# REFORM OF THE 1996 ARBITRATION ACT: WHAT TO EXPECT

Caroline Kenny KC and Arran Dowling-Hussey

4-5 Gray's Inn Square

## Reform of the 1996 Arbitration Act: What to expect

The last dozen or so years have seen a number of revisions to arbitration legislation around the world. For instance, 2010 saw new or revised legislation in the Republic of Ireland1 and Scotland.2 In that context the review of the Arbitration Act 1996 (UK) ('Act') applicable in England, Wales and Northern Ireland, which started in 2021 was apt and necessary. The United Kingdom's Law Commission has recently concluded that exercise. The Law Commission looked at whether the legislation is fit for purposes and reflected international best practice. In the round, the suggested changes, which still have to be given legislative effect, is a 'tune up', rather than a major revision, of an Act which has in the near 30 years since it was last amended shown itself to be robustly effective. The world (including the practice of domestic and international arbitration) has changed significantly since the mid-1990s and the suggested amendments can be seen as practical steps to consolidate the effectiveness of the Act.

The final report issued on 6 September 2023 by the Law Commission followed an initial consultation paper in September 2022 after receipt of submissions from Alternative Dispute Resolution stakeholders, including the London-based Chartered Institute of Arbitrators. A second consultation paper on three controversial issues followed in March of this year. Some issues which were flagged for consideration by the Law Commission, such as codifying rules on confidentiality, were considered and not proceeded with. Where changes were not recommended the Law Commission said that the present position did not need to be revised or any potential amendments would not be practically possible. Several of the Law Commission's recommendations which are of interest and/or importance are set out below.

### CONFIDENTIALITY

English law on confidentiality has been developed solely through the courts. In November 2021 the Law Commission flagged confidentiality and privacy as areas for investigation.3 In the September 2022 consultation paper the Law Commission said it had reached a 'provisional conclusion' that the Act should not include

provisions addressing confidentiality, a position it has now confirmed in the final report. The Commission concluded that the better approach to regulating confidentiality was to allow it to be developed through the courts. It is noteworthy that such an approach is consistent with the view of the 1996 Departmental Advisory

[1] *Arbitration Act* 2010 (irishstatutebook.ie)

[2] *Arbitration (Scotland) Act* 2010 (legislation.gov.uk)

[3] 'Law Commission to Review the Arbitration Act 1996', *Law Commission* (Press Release, 30 November 2021) https://www.lawcom.gov.uk/law-commission-to-review-the-arbitration-act-1996/.

Committee on Arbitration Law ('DAC') which considered amendments to the Act. In its report the DAC said 'there is … no doubt whatsoever that users of commercial arbitration in England place much importance on privacy and confidentiality as essential features'.4 However, they considered it would be difficult to reach a statutory formulation because of the 'myriad exceptions' and qualifications and concluded it was better left to the common law to evolve.5 Essentially, then, in 2023 the Law Commission has reached the same conclusion as the DAC in 1996. Some may consider this as a missed opportunity to clarify the law on confidentiality particularly as London's rival for first place as an arbitration hub, Singapore, amended its legislation in 2020 to empower a tribunal, or the High Court, to enforce confidentiality obligations whether they arise under a law or the rules of any institution or organisation.6

## ARBITRATOR IMMUNITY

Among the changes that are slated to be introduced one that virtually all involved professionally in arbitration will welcome is the revisions to the issue of arbitrator immunity. To allow for the effective operation of arbitral tribunals it is necessary to have measures in place for arbitrator immunity. However, unfettered total immunity would not allow users of arbitration to have confidence in the system as it would fail to protect against any instances of arbitrators acting in 'bad faith.' The final report maintains this balance by making a recommendation that there should be no liability for costs for resignations unless the resignation is shown to be unreasonable. As is perhaps more easily understood than at other times following the late February 2022 invasion of Ukraine, unforeseen circumstances, such as the introduction of sanctions, can arise which may require an arbitrator to resign in circumstances that would not have been foreseeable. The Law Commission recommended that arbitrators' liability for costs in relation to applications for their removal should be confined to instances of 'bad faith'.

## ARBITRATOR DUTY OF DISCLOSURE

Arbitrators presently owe a duty of impartiality under statute and case law7. Post appointment the duty of impartiality continues and, consequently, there is an ongoing duty on an arbitrator to disclose any matters which may give rise to justifiable doubts as to impartiality. This obligation is to be codified in the Act by way of a new section 23A. Separating the duty of disclosure from the existing duty of impartiality in section 33 of the Act will allow it to apply to pre-appointment discussions. The new section will make it clear that the obligation covers the arbitrator's actual knowledge and also matters that they reasonably ought to be aware of.

[4] Departmental Advisory Committee on Arbitration Law, 'Report on The Arbitration Bill', in Lord Mustill and Stewart C Boyd, *Commercial Arbitration: 2001 Companion Volume to the Second Edition* (Butterworths, 2001) 395, 397–9 [10]–[17].

[5] Departmental Advisory Committee on Arbitration Law, '1996 Report on the Arbitration Bill' (1997) 13(3) *Arbitration International* 275, 277–279; *Halliburton Company v Chubb Bermuda Insurance Ltd* [2020] UKSC 48, 19–20 [57] ('*Halliburton*').

[6] *International Arbitration (Amendment ) Act 2020* (Singapore) No 34/2020 ss 4–5.

[7] Section 33 of the Act; see also *Halliburton Company v Chubb Bermuda Insurance Limited* [2020] USKC 48.

## COURT ORDERS IN SUPPORT OF ARBITRATIONS

The High Court in London can make orders that support arbitrations, including orders for the preservation of evidence and freezing injunctions under section 44 of the Act. There has been considerable doubt about whether such orders can have effect against third parties not directly involved in the arbitration. The Law Commission, in its final report, has recommended amendments to the Act so as to explicitly confirm that section 44 orders can be made against third parties. This recommendation is a welcome clarification of the position in relation to third parties.

## SUMMARY DISPOSAL

The final Law Commission Report recommends that new section 39A is introduced into the Act to permit an arbitral tribunal, on the application of a party, to issue an award on a summary basis. The Law Commission recommends that a tribunal may make an award on an issue summarily only where there is 'no real prospect of success' on that issue. The new section 39A will therefore mirror the approach followed in London in litigation. The proposed amendment reflects best practice in international commercial arbitration as various widely used institutional rules already allow for summary disposal of proceedings. The recommendation will assist tribunals to prevent unnecessary delay and expense and allow them to address unmeritorious cases with greater confidence.

## PROCEDURE FOR JURISDICTIONAL CHALLENGES TO AWARDS UNDER SECTION 67

Following the Supreme Court's decision in Dallah v Pakistan [2010] UKSC 46, the current practice in relation to section 67 challenges to an arbitrator's substantive jurisdiction is that there is a de novo rehearing. One school of thought has argued that a de novo hearing is unfair and causes delay as the point has normally been raised and determined by the tribunal. It is also argued that a de novo hearing treats any tribunal's determination on the issue of jurisdiction as effectively a 'dummy run' as arguments may be improved on appeal. Conversely, some argue that a de novo hearing helps safeguard parties' substantive rights. The final report moves away from the Dallah position and recommends reform to court rules to provide that where an objection is made to a tribunal's jurisdiction, in any subsequent challenge to a court under section 67, a party who has participated in the arbitration should not be able to rely on:

- new grounds of objection or new evidence, unless it could not with reasonable diligence have been put before the tribunal; and
- evidence will not be reheard, save in the interests of justice.

This recommendation gives substance to the principle of competence-competence because although a court will have the final word on a tribunal's jurisdiction it requires the objecting party to deploy all its evidence and arguments at the outset and accords weight to a tribunal's ruling.

## CONCLUSION

The recommendations by the Law Commission will ensure that the Act remains fit for purpose and reflects best practice in international commercial arbitration. One never knows but the expectation at the time of writing is that the United Kingdom government will follow the recommendations made in the final Law Commission report. Obviously, time will be needed to consider the recommendations in the final report. The next general election has to be held in the United Kingdom no later than January 2025 and it is hoped, allowing for consultation and preparatory work, that the revised legislation will pass through Parliament and be commenced in the lifetime of the present government.

**Caroline Kenny KC and Arran Dowling-Hussey**

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