Browne Jacobson

Proposed amendments to the Arbitration Act 1996

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The Law Commission issued its final report following its review of the Arbitration Act 1996 and made a number of proposed reforms in order to provide clarity and fairness.

The Law Commission was tasked with determining whether any amendments to the Arbitration Act 1996 (the Act) were required in order to ensure that it remains fit for purpose and continues to promote England and Wales as a leading destination for commercial arbitration.

The review, which was requested by the Ministry of Justice, began in March 2021 and sought input from hundreds of stakeholders. It considered key topics including confidentiality, independence, arbitrator immunity, summary disposal of unmeritorious disputes, challenges to awards on the basis that the tribunal lacked jurisdiction and the governing law of the arbitration agreement. The report recommended a small number of major changes as well as a few minor corrections.

The most significant proposals were as follows:

Power to order summary disposal

The Act should provide the tribunal with the power, on the application of a party, to issue an award on a summary basis where it considers that a party has no reasonable prospect of succeeding on an issue. The intention is to enable the tribunal to deal with disputes more efficiently. It is proposed that this is only by agreement between the parties and on application by a party, rather than at the arbitrator's discretion. The threshold should be set at a level that acknowledges the early stage of the proceedings and the potentially abbreviated nature of the evidence heard to date.

Challenging the award under section 67

Under the current regime, a party can challenge the ruling of the tribunal under section 67 on the basis the tribunal did not have jurisdiction. The Supreme Court decision of Dallah v Government of Pakistan decided that any challenge before the court under section 67 is by way of a full rehearing.

The report recommended that, where there has been a section 67 challenge, the court should not entertain any new grounds of objection or evidence unless it could not with reasonable diligence have been put before the tribunal and evidence will not be reheard. The reasoning behind this proposal is to reduce delays and additional costs but also to prevent the losing party from being able to seek new evidence and improve its position.

The report highlighted that this was a controversial topic and recommended it is effected through rules of court rather than legislation by way of a 'softer' type of reform that could be adjusted after implementation if required.

Governing law

The law determining governing law is set out in the Supreme Court decision of Enka v Chubb. This decision has been criticised as being complex and unpredictable with the effect that many arbitrations are governed by foreign law because the arbitration agreement does not specify a governing law but the contractual matrix does. The report recommended a new rule that the law which governs the arbitration agreement should be:

1. The law that the parties expressly agree applies to the arbitration agreement; or
2. Where no such agreement is made, the law of the seat of the arbitration in question.

This reform was supported by the majority of consultees and aims to provide clarity and reduce satellite litigation on governing law issues.

Arbitrator immunity

It was recommended that the law was reformed so that arbitrators do not incur any liability if they resign unless that resignation was shown to be unreasonable. The proposed reform is intended to provide a balance between ensuring liability for unreasonable resignations without being a deterrent for reasonable ones.

Codification of disclosure

The report recommends codifying the common law position on arbitrator disclosure so that an arbitrator is under a duty to disclose any circumstances which they ought reasonably know might give rise to doubts about their impartiality.

No proposed changes

The report did not propose any changes to issues such as confidentiality, arbitrator independence the discrimination when appointing arbitrators. Full reasoning can be found in the final report which is published here along with the related publications.

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