DISPUTE RESOLUTION BRIEFING

Arbitration Act 1996: controversial challenges and (r)evolutionary reform

Statistics from the Commercial Court Report 2021-22, published in March 2023 (the report), demonstrate that the court is maintaining its non-interventionist approach in relation to challenges to arbitral awards, highlighting that these challenges should not be undertaken lightly. Reforms to the Arbitration Act 1996 (1996 Act) that were proposed by the Law Commission (the Commission) in its consultation published on 27 March 2023 (the consultation) also follow this non-interventionist approach, and are likely to have a positive overall effect on arbitration and on England's popularity as an arbitral seat. In addition to endeavouring to achieve more certainty in the arbitration process, the proposed reforms also seek to increase diversity and prevent discrimination in the appointment of arbitrators.

The report

The Commercial Court reports are published annually by the Judiciary of England and Wales, and provide an overview of the work undertaken by the court, including its decision making. They provide a useful insight for arbitration practitioners in terms of the number of applications made to the court to challenge arbitration awards and the outcomes of these applications.

The majority of arbitration-related claims to the court relate to:

- Challenges to arbitration awards on the grounds of lack of substantive jurisdiction (*section 67, 1996 Act*) (section 67).
- Challenges to arbitration awards on the grounds of serious procedural irregularity (*section 68, 1996 Act*) (section 68).
- Appeals on a point of law (*section 69, 1996 Act*) (section 69).

In total, matters arising from arbitration made up around 25% of the court's cases in the period between October 2021 and September 2022: a significant increase compared to previous years. In relation to section 67 applications, the court saw a 59% increase. However, out of the 27 applications filed with the court, five were dismissed on the papers, one was unsuccessful, one was discontinued and 20 remain pending. Similarly, there was a 54% increase in section 68 applications, bringing these to a total of 40. Five of these were dismissed on the papers, one was dismissed at a hearing, two were discontinued, one transferred out and 31 are pending and awaiting decision.

There was an 8% increase in section 69 applications, with permission to appeal being granted in 13 out of 40 cases. The report points out that, as arbitration applications may span a year-end, it is important to look at the previous year's statistics. A review of the 37 applications received in 2020-21 shows that only two of the 37 applications were ultimately successful.

Despite the large increase in arbitral award challenges under the 1996 Act, the court continues to strive to respect awards and decisions issued by arbitral tribunals. The (un) likely prospects of success that an applicant faces on section 67, 68 or 69 applications should serve as a timely reminder for arbitration practitioners to carefully consider any challenges that they wish to bring. The report confirms that there remains a high threshold for challenging arbitral awards under these provisions.

1996 Act reforms

As mentioned in the report, Commercial Court judges have been liaising with the Commission on potential reforms to the 1996 Act. The Commission first consulted on reforming the 1996 Act in September 2022 (*see Briefing "Arbitration Act 1996 reform: anything contentious?", www.practicallaw.com/w-037-3492*). In light of the responses received to its first consultation, the Commission is making three further proposals that relate to the governing law of the arbitration agreement, jurisdictional challenges and discrimination in arbitration appointments.

Governing law

While the Commission did not address the issue of the governing law of arbitration agreements in its first consultation, it received 31 responses asking it to consider this issue as part of the reforms. The current approach of the English courts in determining the governing law of an arbitration agreement is set out in the Supreme Court's decision in *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* (*[2020] UKSC 38; see News brief "Governing law of arbitration agreements: cutting the Gordian knot", www.practicallaw.com/w-028-0699*) (*see box "Determining the governing law"*).

However, the process set out in *Enka* is complex. It arguably does not provide sufficient certainty and may lead to disagreements between parties. *Enka* may also result in an increased number of situations where foreign law will apply to disputes about the meaning and effect of the

Determining the governing law

In *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb*, the Supreme Court held that:

- If a choice of law, whether express or implied, is specified in the contract that contains or otherwise incorporates the arbitration agreement, there is a presumption that the chosen law will also govern the arbitration agreement even where that law differs from the place chosen as the seat of arbitration.
- This presumption may be displaced where the law of the seat provides that the arbitration agreement is governed by the law of the seat or where there is a serious risk that the chosen law might render the arbitration agreement invalid or non-binding on a party.
- If no choice of law is specified, the arbitration agreement will be governed by the law with which it has the closest and most real connection; generally, this will be the law of the seat of the arbitration (*[2020] UKSC 38*).

arbitration agreement in arbitrations that are seated in England. This would lead to more cases requiring foreign law expert evidence, in turn creating additional procedural steps, and increased time and costs. If foreign law does govern the arbitration agreement of an English seated arbitration, section 4(5) of the 1996 Act will be triggered, adding another layer of complexity in having to decide to what extent each non-mandatory section of the 1996 Act is substantive or procedural.

As a result, the Commission is proposing that, unless the parties agree otherwise, the law of the arbitration agreement will be the law of the seat. This will provide parties with certainty and also lead to the courts having to intervene less in the arbitral process. However, there is an argument that this may impose a governing law on the parties that they did not want to have to follow, especially as in contract negotiations parties are often more focused on the law of the underlying contract than the law of the arbitral seat.

Challenging jurisdiction

The consultation proposes limits on the ability to bring section 67 challenges. The Commission is seeking views on the following proposed limits:

- The court should allow the challenge where the decision of the tribunal on its jurisdiction was wrong.
- 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.
- Evidence should not be reheard, save exceptionally in the interests of justice.

These proposals are intended to prevent applicants having the opportunity of a rehearing and are in line with the principle that an arbitral tribunal is entitled to rule on its own jurisdiction, known as the competence-competence principle. Interestingly, the Commission has recommended a "softer" type of reform by including the proposed limits in the court rules rather than the 1996 Act. This would allow the court to review and adjust the limits if necessary.

In addition to the already low success rates of section 67 challenges, these reforms, if implemented, may have an additional deterrent effect on arbitration practitioners bringing section 67 challenges.

Discrimination in appointments

In its first consultation, the Commission made recommendations in respect of discrimination in the appointment of arbitrators. It provisionally proposed that a term requiring an arbitrator to be appointed by reference to a protected characteristic would be unenforceable unless it could be justified as a proportionate means of achieving a legitimate aim. The Commission maintained this proposal in the consultation.

In addition, the consultation contains a proposal that it should always be deemed justified to require an arbitrator to have a nationality different from that of the arbitral parties. The Commission is also seeking views on whether the 1996 Act should contain a general prohibition on discrimination and the remedies for breaching this.

While some may suggest that there is diversity bias fatigue, this attempt to increase diversity in arbitration should be welcomed. Most arbitration practitioners would agree that more diversity in arbitration can only be a good thing and is much needed. For example, the London Court of International Arbitration (LCIA) Annual Casework report 2022 notes that, while women arbitrators were appointed in 45% of all of the LCIA Court's appointments, parties and co-arbitrators selected a low percentage of women, with only 28% of overall appointments being women (*www.lcia.org/News/lcia-news-annual-report-on-2022-updates-on-the-lcia-court-and.aspx*). Both parties and co-arbitrators need to contribute to achieving greater diversity in arbitral appointments. The codification of diversity requirements will facilitate this.

The proposal that it always be deemed justified to require an arbitrator to have a nationality different to that of the arbitral parties should be uncontroversial, as this will only help to ensure the, at least perceived, impartiality of arbitrators. In addition, an arbitrator of a different nationality to the parties may bring to the table different values and perspectives of the business world, which will likely facilitate conflict resolution. The general prohibition on discrimination and the associated remedies may prove more difficult to implement, so it will be interesting to see what the Commission's final proposal is in due course.

Practical effect

The report should be welcome news for London-based arbitration practitioners. The rise in arbitration-related applications to court shows that London continues to be one of the key international arbitration centres and confirms that the courts remain reluctant to intervene in the arbitration process. The judiciary's respect for the arbitral process is one of a number of reasons why parties continue to choose England as the seat of their arbitration.

The proposed reforms to the 1996 Act further confirm the non-interventionist approach of the judiciary in the arbitral process. Although it is widely accepted in the arbitration community that the 1996 Act generally works well and serves its purpose, there is clearly some need for reform and the Commission should be commended for seeking to involve arbitration practitioners in the process. Overall, the Commission's proposals are positive and will only strengthen England as an arbitration seat. While there may be some difficulties in implementing all of the proposals, particularly surrounding diversity in arbitration, it is of immense importance that these issues are considered and debated so that a fair and certain outcome may be reached.

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The report is available at www.judiciary.uk/wp-content/uploads/2023/04/14.244_JO_Commercial_Court_Report_WEB.pdf and the consultation is available at www.lawcom.gov.uk/project/review-of-the-arbitration-act-1996/.

