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Reform of the English Arbitration Act 1996 – The Law Commission's Final Report

Minding Your Business on **October 6, 2023**

We have previously reported on changes the Law Commission was considering to the Arbitration Act 1996 (the **Act**). The Law Commission has now published its final report (the **Final Report**, available here).

The report draws to a close a review of English arbitration legislation that began in January 2022. A draft bill to implement the Commission's conclusions and recommendations into law is provided with the report so it is now for the UK government to decide whether to introduce those changes to parliament.

The Final Report Proposals

In our previous update, we focussed on proposed amendments to (1) the law governing the arbitration agreement, (2) confidentiality, and (3) challenging arbitral awards on the basis that tribunal lacked jurisdiction.

The Commission's final recommendations on these areas are:

- **The law governing the arbitration agreement**

The welcome proposal in the Final Report is for a clear statutory rule that the law governing the arbitration agreement will be: (i) the law expressly chosen by the parties, otherwise, where no agreement is made (ii) the law of the seat. Importantly for clients with existing agreements, the bill proposes that this change will only apply to arbitration agreements entered into after the amendment to the Act comes into force.

This would change English and Welsh law as it currently stands which is, essentially, that in the absence of an express choice of the governing law of the arbitration agreement, the law governing the main contract will generally be considered an implied choice as the law governing the arbitration agreement. As we previously noted, the ruling in *Enka,* which is the latest judicial statement on this point, could potentially lead to undesirable outcomes, for example, an unintended law determining essential questions, such as the very validity of the parties' agreement to arbitrate.

- **Confidentiality**

The Commission had been considering a default statutory rule that arbitrations are confidential. However, the Final Report recommends against such a rule.

The rationale is that there is no "one size fits all" here – different default rules apply in different arbitral contexts. Further, any general rule would need to be subject to (a still evolving) list of exceptions, which does not lend itself happily to statutory codification.

The Commission therefore concluded – and we agree – that the development of the law around confidentiality is better left to the courts and bespoke practices of arbitral rules, which parties are free to adopt.

- **Challenging arbitral awards on the basis that the tribunal lacked jurisdiction**

Finally, the Final Report adopts the amendment we envisaged in our last post to the process for challenging a tribunal's ruling on its own jurisdiction before the English courts (pursuant to s 67 of the Act).

Under the current law, a s 67 challenge is by way of a full rehearing, even if there was a full hearing on the matter before the tribunal. Instead, the Final Report recommends steps to curtail and streamline that process. In particular, in any s 67 challenge by a party who has taken part in the arbitral proceedings (1) the court will not entertain any new grounds of objection, or any new evidence (save in exceptional circumstances) and (2) evidence will not be reheard, save in the interests of justice. If the proposal is adopted, it will be for the Civil Procedure Rules Committee responsible for the court rules to effect the changes.

Will the draft bill become law, and if so, when?

The Final Report includes a draft bill which (maybe optimistically) refers to the Arbitration Act 2023. The bill has been presented to the government, which will now decide whether to introduce it to Parliament. When and in what form the bill may become law is likely to largely depend on two factors.

First, the passage of the Bill through Parliament is likely to be faster if there are no substantive amendments proposed to it. Some comfort that objections will be minimized can be taken in the extensive consultation period that fed into the final report and proposals. One point for debate may be whether the governing law change goes far enough to resolve the uncertainty introduced by the *Enka* ruling, given the proposal is only prospective in effect. That said, legislation with retroactive impact brings its own criticisms.

Second, timings may also be impacted by the next general election, which could come next year. It appears that the government hopes to introduce the Bill into law before the next general elections – Justice Minister, Lord Bellamy KC commented that the government "*will respond to the Law Commission's report shortly so we can maintain the UK's reputation as a world leader in resolving legal disputes.*" We will watch this space and report.

View original.

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