Hogan Lovells

The Worshipful Company of Arbitrators

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WCA Seminar

Reform of the Arbitration Act 1996: has the current Bill got it right?

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James Clanchy

James Clanchy
COMMERCIAL ARBITRATOR

www.jamesclanchy.com

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Arbitration Bill: the main changes

James Clanchy, FCIArb
Arbitrator, Associate Member, Six Pump Court Chambers

Hogan Lovells, 18 September 2024

A bill to amend the Arbitration Act 1996

- First amendments to the Act
- Law Commission was asked on 25th anniversary of the Act in 2021 to conduct a review and determine whether any amendments were needed to ensure it
  - remained fit for purpose
  - continued to promote England and Wales as a leading destination for commercial arbitration
- After consultations, the Law Commission's Final Report and Bill was published in September 2023
- Bill reached 2nd reading in House of Lords and a Lords Special Public Bill Committee in March 2024 before the General Election and the change of government
- New Bill introduced in July 2024 and passed 2nd reading in HL, now at report stage

Main changes

- clarification of the law applicable to arbitration agreements (reversing *Enka v Chubb*)
  - Clause1/section 6A
- codification of an arbitrator's duty of disclosure (expounded in *Halliburton v Chubb*)
  - Clause 2/section 23A
- strengthening of arbitrator immunity around resignation and applications for removal
  - Clauses 3 and 4/sections 24, 25, and 29
- introduction of a power for arbitrators to dispose summarily of issues which have no real prospect of success - Clause 7/section 39A
- clarification of court powers in support of arbitral proceedings, and in support of emergency arbitrators – Clause 8/section 41A and Clause 9/section 44
- revised framework for challenges under section 67 of the Act (where the challenge alleges that the arbitral tribunal lacked jurisdiction) – Clauses 10 and 11/section 67

Matters raised but not addressed in the Bill

- Discrimination in arbitral proceedings
- Confidentiality
- Corruption

Law of the arbitration agreement: what is it?

Dicey & Morris

RULE 65—

(1) The material validity, scope and interpretation of an arbitration agreement are governed by its applicable law, namely:

(a) the law expressly or impliedly chosen by the parties; or,

(b) in the absence of such choice, the law that is most closely connected with the arbitration agreement, which will in general be the law of the seat of the arbitration.

(2) In general, arbitral proceedings are governed by the law of the seat of the arbitration.

(3) The substance of the dispute is governed by either:

(a) the law chosen by the parties; or

(b) if the parties so agree, such other considerations as are agreed by the parties or determined by the tribunal; or

(c) if there is no such choice or agreement, the law determined by the conflict of laws rules which the arbitral tribunal considers applicable

Law of the arbitration agreement: *Enka v Chubb*

- Supreme Court in *Enka v Chubb* [2020] UKSC 38 sets out 9 principles for determining the law applicable to the arbitration agreement
- No. iv):
  - "Where the law applicable to the arbitration agreement is not specified, a choice of governing law for the contract will generally apply to an arbitration agreement which forms part of the contract."

Law of the arbitration agreement: London rules

- LMAA Terms, paragraph 6:

  "In the absence of any agreement to the contrary, the parties to all arbitral proceedings to which these Terms apply agree:

  (a) that the law applicable to their arbitration agreement is English and;

  (b) that the seat of the arbitration is in England."

- LCIA Rules 2020, Article 16.4:
  - "…the law applicable to the Arbitration Agreement and the arbitration shall be the law applicable at the seat of the arbitration, unless and to the extent that the parties have agreed in writing on the application of other laws or rules of law and such agreement is not prohibited by the law applicable at the arbitral seat."

Law of the arbitration agreement: a lacuna in the ICC Arbitration Rules

- The French Cour de Cassation in *Kabab-Ji v Kout Food Group:*

> « En vertu d'une règle matérielle du droit de l'arbitrage international, la clause compromissoire est indépendante juridiquement du contrat principal qui la contient directement ou par référence et son existence et son efficacité s'apprécient, sous réserve des règles impératives du droit français et de l'ordre public international, d'après la commune volonté des parties, sans qu'il soit nécessaire de se référer à une loi étatique, à moins que les parties aient expressément soumis la validité et les effets de la convention d'arbitrage elle-même à une telle loi. »

> « …according to the common will of the parties, without having to refer to any national law, unless the parties have expressly submitted the validity and effects of the arbitration agreement itself to such a law. »

Law of the arbitration agreement: the French answer

Law of the arbitration agreement: the Bill's answer

"6A **Law applicable to arbitration agreement**

(1) The law applicable to an arbitration agreement is—

(a) the law that the parties expressly agree applies to the arbitration agreement, or

(b) where no such agreement is made, the law of the seat of the arbitration in question.

(2) For the purposes of subsection (1), agreement between the parties that a particular law applies to an agreement of which the arbitration agreement forms a part does not constitute express agreement that that law also applies to the arbitration agreement. "

Thank you

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Andrew Parsons

THE ARBITRATION BILL

SHOULD THE BILL INCLUDE SPECIFIC PROVISION TO PREVENT CORRUPTION IN ARBITRATION?

This issue was raised by Lord Bellamy KC following the decision of Mr Justice Knowles in the case of

***Nigeria v P&ID* [2023] EWHC 2638**

THE ARBITRATION BILL

SIR H, SOMEBODY HAS ASKED HOW WE CAN STOP CORRUPTION IN ARBITRATION.

WELL, PRIME MINISTER, PERHAPS WE SHOULD START WITH HOW TO STOP IT IN POLITICS?

15/9/24

THE NIGERIA CASE

THE DECISION

The *Nigeria* case was a particularly disturbing case where huge sums were awarded in the arbitration to the dishonest party which practised bribery and corruption. Ultimately justice prevailed. Following further disclosure of papers through courts' assistance and an additional appeal to the High Court, the award was set aside under s.68(2)(g) of the Arbitration Act 1996. Mr Justice Knowles decided that the award had been obtained by fraud and corruption: firstly, based on P&ID's lawyers obtaining and keeping confidential and privileged legal documents which enabled them to track Nigeria's strategy through the arbitration; secondly, based on P&ID's dishonest evidence as to how the underlying contract was brought about and not revealing the bribery of a Nigerian official; and thirdly, based on P&D's continued bribery of that official during the period of the arbitration in order to suppress evidence of the bribery at the time the contract was brought about. Mr Justice Knowles drew attention to issues regarding corruption in arbitration.

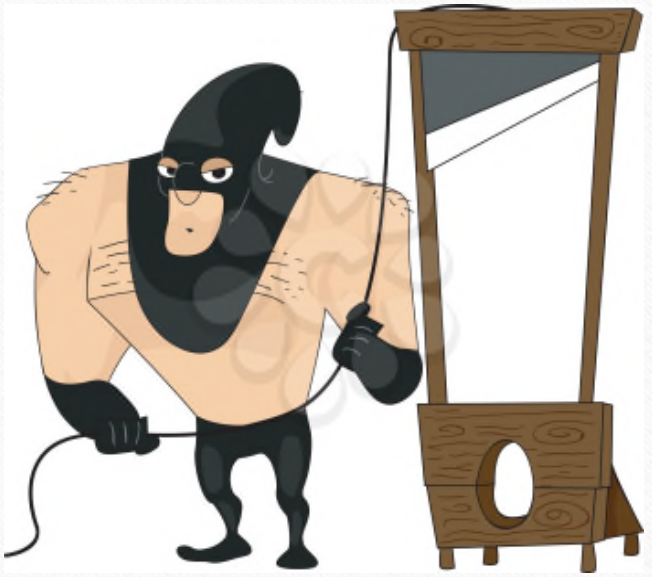
THE ARBITRATION BILL

SHOULD THE BILL INCLUDE SPECIFIC PROVISION TO PREVENT CORRUPTION IN ARBITRATION?

- **The Bill currently contains no specific provision to prevent corruption in arbitration and it is suggested that no such provision is necessary.**
- **As Mr Justice Knowles noted early on his judgment, the *Nigeria* case was a highly unusual case. It involved very experienced arbitrators, huge sums of money and a complex network of entities and individuals, several of which he found to have been dishonest and corrupt. The very experienced arbitrators unfortunately did not spot such dishonesty and corruption. It is suggested that experienced judges in any tribunal or court of competent jurisdiction which respects the rule of law are also likely to have been deceived in a similar situation. The issue of how to prevent corruption therefore goes far wider than how to prevent it in arbitration. It cannot and should not be confined only to arbitration.**

THE ARBITRATION BILL

SHOULD THE BILL INCLUDE SPECIFIC PROVISION FOR SUMMARY DISPOSAL AND IF SO, SHOULD THE TEST BE “NO REASONABLE PROSPECT OF SUCCESS” OR SOME OTHER TEST?



THE ARBITRATION BILL

Section 7 of the Bill inserts a new section 39A into the Arbitration Act 1996, which provides:

"39A. Power to make award on summary basis

(1) Unless the parties otherwise agree, the arbitral tribunal may, on an application made by a party to the proceedings (upon notice to the other parties), make an award on a summary basis in relation to a claim, or a particular issue arising in a claim, if the tribunal considers that –

(a) a party has no real prospect of succeeding on the claim or issue, or

(b) a party has no real prospect of succeeding in the defence of the claim or issue."

THE ARBITRATION BILL

The “no real prospect of success” test is identical to the test in rule 24.3(a) of the Civil Procedure Rules, so it is perhaps helpful to consider case law on the subject.

The well-known test concerning whether summary judgment is appropriate is still usefully summarised in the judgment of Lord Woolf MR in the case of *Swain v Hillman* (EWCA) [2001] 1 ALL ER 91 at page 92j.

Ultimately, the tribunal is required to ask itself whether a claim or defence has a “realistic” as opposed to “fanciful” prospect of success.

Now, let’s have a discussion!

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Annabel Maltby

Introduction

- Amendments relating to s.67 of the Arbitration Act 1996 (the "Act"), challenging the award: substantive jurisdiction (clauses 5, 6, 10 and 11 of the draft Arbitration Bill (the "Bill")).
- Emergency arbitrators, new s.41A to be inserted into the Act (clause 8 of the Bill).
- Confidentiality, not included in the Bill: a missed opportunity?

Amendments to s.67 of the Act

Section 67 (challenging the award: substantive jurisdiction)

67 Challenging the award: substantive jurisdiction.

(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court—

(a) challenging any award of the arbitral tribunal as to its substantive jurisdiction; or

(b) for an order declaring an award made by the tribunal on the merits to be of no effect, in whole or in part, because the tribunal did not have substantive jurisdiction.

A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).

(2) The arbitral tribunal may continue the arbitral proceedings and make a further award while an application to the court under this section is pending in relation to an award as to jurisdiction.

(3) On an application under this section challenging an award of the arbitral tribunal as to its substantive jurisdiction, the court may by order—

(a) confirm the award,

(b) vary the award, or

(c) set aside the award in whole or in part.

(4) The leave of the court is required for any appeal from a decision of the court under this section.

Section 67: issues considered by Law Commission leading to inclusion of clauses in the Bill

- Should a challenge under s.67 take the form of a rehearing or a review?
- Relationship between s.32 of the Act (determination of preliminary point of jurisdiction) and s.67 of the Act.
- Do the remedies under s.67 need supplementing for consistency with the remedies available under s.68 (challenging the award: serious irregularity) and s.69 (appeal on a point of law)?
- Ability of arbitral tribunal to make an award on costs incurred in arbitral proceedings even when the tribunal or court rules that the tribunal does not have jurisdiction.

Section 67: should a challenge under s.67 take the form of a "*de novo*" rehearing or a review? (I)

- Concerns regarding current *"de novo"* approach that prompted Law Commission to explore this issue:
  - Potential delay and increased costs through repetition
  - Question of fairness: hearing before Tribunal could become a "*dress rehearsal*"

- Concerns regarding review replacing "*de novo*" approach:
  - Critical protection to parties who have not consented to arbitration
  - Court can use existing case management powers to achieve an efficient and fair process
  - Inconsistent with competence-competence principle
  - Potential failure to establish issue estoppel when award is enforced abroad
  - Out of step with approach in other jurisdictions

Section 67: should a challenge under s.67 take the form of a "*de novo*" rehearing or a review? (II)

- Final proposal is a "*pragmatic compromise*"
- Bill will confer an explicit power to make rules of court to implement the following:
  - *Where an objection has been made to the tribunal that it lacks jurisdiction, and the tribunal has ruled on its jurisdiction, then in any subsequent challenge under s.67 by a party who has taken part in the arbitral proceedings:*
    - *The court will not entertain any new grounds of objection, or any new evidence, unless even with reasonable diligence it could not have been put before the tribunal;*
    - *Evidence will not be reheard, save in the interests of justice.*
- See clause 11 of the Bill

Section 67: consistency with s.32 (determination of preliminary point of jurisdiction)

- S.32 of the Act provides that a party may apply to the court to make a preliminary determination as to the jurisdictional of the arbitral tribunal
- Law Commission concluded that there are two pathways:
  - Tribunal rules first, followed by s.67 challenge; or
  - Court can rule directly under s.32
- Clause 5 of the Bill provides that an application under s.32 must not be considered to the extent that it is in respect of a question on which the tribunal has already ruled

Section 67: remedies

- Current position in s.67:
  - Remitting the award to the Tribunal not explicitly mentioned
  - Setting aside the award available only under s.67(1)(a) and (3), not under s.67(1)(b)
  - Declaring the award to be of no effect available under s.67(1)(b), not under s.67(1)(a)
  - Inconsistent with remedies available under ss.68 and 69
- Clause 10 of the Bill will amend s.67(3) so that the following remedies are available:

  (a) confirm the award,

  (b) vary the award,

  (c) remit the award to the tribunal, in whole or in part, for reconsideration,

  (d) set aside the award, in whole or in part, or

  (e) declare the award to be of no effect, in whole or in part.

Section 67: costs

- Where an arbitral tribunal rules that it does not have jurisdiction, can the tribunal nevertheless issue a binding award on costs incurred in the arbitration proceedings up to that point?
- Ability of court to remit question of costs back to tribunal?
- Law Commission recommended that the Act be amended to provide explicitly that an arbitration tribunal is able to make an award of costs in consequence of a ruling by the tribunal or by the court that the tribunal has no substantive jurisdiction.
- See clause 6 of the Bill

Emergency arbitrators

Emergency arbitrators: issues considered by Law Commission

- Should the Act provide a scheme of emergency arbitrators to be administered by the court?
- Should the provisions of the Act apply generally to emergency arbitrators?
- What should happen if an interim order made by an emergency arbitrator is ignored by an arbitral party?

Emergency arbitrators: areas where reform not recommended

- Should the Act provide a scheme of emergency arbitrators to be administered by the court?
  - Recommendation: no
  - Level of direct management in the arbitral process required to administer emergency arbitrator scheme not suited to the courts
- Should the provisions of the Act apply generally to emergency arbitrators?
  - Recommendation: no
  - Much of the Act is not suited to being read as if references to an arbitrator or tribunal included an emergency arbitrator

Emergency arbitrators: enforcing their orders

- The Act does not currently address what should happen if an interim order made by an emergency arbitrator is ignored by a party
- Law Commission suggested two ways for the court to support emergency arbitrators:
  - Empower emergency arbitrator whose order has been ignored to issue a peremptory order, which if still ignored, might result in the court ordering compliance
  - Amendment to the Act to allow an emergency arbitrator to give permission for an application under s.44(4)
- Both included in Bill – see clause 8, with amendments to s.41, s.42 and s.44

Confidentiality

Confidentiality: a missed opportunity?

- The Law Commission made no recommendation for reform, concluding that:

  "*...we do not think that a statutory rule on confidentiality would be sufficiently comprehensive, nuanced or future-proof....the current approach works well, and...the development of the law of confidentiality is better left to the common law – alongside the bespoke practices of arbitral rules.*"

Discussion

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