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The Arbitration Act under review

The Arbitration Act 1996 is seen as one of the jurisdiction's most successful pieces of legislation. Together with a "hands-off" approach from the judiciary, it has laid the groundwork for London, in particular, to become a well-respected seat for international arbitrations. When, in September 2022, the Law Commission published a consultation paper on making changes to the Act, the overwhelming response was : "If it's not broken, don't fix it".

However, most recognised that there was scope for some minor improvements. After those initial proposals, the law Commission published a second consultation paper setting out some more developed ideas. The consultation period for this paper closed on 22 May 2023 and the outcome is awaited, but it seems likely that some proposals will be acted upon, of which the following are particularly important:

Summary procedure

The first consultation paper proposed the introduction of an express right for tribunals to adopt a summary procedure, if not excluded by the parties' arbitration agreement, in cases where the claim or defence "has no real prospect of success". The current text of the Act allows arbitrators to adopt procedures to avoid unnecessary delay and expense (s.33(1)), but this has rarely been taken as far as a summary process to dispose of a claim, for legitimate fear that such a step would be challenged on grounds of serious irregularity. An express right to adopt a summary procedure would go some way to addressing one potential disadvantage of arbitration compared to litigation.

Court orders

The Commission proposes that the Act be amended to make clear that the courts can make orders in support of arbitration that include orders against third parties. Most consider that s.44 of the Act already contains this power, but clarification can only be welcome. The first consultation paper also proposes that the courts should be able to make orders for compliance with orders made by emergency arbitrators. This would give real teeth to the emergency arbitrator provisions of many institutional rules, which are currently often excluded by parties, so as to ensure they can apply directly to court for injunctive relief that can bind third parties.

Jurisdictional challenges

The first consultation proposes that hearings under s.67 of the Act should take the form of appeals from the decision of the tribunal, rather than a completely fresh hearing of the issue. A less significant amendment would make clear that a tribunal can make an award on costs in a case where it has decided that it has no jurisdiction over the dispute.

Law of the arbitration agreement

Following the Supreme Court decision in Enka v Chubb, many respondents to the first consultation indicated that the question of the law of the arbitration agreement should be better addressed in the Act. Under the current law, where no law of the arbitration agreement is specified, it is likely that the law of the main contract will govern the arbitration agreement, even if the seat is in England and Wales. There is logic in this, in that the whole contract is governed by one law, but it complicates the application of the Act to an arbitration seated in England and Wales. In its second paper, the Commission proposes a default position that, where the parties do not specify the governing law of the arbitration agreement, it should be the law of the seat.

If, as expected, this consultation exercise leads to steps to amend the Act, we would expect to see draft legislation around the end of the year.

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