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Reform of the English Arbitration Act 1996 – Where are We Now?

Minding Your Business on **June 26, 2023**

England & Wales is one of the most popular locations for commercial parties to resolve disputes by way of arbitration. The Law Commission (the body responsible for considering and recommending legislative change to the UK government) is considering whether the Arbitration Act 1996 (the Act), which provides the framework for arbitration in England & Wales needs to be updated in line with party needs.

The Law Commission has now published two consultation papers (available here) addressing several areas for potential reform including confidentiality, independence of arbitrators and disclosure, discrimination, immunity of arbitrators, jurisdictional challenges against arbitral awards, and the proper law of the arbitration agreement. The consultation period on the second paper closed recently, at the end of May 2023.

Some of the key themes arising from the reform proposals are as follows:

1. **Confidentiality** – Confidentiality in the arbitration context might attach to things said in a hearing, or to documents produced to support a claim for example, and restricts how those things could be repeated. A duty of confidentiality can arise contractually where the parties agree that their arbitration will be confidential, or in equity, where potentially private information is received in circumstances importing an obligation of confidence.

The Act currently does not contain provisions about confidentiality. The Law Commission considered whether the Act should provide a default rule that arbitrations are confidential, with a list of exceptions. It has provisionally concluded that the Act should not seek to codify the law of confidentiality which is better left to be developed by the courts. The conclusion was reached partly on the basis that the Law Commission was not persuaded (a) that all types of arbitration should be confidential (e.g. investor claims against states, where the default should be transparency), and (b) that a possible list of exceptions is sufficiently certain to justify codification.

While the Law Commission's reasoning is understandable, a mandatory statutory duty of confidentiality would make the law more certain and could provide an opportunity to reassure commercial parties to whom the confidentiality of arbitration proceedings may be of paramount importance, that English arbitrations are confidential and make England a more appealing jurisdiction for international commercial disputes.

- **Law governing the arbitration agreement** – The current law in England & Wales for determining the proper law of an arbitration agreement was set out in the Supreme Court's decision in *Enka v Chubb* [2020] UKSC 38. In short, it states that:
- If there is no choice of law specified for the arbitration agreement, and if the arbitration agreement forms part of a matrix contract which contains a choice of law, then that chosen law of the matrix contract will also govern the arbitration agreement (although that chosen law "may" be displaced in some circumstances).
- If there is no choice of law anywhere, the arbitration agreement will be governed by the law with which it has the closest and most real connection. According to the majority in *Enka*, this will be the law of the seat of the arbitration (but that chosen law may perhaps be displaced if there is a serious risk that the chosen law might render the arbitration agreement invalid).

For the reasons discussed in our blog post here, the process specified in *Enka* could potentially lead to undesirable outcomes. It is viewed as introducing both uncertainty for parties complexity in the conduct of the arbitration. Recognizing these risks, the Law Commission has provisionally proposed that a new rule be introduced into the Act to specify that the law of the arbitration agreement is the law of the seat, unless the parties expressly agree otherwise. If implemented, this would be a very welcome change.

- **Challenging arbitral awards on the basis that tribunal lacked jurisdiction (s 67 of the Act)** – Under section 67 of the Act a party can make an application to court challenging an arbitral award on the basis that the tribunal lacks jurisdiction. The focus of the Law Commission's concern was a situation where an objection has been made to the tribunal itself that it lacks jurisdiction, and the tribunal has ruled on its jurisdiction in an award, but there is then a subsequent challenge under section 67 by a party who has participated in the arbitral proceedings.

Under the current law, that challenge comprises a full rehearing. The Law Commission's view is that such challenges should not be hard in a full rehearing. It has provisionally proposed that (1) the court should not entertain any new grounds of objection, or any new evidence, unless even with reasonable diligence the grounds could not have been advanced or the evidence submitted before the tribunal; (2) evidence should not be reheard, save exceptionally in the interests of justice; and (3) the court should allow the challenge only where the decision of the tribunal on its jurisdiction was wrong. The Law Commission proposed that this process should be encapsulated in rules of court, rather than in legislation.

Irrespective of which proposals are eventually introduced as amendments into the Act, there is a clear desire in this jurisdiction to ensure the continued success of the Act. We will report in future posts on the final recommendations.

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