BCLP. Client Intelligent

Insights

THE ARBITRATION ACT 2024: AN AGGREGATION OF MARGINAL GAINS

Sep 06, 2023

SUMMARY

The Law Commission of England and Wales has concluded its review of the Arbitration Act 1996.

In our International Arbitration Survey 2022, we canvased views on the potential areas for reform of the Act.

On 6 September, the Law Commission published a final report setting out its conclusions and recommendations for the reform together with a draft Arbitration Bill.

The headline point is that the new Act will not contain any dramatic changes. A common refrain during the consultation process was that the 1996 Act was fundamentally sound and there was no need for a fundamental re-draft. Instead, the focus has been on incremental improvements to the Act to ensure that it remains "state of the art" and *"continues to support London's world-leading role in international arbitration."*

Here is a summary of what we can expect to see in a new Arbitration Act.

KEY CHANGES

GOVERNING LAW OF THE ARBITRATION AGREEMENT

The report recommends the introduction of a new default rule specifying the governing law of the arbitration agreement. The draft Arbitration Bill provides that parties can expressly choose the law governing the arbitration agreement but, in the absence of an express choice, the governing law of the arbitration agreement will be the law of the seat of arbitration. This will mean that the choice of law governing the underlying/main contract will not be a relevant consideration in determining the law of the arbitration clause unless drafted in such a way as to clearly constitute an express choice of the law governing the arbitration agreement as well as the main contract. The aim of this reform

is to eliminate situations where a choice of law governing the underlying/main contract is treated as an implied choice of the law governing the arbitration clause.

ARBITRATORS' DUTY OF DISCLOSURE

The report recommends the introduction of a statutory duty of disclosure for arbitrators, essentially codifying the common law rule as set out in *Halliburton v Chubb* that requires arbitrators to disclose circumstances that would or might give rise to doubts as to their impartiality. The new statutory duty encompasses what an arbitrator actually knows or ought reasonably be expected to know. However, the new Act will not address the scope of the disclosure required or set out any specific circumstances that must be disclosed. This is in recognition of the fact that circumstances that might give rise to doubts over an arbitrator's impartiality may vary from sector to sector.

EXTENSION OF ARBITRATOR IMMUNITY

The report recommends and extension of arbitrator immunity. Under the proposed new Act, arbitrators will have no liability for resignation, unless the resignation is shown to be unreasonable. In applications to remove arbitrators, arbitrators will not be liable for costs, unless it is shown that they have acted in bad faith.

SUMMARY DISPOSAL

The report recommends the introduction of a new power of summary disposal/dismissal of a claim or defence has no real prospect of success. Summary disposal/dismissal will take effect by the adoption of an expedited procedure, determined by the tribunal, after consultation with the parties.

SECTION 44 TO EXTEND TO THIRD PARTIES

The report recommends an amendment to section 44 of the Act to make it clear that orders can be made against third parties. A third party will have full rights of appeal in respect of any order made under section 44. This is the only recommended change to section 44. There will be no change to section 44(2)(a), the mechanisms for taking witness evidence. There will be no repeal of section 44(5), the restriction on power of court to act to circumstances in which tribunal (or any arbitral or other institution or person vested with power by the parties) has no power or is unable for the time being to act effectively.

POWERS OF EMERGENCY ARBITRATORS

The report recommends targeted amendments to the Act to give Emergency Arbitrators powers that mirror those of ordinary arbitrators.

SECTION 67 CHALLENGING AN AWARD ON JURISDICTIONAL GROUNDS

The report recommends an amendment to the procedure for challenging an award under section 67 of the Act. Where an objection has been made that the tribunal lacks jurisdiction, and the tribunal has ruled on this, then any subsequent section 67 challenge by a party who participated in the arbitral proceedings should not be in the form of a full rehearing. The new process is to be set out in the rules of court rather than in the new Act, so it will be for the Rules of Court Committee to make the recommended changes. The recommended changes are: (1) that 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; and (2) evidence should not be reheard, save exceptionally in the interests of justice.

The report recommends two additional amendments to section 67. The first is an amendment to include the further remedy that the court may declare the award to be of no effect (mirroring the remedies available under section 68 of the Act). The second is an amendment to confirm that an arbitral tribunal can make an award of costs in consequence of an award ruling that it has no substantive jurisdiction.

NO CHANGE

CONFIDENTIALITY

The Act currently does not include any provisions about confidentiality in arbitration and the Law Commission considered whether it should. They concluded that the Act should not seek to codify the law of confidentiality, and that the law of confidentiality is better left to be developed by the courts. The Law Commission was not persuaded that all types of arbitration should by default be confidential. It also felt that the introduction of a default rule of confidentiality would be out of step with the trend towards greater transparency in arbitration.

DISCRIMINATION

The Law Commission considered potential amendments to the Act to prohibit discrimination in the appointment of arbitrators and in arbitration generally. However, the Law Commission decided that amendments to the Act to address discrimination were unlikely to be successful and concluded, with regret, that they should not recommend any changes.

SECTION 69 APPEAL ON A POINT OF LAW

The Law Commission considered whether section 69 should be repealed, to increase the finality of arbitral awards, and whether the circumstances in which an appeal under section 69 can be brought should be expanded, to allow the court more opportunity to consider questions of law. After consultation, the Law Commission concluded that section 69 strikes an appropriate balance between ensuring the finality of arbitral awards and ensuring that errors of law are corrected. The

Commission also noted that section 69 is non-mandatory, allowing parties to opt out, and, as a percentage of arbitrations, rarely invoked. On this basis, section 69 will remain.

NEXT STEPS

The next phase will depend on whether the Ministry of Justice are able to secure a legislative slot for the Arbitration Bill before the next General Election. Assuming they are, we expect to see a new Arbitration Act in 2024.

RELATED PRACTICE AREAS

- International Arbitration

MEET THE TEAM

George Burn

London

george.burn@bclplaw.com
+44 (0) 20 3400 2615

Victoria Clark

London

victoria.clark@bclplaw.com
+44 (0) 20 3400 3095
