DEFEAT IS OPTIONAL...

CHOOSE YOUR CHALLENGE CAREFULLY!

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Introduction

In this article, we consider the key arbitration statistics contained in the recent English Commercial Court ("Court") Report for the year 2021 - 2022 ("Report"). We also discuss how the statistics tie in with the proposed reforms to the Arbitration Act 1996 ("Act").

These reports are published annually by the Judiciary of England and Wales and provide an overview as to the work undertaken by the Court, including its decision-making. They provide a useful insight for arbitration practitioners in terms of insight into the number of applications made to the Court to challenge arbitration awards and the outcome of such applications.

The majority of arbitral claims to the Court relate to challenges to arbitration awards under the Act:

(1) On the grounds of lack of substantive jurisdiction (s67);

(2) On the grounds of serious procedural irregularity (s68); and

(3) Appeals on a point of law (s69).

In short, the Court maintains its non-interventionist approach to arbitral awards, such that challenges to arbitral awards should not be undertaken lightly and the proposed reforms to the Act follow the Court's non-interventionist approach.

The Report

In total, matters arising from arbitration made up around 25% of the Court's cases in 2021 - 2022. The Report shows a significant increase in arbitration related applications in this period compared to previous years:

(1) Section 67 applications: the Court saw a 59% increase relating to challenges for lack of substantive jurisdiction. However, out of the 27 applications filed with the Court, 5 were dismissed on the papers, 1 was unsuccessful, 1 was discontinued and 20 remain pending.

(2) Section 68 applications: there has been a 54% increase relating to challenges for serious irregularity with the Court receiving 40 such applications. Of those, 5 were dismissed on the papers, 1 was dismissed at a hearing, 2 were discontinued, 1 transferred out and 31 are pending and awaiting decision.

(3) Section 69 applications: an 8% increase relating to appeals on a point of law saw permission to appeal being granted in 13 out of 40 cases. The final decision on the appeals was pending at the time of publication of the Report. However, the Report points out that as arbitration applications may span a year-end, it is important to look at prior year figures. A review of the 37 applications received in 2020 – 2021 shows that only 2 of the 37 applications were ultimately successful.

Despite the (large) increase in arbitral award challenges under the Act as outlined above, the Court continues to strive to respect awards and decisions issued by arbitral tribunals. The 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 they wish to bring; the Report confirms that there remains a very high threshold for challenging arbitral awards under these provisions.

Reforms to the Act

The Report points out that the Judges of the Court have liaised with the Law Commission on the potential reform of the Act.

In light of the responses received to its first consultation paper the Law Commission published the second consultation paper on the reform of the Act on 27 March 2023.

Amongst other important topics such as discrimination in arbitral appointments, the second consultation paper addresses challenges to an arbitral tribunal's substantive jurisdiction under section 67 of the Act and proposes limits on the ability to bring section 67 challenges.

The Law Commission is seeking views on the following proposed limits:

(1) the court should allow the challenge where the decision of the tribunal on its jurisdiction was wrong;

(2) 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

(3) evidence should not be reheard, save exceptionally in the interests of justice.

The proposed reforms are intended to prevent applicants from having the opportunity of a 're-hearing' and are in line with the principle that an arbitral tribunal is entitled to rule on its own jurisdiction (the 'competence-competence' principle). Interestingly, the Law Commission has recommended a 'softer type of reform' by including the proposed limits within the Court rules rather than the Act itself as this would allow the proposed limits to be within the scope of the Court's review and allow the Court to adjust the limits accordingly if necessary.

The reforms proposed may have, if implemented, an additional deterrent effect on arbitration practitioners considering whether to bring a section 67 challenge, in addition to the already low success rates of section 67 challenges.

Comment

The Report should be welcome news for London based arbitration practitioners. The rise in arbitration related applications shows that London continues to be one of the key international arbitration centres and confirms that the Court remains reluctant to intervene in the arbitration process. The English judiciary's respect of the arbitration process and the tribunal's decision-making is further confirmed by the section 67 reforms proposed by the Law Commission. If the section 67 reforms are indeed implemented, we expect to see a drop in section 67 challenges to give further certainty of the arbitral process.