

Are amendments to be expected for the Arbitration Act 1996?

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Following the rise in the use of arbitration in recent years and the 25th anniversary of the [Arbitration Act 1996](#), the Law Commission has published a review of the legislation. [The Opioid crisis - how does the rise in Fentanyl overdoses affect insurers?](#)

The report discussed the following topics:

Codification of the statutory duty of disclosure

The Arbitration Act doesn't currently include provisions relating to confidentiality. However, the Law Commission concluded that a default rule of confidentiality was not necessary, as parties are already protected under law when they choose to arbitrate confidentially. Additionally, some forms of arbitration prefer to take a transparent approach.

As arbitrators are subject to an express duty of impartiality, the Law Commission also concluded that a specific duty of independence is not required of arbitrators.

It was recommended that arbitrators should have a specific duty to disclose any circumstances which may infringe their impartiality. The Law Commission also recommended that arbitrators should disclose circumstances that they are or ought to be aware of.

Strengthening arbitrator immunity around resignation and applications for removal

Currently an arbitrator can be at risk of liability for replacement fees if they resign or for the costs of court applications for their removal, unless they apply to the court to grant relief. The report recommended the strengthening of arbitrator immunity by ensuring that arbitrators are not liable for their resignation unless it's unreasonable, nor incur the costs for removal unless acting in bad faith.

Introducing the power to make an arbitral award on a summary basis

Summary disposals can save time and expense by providing a summary judgment without a trial where there is no real prospect of success and no other reason why the issue requires a trial. As the Act currently stands there are no explicit provisions for summary disposals, and arbitrators have a duty to allow a reasonable opportunity for the parties to present their cases. The Law Commission recommends that the Act should allow for arbitral tribunals to issue an award on a summary basis following an application by a party and the agreement of both parties. The preferred threshold for making an award is where the tribunal considers that a party has no real prospect of success.

An improved framework for challenges to awards under section 67

Currently, if a party asks the court to determine matters relating to the jurisdiction of the tribunal, such as whether there is a valid arbitration agreement, this requires the agreement of the other parties or permission from the tribunal. A party can also object to the tribunal which will have competence to rule on jurisdiction, unless otherwise agreed. The tribunal's ruling can also be challenged before the court. *Dallah v Government of Pakistan* stated that any challenge before the court will be subject to a re-hearing, even if this had already been completed by the tribunal.

The Law Commission has suggested that where an objection is made regarding a tribunal's jurisdiction and the tribunal has ruled on such, any further challenges by any party which was a party to the arbitral proceedings should not have the ability to bring any new grounds of objection or evidence, except for in certain situations where this evidence could not have been used before, and evidence should not be reheard. This approach is recommended to prevent delay and decrease costs, whilst ensuring fairness so that new evidence cannot be sought nor arguments developed, following the first hearing at the tribunal.

Recommendations were also made as to amending the remedies under the Act to include declaring the award to be of no effect and remitting the award to the tribunal for consideration. The first of these only to be exercised where it would be inappropriate to use the second. To ensure clarity, the report also recommended that the act be amended to explicitly state that a tribunal can make an award of costs, in consequence of a ruling that the tribunal has no substantive jurisdiction.

A new rule on the governing law of an arbitration agreement

Following *Enka v Chubb*, in absence of any governing law specific to the arbitration agreement, the governing law of the matrix contract will be implied into the agreement. The Law Commission suggested that a new rule should be included within the Arbitration Act to provide that where there has been no express agreement regarding which law will apply to the arbitration agreement, the law of the seat of the arbitration in question will apply instead. This would allow for more arbitration agreements to be governed by English and Welsh law, ensuring the non-mandatory sections of the Act to continue to apply, reducing costs and complexity and ensuring a supportive framework for arbitration to be in place.

Clarification of court powers in support of arbitral proceedings and emergency arbitrators

At present, the Arbitration Act is unclear on whether orders can be made against third parties to arbitration proceedings and where such orders are made, third parties have restricted rights of appeal. The Law Commission recommends that the legislation be amended to explicitly state that orders can be made against third parties and to remove the restrictions on their right to appeal by ensuring that they do not require the court's consent to do so.

The Law Commission also recommends that the Act should assist with court enforcement of orders made by emergency arbitrators. The report suggested two possibilities to achieve this; the first to allow the arbitrator to make peremptory orders that could be enforced by the court if ignored; the second to amend the legislation to allow emergency arbitrators to grant permission for applicants to seek an order from the court.

The report also makes other minor recommendations such as:

- amending the Act to confirm that appeals are available following a High Court decision for an application to stay legal proceedings; and
- allowing applications to the court to determine preliminary points of jurisdiction or points of law to be made with either the agreement if all parties or the permission of the tribunal, removing the obligation to satisfy extra requirements when seeking tribunal permission.

With the Law Commission including draft amendments to legislation within the report, time will tell whether these recommendations will be incorporated into the Act by Parliament in the near future.



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