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Insights

THE ENGLISH ARBITRATION ACT TURNS 25: IS IT TIME FOR AN UPDATE?

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"The 1996 Act is not a complete code of the law of arbitration but allows judges to develop the common law in areas which the Act does not address."

So said Lord Hodge in his lead judgment in last year's widely reported UK Supreme Court decision in Halliburton v Chubb.

Complete or not, the Arbitration Act 1996 creates the framework for arbitrations conducted under English procedural law. It plays an important role in helping to make England an attractive destination for commercial arbitrations in an increasingly competitive market.

The courts have an important part to play in this process, allowing the law to respond pragmatically to real-life situations, however, evolution through the development of the common law remains a reactive rather than a proactive way of keeping pace with change.

Back in July 2016, the Law Commission announced that it was contemplating reform of the Arbitration Act 1996 in its Thirteenth Law Reform Programme. In December 2017, the Commissioners chose 14 topics for that programme. The reform of the Arbitration Act failed to make the cut: displaced, perhaps, by the project at the top of the list "A Modern Framework for Disposing of the Dead."

The Law Commission is beginning the process of identifying potential law reform projects for its 14th Programme of Law Reform, likely to take place in 2021. If England is to retain its competitive advantage as a seat for commercial arbitration, now may be the time move the reform of the Arbitration Act to the top of the list.

There are various areas in which reform of the Arbitration Act could be undertaken. Rather than presenting an exhaustive list, this blog focuses on three potential areas for reform.

Confidentiality

Confidentiality is one of the perceived advantages of arbitration over court litigation. Parties often choose to arbitrate in order to keep details of their dispute private. However, there is no statutory

definition of confidentiality in the Arbitration Act 1996. The 1989 Report by the Departmental Advisory Committee on Arbitration Law (the DAC Report) makes it clear that this was a deliberate decision. The drafters of the Act considered giving confidentiality a firm statutory basis in the Act, but the exercise proved too controversial and difficult. One issue was whether it was possible to give an accurate exposition of the principle of confidentiality in the abstract. Another concern was that the myriad of exceptions and qualifications to the principle of confidentiality made it difficult to formulate acceptable statutory guidelines.

The DAC Report notes that the position is not wholly satisfactory, but concludes that, because the principles are unsettled, they are better left to the common law to evolve on a pragmatic case-by-case basis. However, that conclusion is subject to the following caveat:

"In due course, if the whole matter were ever to become judicially resolved, it would remain possible to add a statutory provision by way of amendment to the Bill."

Almost 25 years have passed since the Act was enacted and, in that time, the common law has evolved.

The Court of Appeal decisions in Ali Shipping Corporation v Shipyard Trogir [1997] EWCA Civ 3054 and Emmott v Michael Wilson & Partners Ltd [2008] EWCA Civ 184 are now the leading cases on the nature of the obligation of confidentiality. A further raft of case law has formulated recognised exceptions to the duty of confidentiality. Gaps remain, but a reform of the Arbitration Act would allow the drafters to re-consider whether it is now possible to formulate some clear, statutory guidelines on confidentiality.

In addition, and perhaps more importantly, it would open the door for a review of the juridical basis of confidentiality in arbitration. As things stand, as a matter of English law, there is an implied duty of confidentiality in arbitration – making confidentiality a presumption, not an option. This is not the case in all other jurisdictions. For example, Norway's Arbitration Act has adopted an "opt-in" system and Australia's Arbitration Act has adopted an "opt-out" system.

Other jurisdictions have chosen to support the duty of confidentiality with legislation. For example, the obligation to treat all matter relation to the arbitration as confidential is enshrined in the Arbitration (Scotland) 2010 Act. Singapore and New Zealand also have codified provisions.

The legal basis and scope of the duty of confidentiality are important issues of policy. A balance needs to be struck between the increasing trend towards transparency in arbitration and the fact that confidentiality is regularly cited by parties as one of the key advantages of arbitration as compared with litigation. Jurisdictions like New Zealand, Scotland and Singapore have sought that balance through legislation, perhaps now is the time for England to follow suit.

Section 44 and non-parties

Section 44 of the Arbitration Act deals with the relationship between the arbitral tribunal and the court and the court powers exercisable in support of arbitral proceedings. This is a pivotal provision, designed to provide non-interventionist support from the courts to facilitate arbitrations, and it has given rise to a significant body of case law.

Section 44 gives the court the same supportive powers for making orders in relation to (amongst other things) the taking of evidence of witnesses and the granting of interim injunctions as it has for the purposes of legal proceedings. One particularly controversial area, where the case law is still evolving, is whether and to what extent the court's powers under section 44 may be exercisable against third parties.

There is nothing in the DAC Report to indicate whether parliament intended that the courts have jurisdiction to make an order against a non-party under section 44. In his 2014 judgment in Cruz City v Unitech [2014] EWHC 3704 (Comm), Males J cited this as one of the reasons for concluding that section 44 does not extend over third parties.

"This is something which, if it was intended, could be expected to be stated with clear words."

Males J recognised that this view would create a gap in the law and that an injunction from the courts may not be available against third parties' acts frustrating the arbitration process. However, he held that a gap

"is not a reason to find a jurisdiction which is not justified on the wording of the relevant sections".

Since then, the Court of Appeal in A and B v C, D and E [2020] EWCA Civ 409 has held that section 44(2)(a) does give the power to order the taking of evidence from a non-party – but left open the question of whether all orders under section 44(2) can be made against non-parties.

A reform of the Arbitration Act would be an opportunity to bring welcome clarity to this important question.

Section 44(5) and the Emergency Arbitrator

Another area where reform would be welcome is in relation to the application of section 44(5) of the Act.

Section 44(5) provides that *"the court shall act only if or to the extent that the arbitral tribunal and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively."*

Since the Act was drafted, most of the major arbitral institutions have introduced provisions for the appointment of emergency arbitrators. This has led to uncertainty as to whether court ordered injunctive relief can be sought in cases where similar relief could be obtained from an emergency arbitrator.

In Gerald Metals v Timis [2016] EWHC 2327 (Ch), the court rejected an application for injunctive relief on the grounds that the applicant had the ability to obtain such relief under the emergency arbitrator provisions provided under the 2014 LCIA Rules and that the matter was not sufficiently urgent that the Court should step in to exercise its powers under s44 Arbitration Act 1996.

The LCIA Rules 2020 have sought to clarify the position, making it clear that it is not the intention of the LCIA that the emergency arbitrator provisions should be treated as an alternative to or substitute for the right of a party to apply to the court for interim or conservatory measures before the formation of the tribunal. However, in doing so, the LCIA recognised that it is unable to legislate for how the court will interpret section 44(5). A reform of section 44(5) to make it clear that parties retain the ability to seek court support where necessary would address this.

Conclusion

Since the Arbitration Act 1996 was enacted the common law has played an important part in developing English arbitration law. However, recent case law has highlighted gaps in the Act and areas where clarification and reform would be welcome. As the Arbitration Act celebrates its 25th birthday, perhaps now is the time for a systematic review of the Act to ensure that it remains fit for purpose in the years to come.

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