration itself and also in court.

In particular, the English courts have been clear that a party who objects to jurisdiction but participates in an arbitration and subsequently brings a section 67 jurisdictional challenge is entitled to a complete rehearing of the jurisdictional question, rather than just a review of the tribunal's decision on the issue (see for example *Dallah Co v Ministry of Religious Affairs of Pakistan* [2009] EWCA Civ 755, per Moore-Bick L.J. at [21]). Section 67 provides that a party may challenge an arbitral award on the basis that the tribunal did not have substantive jurisdiction. It is a mandatory provision and its application cannot be excluded. However, a party will only be able to avail itself of a section 67 challenge if it has also sought to raise any jurisdictional objections before the Tribunal. This means that where a section 67 challenge is made, the same battle will be fought twice, once before the Tribunal and once before the English courts. This process leads to significant duplication of work and additional costs.

There has been much criticism of this "re-hearing approach", notably as submitted by the respondent in the case of *GPF GP S.À.R.L. v The Republic of Poland* [2018] EWHC 409 (Comm). In that case, the respondent to a section 67 challenge argued that the section "*must not be allowed to erode the efficacy of international arbitration*", referring in particular to the stated purposes of the 1996 Act to avoid unnecessary delay and expense and that safeguards should only be as "*necessary in the public interest*". In support of these submissions, the respondent relied on a passage in Arbitration Law (5th Edition) which stated that "*every challenge under section 67 involves cocking a snook at the very first principle set out in the Act (in section 1(a))*" and that in every case, either the court or arbitration process "*will prove to have been a complete waste of time and money*".

Presumably in light of these criticisms, the Law Commission has said that it will be considering whether this "re-hearing approach" should be replaced with a "review".

The Law Commission is also considering streamlining the jurisdictional challenge process more generally and whether the possible remedies under section 67 should mirror the remedies available under section 68 and 69 (which include the power to remit the award back to the tribunal).

The decision to look at this issue may also be influenced by the position in other jurisdictions. For example, as explained in Merkin and Flannery on the Arbitration Act (6^{th} Edition), the level of judicial scrutiny of a jurisdiction award in France and Switzerland appears to be much "lighter touch". That book also explains that in the United States, the Supreme Court has drawn a distinction between cases where the parties have expressly referred the question of arbitrability to arbitration (in which case the court only does a "review" rather than a "re-hearing") and cases where they have not. Although the Law Commission has not indicated exactly what it has in mind, it may be considering the proposals made in Merkin and Flannery on the Arbitration Act 1996. As well as encouraging the courts to apply a lighter touch to the decisions of tribunals, that text suggests that in some cases it might be appropriate for the tribunal to offer the applicant permission to apply to the courts for a determination on jurisdiction under section 32, with the consequence that if that party refuses to take up the offer, the section 67 application should be limited in some way (for example by denying the applicant the right to adduce evidence, or by applying cost sanctions).

However, given the rarity of section 67 challenges – there were only 19 brought 2019 – any significant change will only affect a very small proportion of cases. Indeed, the Commercial Court Guide already contains a number of provisions aimed at limiting the scope for section 67 challenges, including the ability for the Court to dismiss them on paper. Most recently, the Guide has also introduced further deterrents – confirming that an application will only be appropriate "*in cases where there are serious grounds for a contention that the matters relied on do affect the substantive jurisdiction of the tribunal…rather than being matter to be raised (if at all) under section 68 or 68 of the Act*" (see O8.4), and extending indemnity cost consequences to section 67 challenges where parties request a hearing and then their claim is dismissed.

Arguably though, the decision to streamline these provisions should not be judged by the number of affected cases. Rather, addressing such procedural efficiencies on an evolving basis will ensure that the Law Commission achieves its ultimate objective, which is to ensure that England continues to be perceived as an attractive place for arbitration.

Appeals on Points of Law under Section 69

The availability of appeals on a point of law under section 69 of the Act is fairly unique to England. As it is not a mandatory provision, it is routinely excluded by parties, particularly as many institutional rules exclude the possibility of any non-mandatory appeals (see for example Rule 26.8 of the LCIA Rules, and Article 35(6) of the ICC Rules).

This provision has always been fairly divisive amongst the UK arbitration community,

especially because it differs from the approach of other jurisdictions, where such a right is either unavailable, or available only on an "opt in" rather than "opt out" basis (such as in Hong Kong – see Schedule 2, sections 5 and 6 of the Hong Kong Arbitration Ordinance). Indeed, the Departmental Advisory Committee (DAC) mentioned in its 1996 Report on the Act that it received a number of responses calling for the abolition of any right to appeal altogether. It does not, therefore, come as a huge surprise that the Law Commission wants to look at the issue afresh.

The Law Commission has stated so far that the options include keeping the provision the same, deleting it, or limiting it to questions of general importance where there is a real prospect of successfully showing that the decision of the tribunal is wrong. This would therefore introduce a stricter test than the current one, which is either that the decision is "*obviously wrong*", or for questions of public importance, that the decision is "*at least open to serious doubt*".

As recorded in the DAC Report, those in favour of abolition argue that by agreeing to arbitrate their dispute, the parties have agreed to abide by the decision of their chosen tribunal, not by the decision of the court. Thus finality trumps all. However, the DAC ultimately concluded that a limited right of appeal would ensure that the law chosen by the parties will be properly applied – where a tribunal fails to correctly apply English law, it will not be reaching the result contemplated by the arbitration agreement, and the court should therefore be able to step in unless excluded by the parties. Those in favour of the provision also argue that the ability to publish judgments in relation to points of law aids the development and public scrutiny of English law (as the provision does not apply to foreign law) – which ensures the precedential value of arbitration decisions.

As with section 67 challenges, section 69 challenges are similarly rare – there were only 22 applications in 2019. Nonetheless, any abolition of the right of appeal would be a significant move conceptually. It is also a particularly popular provision in certain types of disputes – such as ad hoc disputes and in the shipping and commodities sectors. As it stands, parties who wish to retain the right of appeal can do so, and those who would prefer finality can continue to exclude the provision. As such, unless the Law Commission receives overwhelming feedback to abolish or vary the status quo, then it may be that the position is unlikely to change.

It is clear that the process of reviewing sections 67 and 69 of the Act will involve consideration of important principles of English arbitral procedure, and that any proposed change may be conceptually significant, even if only a minority of cases are affected. Even if the Law Commission ultimately decides not to recommend any changes however, the process of weighing up the various options and views will be an effective way of ensuring that the UK "*remains at the forefront of international dispute resolution*".

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