Kluwer Arbitration Blog

Modernising The Arbitration Act 1996: A Critique of the Law Commission's Proposed Reforms

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The Arbitration Act 1996 (the "**Act**"), the principal legislation governing arbitration in England, Wales and Northern Ireland, came into force 25 years ago. This landmark Act has enabled London to become a top arbitral seat and England and Wales is now home to at least 5,000 arbitrations every year. On 22 September 2022, to mark this anniversary, the Law Commission reviewed the Act and published a Consultation Paper on possible reforms (the "**Paper**"), seeking input from stakeholders by 15 December 2022.

The objectives of the reform process are to modernise the law and ensure it remains "*state of the art*" for domestic arbitrations and continues to support England and Wales as the global first choice for international commercial arbitrations.

This post reviews six important topics relevant to the review namely: non-discrimination, arbitrators' duties, summary disposal, emergency arbitration, section 44 and section 67. All quotes are from the Paper.

Non-discrimination in Arbitrators' Appointments

The Law Commission considers that the Act should prohibit discrimination in arbitrator appointments, acknowledging that, currently, nothing prevents an arbitration clause providing for "*commercial men*" as arbitrators from being struck down. It proposes that the Act should:

- prohibit arbitral appointments on the basis of an arbitrator's **protected characteristic(s)** (namely: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation); and
- render unenforceable arbitration agreements requiring an arbitrator to have a protected characteristic(s), *unless* in the context of the arbitration in hand it is **a proportionate means of achieving a legitimate aim**.

The rationale for this proposal is sound, especially when we are far from gender parity amongst arbitrators, and preventing discrimination in arbitration is paramount. However, for the below reasons, the current proposal may not be the best way to achieve this end:

- international arbitration practitioners will need to familiarise themselves with the *Equality Act 2010* – a complex English Act – and its related jurisprudence because the terms in bold above are borrowed from it rather than being defined in a standalone way for the purposes of the Act;
- "*protected characteristics*" form a closed list, there being no catch-all provision to take account of future developments;
- the "*proportionate means*" test will be developed by the English courts on a case-by-case basis, which could cause potential concern for foreign parties who may feel that the English court is not best-placed to consider their local cultural/religious considerations for arbitrator selection;
- the requirements may be employed as a guerrilla tactic (e.g., to significantly stall proceedings; for example, a respondent could engage an arbitrator whose maternity leave is imminent, knowing the claimant cannot challenge the appointment because "*pregnancy and maternity*" are protected characteristics); and
- awards may still face enforcement barriers under the New York Convention on the basis that the tribunal was not composed in accordance with the parties' agreement (e.g., an all-woman tribunal appointed under a clause providing for "*commercial men*").

The key is to introduce a user-friendly test which (i) would be workable for the international business community and (ii) avoids being mired in complex local legislation. Save for one stakeholder, who expressed an opinion earlier in the reform process, we are not aware of other stakeholders expressing any concerns with the current proposal. To date, most stakeholders have either (i) not publicly critiqued the current proposal or (ii) endorsed it or the rationale underpinning it.

Arbitrators' Duty of Disclosure

The Paper proposes codifying an arbitrator's continuing duty of disclosure – outlined in ***Halliburton v Chubb*** – but is against introducing a new statutory duty of independence, asserting that an arbitrator's connection to the parties doesn't really matter and is often inevitable; rather, its effect on impartiality, and the openness about such connections, is what counts. This seems a reasonable approach and is an important change which modernises legislation in line with soft law.

The Paper asks whether the Act should specify the state of knowledge required of an arbitrator's duty of disclosure duty and, if so, if it should be based on the arbitrator's actual knowledge or an objective standard (what he/she ought to know after making reasonable enquiries). Given the current uncertainty in English jurisprudence about the state of knowledge required, the Act should clarify this expressly. An objective standard may be best as international arbitrators are already familiar with this under the widely-consulted IBA Guidelines on Conflicts of Interest (General Standard 7(d)).

Summary Disposal

The Paper proposes an express summary disposal procedure that uses the English courts' threshold, namely the claim/defence has "*no real prospect of success*" and there is "*no other compelling reason*" for it to continue to full hearing. This is a rare but welcome proposal, not commonly found in foreign arbitration legislation, which seeks to promote cost and time efficiency and to reassure arbitrators, and foreign enforcing courts, that summary disposals may be appropriate and

proper in the right circumstances (thereby combatting due process paranoia). This proposal could be particularly appealing to financial institutions enforcing payment obligations so may be attractive to speed up arbitrations.

The Act could adopt the "*manifestly without merit*" test outlined in many institutional rules, which may be better known by international arbitrators, but there is no settled jurisprudence on its meaning. Conversely, the meaning of the proposed threshold is clearly articulated in English case law, so this is likely to be the better option for legal certainty. The threshold set by English law is also high which should appease any concerns that foreign parties may have about this new procedure.

The Paper proposes that:

- the summary procedure can only be invoked by party application (not unilaterally by an arbitrator); and
- the tribunal must consult with the parties on the form of the procedure.

Users should welcome these proposals, designed at protecting party autonomy and procedural due process whilst allowing flexibility. However, the Act should also incorporate a reasonable time limit for arbitrators to make their determination in order to protect against delay.

Emergency Arbitration and Section 44 (Court Powers Supporting Arbitral Proceedings)

Emergency arbitration is a new phenomenon which post-dates the Act. The Paper provisionally concludes that the provisions which apply to arbitrators should not apply to an emergency arbitrator ("**EA**") because many of them would be inappropriate in such context. Moreover, an EA regime should not be administered by the courts but by arbitral institutions, which are best-placed to administer such proceedings under their rules.

Adopting this proposal would mean that *ad hoc* arbitrations cannot, in future, benefit from an EA regime, something now well-engrained in modern arbitrations. This is significant because many traditional sectors, such as construction and commodities, as well as more recently established ones, such as FinTech, favour *ad hoc* arbitration as an efficient option for resolving disputes. Consideration should therefore be given to ensuring that the Act provides an EA regime which could apply to *ad hoc* arbitrations and to institutional arbitrations where no EA mechanism is otherwise available.

The Paper addresses non-compliance with EA orders and proposes either:

- permitting an EA to issue a peremptory order, backed up by a court order, if ignored; or
- bringing EAs into the remit of section 44 and allowing EAs to give permission for section 44(4) applications so that the court can grant interim relief relating to the EA order.

While (ii) is simpler, (i) maintains the primacy of the arbitral regime and is what practitioners are accustomed to under sections 41 and 42.

The Paper discusses what it describes as the widespread, but "*incorrect*", perception that following the decision in ***Gerald Metals***, section 44(5) of the Act precludes recourse to court where

emergency arbitration is possible. Consequently, it suggests repealing section 44(5). Given the controversy generated by ***Gerald Metals***, repealing section 44(5) would simplify things and would clarify that the Court can assist in the EA context within the confines of sections 44(3) and 44(4).

To address the "*vexed question*" of whether an order under section 44 can be made against someone who is not a party to the arbitration proceedings/agreement ("**third party**"), the Paper asks whether s44 should be amended "*to confirm that its orders can be made against a third party*". Third party orders are possible for most, but not all, matters listed in section 44(2) – it depends on the applicable domestic law rules, which are imported into that section. For this reason, it may be confusing to adopt the proposed blanket confirmation; it would likely be clearer to maintain the current status quo, especially in light of the evolving law concerning the matters listed in section 44(2).

Section 67 Challenges (Challenging Award Based on Tribunal's Lack of Jurisdiction)

Currently, section 67 challenges may proceed by way of a re-hearing, with the inevitable duplication of cost and time (since the tribunal's ruling is given no weight) but with the advantage of the court having the final say.

The Paper proposes that a section 67 challenge should instead take the form of an **appeal** (review of the award) in circumstances where:

- a party has participated in the arbitration and objected to the tribunal's jurisdiction; and
- the tribunal has ruled on jurisdiction in an award.

This seems sensible in order to prevent (i) the "*heads I win, tails it does not count*" mentality (ii) the tribunal's jurisdictional hearing being a "*dress rehearsal*" and (iii) duplication.

Currently, a party may also ask the court to determine a point of jurisdiction under section 32, which is possible either *before* or *after* a tribunal has ruled on its jurisdiction. It makes sense for the proposed 'appeal, not rehearing' reform to apply equally to section 32 where the tribunal has ruled on jurisdiction. However, serious consideration should be given to whether it should apply in the following scenarios: (i) section 32 applicants who do not possess a tribunal ruling on jurisdiction and (ii) non-participating parties in an arbitration who may seek a jurisdictional determination or apply under section 67 (*see* section 72), since there will be no award to review or "*second bite of the cherry*", respectively.

Conclusion

The Act would benefit from modernisation but the objective should be to maintain the simplicity of its 1996 counterpart and to avoid complexity. Many, but not all, of the current proposals achieve this objective.

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