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Reform of the English Arbitration Act 1996: Three Areas under Scrutiny

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England is one of the most popular jurisdictions for commercial parties to resolve disputes through arbitration: London and Paris were ranked as the top two preferred cities in the world in 2022. To ensure England's arbitration regime remains modern and competitive, the Law Commission – a body responsible for considering and recommending legislative change to the UK government – is currently considering updates to the legal framework of arbitration in England & Wales, the Arbitration Act 1996 (the **Act**).

This reform should be of significant interest to international parties and UK participants alike – arbitration has grown by about 25% between 2016 and 2020, with a wide range of originating geographies for participants: in 2022 88% of parties in LCIA arbitrations came from 90 Counties other than the UK.[1]

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

We address three key themes among the latest proposals:

0. **Confidentiality** – the Act currently does not contain provisions about confidentiality. Confidentiality in arbitration might attach to things said in a hearing, or to documents produced to support a claim, for example. Confidentiality 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 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, which is better left to be developed by the courts. This was because the Law Commission was not persuaded (1) that all types of arbitration should be confidential (e.g. investor

claims against states, where the default should be transparency), or (2) that a possible list of exceptions is sufficiently certain to justify codification.

On the other hand, and as responses to the consultation flagged, a mandatory statutory duty of confidentiality would bring certainty and reassure commercial parties to whom the confidentiality is of paramount importance and so make England a more appealing jurisdiction for international commercial disputes. Any proposal in this area could be consequential.

- **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:
    - If there is no choice of law specified for the arbitration agreement, and if the arbitration agreement forms part of a matrix contract that contains a choice of law, then that chosen law will also govern the arbitration agreement (although that chosen law "may" be displaced in some circumstances).
    - If there is no choice of law anywhere in the contracts, 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).

The process specified in *Enka* could lead to undesirable outcomes. It introduces uncertainty for parties and complexity in the conduct of the arbitration. Clarity for parties about the terms of their agreement, certainty about the law applicable to the interpretation and conduct of the arbitration, and the desire to minimise satellite disputes are key issues for participants and bear on their choice of England as the legal seat. Recognising these risks, the Law Commission has provisionally proposed that the Act specifies 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 –** under section 67 of the Act, a party can make an application to the English 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 then faces a subsequent jurisdiction challenge under this section.

Under the current law, that challenge would require a rehearing. The Law Commission's proposal in its first consultation paper was that those challenges should not be heard in a *full* rehearing. That suggestion elicited strong responses from consultees. The primary issues are limiting delay and cost issues and reducing uncertainty and unfairness, by not permitting a party challenging jurisdiction to have a "second bite of the cherry". The Commission has now provisionally proposed that while a rehearing is the preferable course, limits to the challenge should be clearly set out. In particular, it has recommended: (1) the court should not entertain any new grounds of objection or any new evidence; (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 the court, rather than in legislation.

Irrespective of which proposals are eventually introduced as amendments to the legislation, there is a clear desire in this jurisdiction to ensure the continued success of the Act. The outcome of these

policy proposals will be significant. We will report in future posts on the final recommendations.

[1] LCIA 2022 Annual Casework Report: https://www.lcia.org/lcia/reports.aspx

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