Kluwer Arbitration Blog

Reforming Arbitration Act 1996: Recalling Everlasting Legacy

Farqaleet Khokhar · Thursday, March 27th, 2025

Arbitration Act 1996 ("1996 Act") marked its Silver Jubilee on 31 January 2022, followed by modifications proposed by the Law Commission to uphold its status as a landmark piece of legislation and reinforce London's position as the premier destination for international arbitration. After review by the Law Commission, on 21 November 2023, the Arbitration Bill hit the floor of the House of Lords. On 25 February 2025, the Arbitration Bill ("2025 Arbitration Act") secured the Royal Assent (see coverage on the Blog here).

In the last three decades, the 1996 Act consolidated the position of London as an epicentre for global dispute resolution and had a worldwide impact on the various arbitration laws, legal landscapes, and arbitral institutional rules. The advent of an updated arbitration law is a significant development, but the English court jurisprudence developed due to the 1996 Act also merits a close and critical consideration. Thereby, this post shall scrutinise the landmark decisions to pinpoint, due to such evolved jurisprudence, whether or not there was a need for reform.

Several landmark decisions that have advanced law and addressed complex issues are discussed below.

Lesotho Highlands v Impergilo

Indeed, the first reference should be made to the House of Lords verdict in *Lesotho Highlands Development Authority v. Impregilo SpA*. Lesotho Highlands was a significant decision as it restated and reaffirmed the minimum judicial intervention policy, the most fundamental policy of the English arbitration law. This arbitration-friendly policy states that, to set aside an award pursuant to Section 68, it is inadequate only to demonstrate the occurrence of serious irregularity. Rather, it is required to show that such irregularity caused substantial injustice. This requirement effectively outlines the minimum supervisory role of English courts over arbitration. However, by intervention, the English courts can set aside awards in extreme circumstances when arbitration proceedings conducted by the tribunal went so wrong that justice calls out for correction; the Departmental Advisory Committee Report also sets the same.

Fiona Trust Case

The most influential House of Lords verdict in *Fiona Trust & Holding Corp v. Privalov* provided a policy for adjudicating disputes by a single and streamlined arbitration process. The House of Lords stated that the tribunal's jurisdiction to examine contractual disputes extends to determining contractual invalidity. Therefore, a party can challenge the arbitration clause and contractual validity. However, doing so does not shift this question from the tribunals to the courts; the tribunal will assume jurisdiction over this matter. Lord Hoffmann inventively underscored a legal doctrine to commercial practice, stating that the interpretation of the arbitration clause shall start from the presumption that parties, as sensible businessmen, intended for any dispute *vis-à-vis* their relationship—including the issue of contractual validity—to be tried by the same tribunal. The decision in the *Fiona Trust* case was a logical and systematic sequence of Lesotho Highlands' decision.

Dallah Real Estate Case

The next on the list is the United Kingdom Supreme Court's decision in *Dallah Real Estate and Tourism Holding Company v. Ministry of Religious Affairs, Government of Pakistan* whereby the Supreme Court and Paris Court of Appeal reached different outcomes while applying the same law on the identical set of facts. The Supreme Court held that, under Section 103, the English courts must independently review the tribunal's jurisdiction over the matter, regardless of whether the tribunal itself had considered and determined its jurisdiction. This means the courts are not bound by the tribunal's own assessment of its authority to hear the case. Thus, under the 1996 Act, the principle of competence-competence authorizes the arbitrator to be the first judge of its jurisdiction rather than the sole adjudicator. In *Dallah*, Lord Mance highlighted what matters the most is whether foreign arbitral awards will likely be enforced in the jurisdiction where a party has sought such enforcement. To this extent, what ultimately matters is the court's view on whether arbitration lawfully subsists; the arbitrator's decision cannot impede the jurisdiction of the national courts. This position is based on the very policy of the 1996 Act that for the existence of arbitration, the national court must recognize it under domestic law.

Jivarj v. Hashwani

Jivraj v. Hashwani is another landmark case by the Supreme Court in which various specific and vital issues were navigated *vis-à-vis* the anti-discrimination and employment regulations. *Inter alia*, the significant issue in this case was whether the parties could restrict the choice of arbitrator. Lord Clarke formed a policy under Section 1, stating that arbitration provides parties with freedom to constitute their own dispute resolution process as litigation lacks these unique characteristics.

Halliburton v. Chubb

In *Halliburton Company v. Chubb Bermuda Insurance Ltd*, the Supreme Court discussed the issue concerning integrity of arbitration. Particularly in the last decade, the unilateral appointment of arbitrators has been criticised. In that context, Lord Hodge unequivocally upheld the English legal

position that, despite the realities of unilateral appointments, 'a party-appointed arbitrator in English law is expected to come up to precisely the same high standards of fairness and impartiality as the person chairing the tribunal'. These high criteria of impartiality require disclosure because, as the Supreme Court held, 'there is a legal duty of disclosure in English law which is encompassed within the statutory duties of an arbitrator under Section 33 of the 1996 Act and which underpins the integrity of English-seated arbitrations.'

Enka Insaat Case

Finally, the Supreme Court's decision in *Enka Insaat Ve Sanayi AS v. OOO Insurance Company Chubb* shall pave the way for this discussion. This is the only decision that gave birth to a new and innovative rule in the Reformed Arbitration Act. In this case, the Supreme Court held that if the parties failed to specify the governing law of the arbitration agreement expressly or impliedly, the law governing the matrix contract shall, too, govern the arbitration agreement even if the law of the seat is different from the law governing the matrix contract. The Supreme Court disagreed with the Court of Appeal and said it was erroneous to state that a strong presumption exists that by implied choice, the parties intend the law of the seat to be the governing law of the arbitration agreement.

The Reformed Arbitration Act will now overrule this established principle that rather than the law of the seat, the governing law of the matrix contract shall govern an arbitration agreement. The Law Commission recommended that in Section 6A, the Reformed Arbitration Act will enshrine a principle that 'unless the parties agree otherwise, the law of the seat shall govern the arbitration agreement'.

Analysis and Comment

Enka v. OOO Insurance Company is a single case that would stand as a justification for the 1996 Act amendment. For all the other circumstances, as the cases have been identified and analysed above, there is no need to amend the 1996 Act. For instance, the Reformed Arbitration Act only codifies the duty of disclosure established in *Halliburton v. Chubb*. This general duty has also always been covered by the English common law.

Further, the Reformed Arbitration Act establishes a rule that restricts the intensity of judicial review of the award challenged pursuant to Section 67 of the 1996 Act; in the *Dallah Real State* Case, the Supreme Court held that any challenge before the enforcing court should be through a *de novo* rehearing, was related to enforcement in light of Section 103, but not a case under Section 67.

Lesotho Highlands was not part of the review agenda of the Law Commission. However, *Jivraj v. Hashwani discusses the matter of* discrimination in arbitration, which the Law Commission also discussed. In the Section 4.66 of the Final Report, the Law Commission suggested that there is no need to legislate further to restrict discrimination on the basis that this will not play a role in the diversity of arbitral appointments; however, it will open the doors to unwarranted litigation and challenges to awards.

It is noteworthy that English courts have not only achieved the basic objective of the 1996 Act, but

have also evolved and developed the jurisprudence with time. Thereby, it is not unfair to state that there was no pressing need to reform the 1996 Act as it had no pertinent lacunas. Additionally, no legal or policy matters in the arbitration regime require the advent of new legislation. However, the 2025 Arbitration Act does advance two principles: first, a new principle on the review of awards pursuant to Section 67, and second, a principle on the law governing arbitration agreements. These advancements aid a purpose of practical significance rather than legal or policy principles. Regarding the first advancement, the Law Commission made a genuine proposal that under Section 67, rather than entirely rehearing the case, challenges shall be made by way of an appeal. The final proposal of the Law Commission restricts the ability of the party to introduce new objections or evidence before the enforcing court. However, the party may assert the court to rehear evidence in the interest of justice. The second advancement is not a new one. Before the decision in *Enka*, it was already held in *Sulamerica CIA Nacional De Seguros SA and others v. Enesa Engenharia SA and others* that the law of the seat shall govern the arbitration agreement; thus, this principle will be codified.

Concluding Remarks

The question should be whether the enactment of the 2025 Arbitration Act is unwarranted or can be justified based on two advancements and some other minor changes that it will bring to the English regime. The answer should be that, while enacting the 2025 Arbitration Act was justifiable, and although the English arbitration regime was already advanced and evolved through the endeavour of the English courts, there was no need for grave modifications. Legislative interventions do not always address loopholes or new legal or policy matters. Such interventions generally are not always innovative. New enactments or legislation can perform a fine function, although they have less ambitious purposes.

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