# Arbitration

Mikhail Vishnyakov, Cooke, Young & Keidan

# Law Commission's 'herculean' task of reform

As part of its review of the Arbitration Act 1996, the Law Commission recently published its second consultation paper (SCP). Unlike the first consultation paper, which focused on eight topics, the SCP is narrower and focuses on three: (i) the governing law of the arbitration agreement; (ii) challenging jurisdiction under section 67 of the Arbitration Act 1996; and (iii) discrimination. The latter two were covered by the first consultation paper but are raised again – they are 'perhaps the most controversial topics of potential reform'. The SCP is likely to generate considerable engagement and debate, and the below outline is intended to encourage stakeholders to review and consider the SCP.

**Proper law of the arbitration agreement**

As often happens, a contract contains a governing law clause as well as an arbitration clause which specifies the seat of the arbitration but does not specify the governing law of the arbitration clause. If the governing law of the contract is not the same as the law of seat, arguments may arise as to the law that governs the arbitration agreement. In this scenario, the English court will need to apply the complex test set out by the Supreme Court in *Enka v Chubb* to determine the governing law of the arbitration agreement.

Briefly, this test provides that if the governing law of the arbitration agreement has not been chosen (expressly or impliedly), then the arbitration agreement will be governed by the law of the contract itself. The test also provides for the displacement of that law in certain circumstances and addresses the position if there is no choice of law (the law of the seat is likely to be the governing law, but again that position may be displaced). As the SCP notes, the *Enka v Chubb* approach is 'complex, and its application in any given case is likely to leave room for argument' .

Furthermore, applying this test may lead to many London-seated arbitrations proceeding under arbitration agreements governed by foreign law. This is because many international contracts are governed by foreign law but provide for an arbitration to be seated in England and Wales (typically London). The current approach may oust the law of England and Wales on important topics such as separability, arbitrability, scope and confidentiality.

Finally, a foreign-law-governed arbitration agreement may displace non-mandatory provisions of the Arbitration Act 1996. This means that 'it can be difficult to decide whether a particular provision of the act relates to the arbitration agreement, and so should be disapplied, or is instead concerned with procedural matters, and so remains in place' (SCP, paragraph 2.34).

It is difficult to envisage clients considering the risks and complexities of the *Enka v Chubb* approach at the time of entering into their contracts. Notably, the arbitration clause is often considered at the very end of a negotiation and is therefore colloquially referred to as the 'midnight clause'; little (if any) appetite may exist to explore this source of 'disputes about disputes' at midnight.

Considering the identified disadvantages, and notwithstanding the arguments against reform, the Law Commission provisionally proposes that the law of the arbitration agreement be the law of the seat, unless the parties expressly agree otherwise in the arbitration agreement.

**Challenging jurisdiction under section 67**

As things stand, a party may challenge the jurisdiction of the tribunal in the arbitration and may then challenge the subsequent award under section 67 of the Arbitration Act 1996. That challenge would proceed by way of a full rehearing, increasing delay and cost, and provide a 'second bite of the cherry'. Accordingly, further to its first consultation, the Law Commission proposed to amend the section 67 process to an appeal, rather than a full rehearing. However, in response to that proposal, consultees pointed out that an appeal 'could encompass a rehearing'.

The commission proposes to set out the limits of the challenge (for example, evidence should not be reheard, unless that is required in the interests of justice). Additionally, the commission proposes that these restrictions be added by rules of court, rather than by amending the Arbitration Act 1996.

**Discrimination**

As things stand, employment law rules, and the protections against discrimination set out therein, do not apply to arbitrator appointments. The SCP maintains the provisional recommendation that a term which requires an arbitrator to be appointed by reference to a protected characteristic be unenforceable, 'unless that requirement is a proportionate means of achieving a legitimate aim'. The SCP further proposes that it should always be deemed justifiable to require the appointment of an arbitrator of a different nationality from the arbitral parties.

Given that discriminatory appointments – rather than discriminatory terms – have been flagged by consultees as the 'bigger problem' (4.63), the Law Commission is inviting views on prohibiting 'discrimination generally in an arbitration context' (4.63). A potential downside of this may be that this will also prohibit the 'positive action' that exists to increase diversity in arbitration.

**Comment**

The deadline for responding to the consultation is 22 May. Given the importance of the topics covered in the SCP, it is likely to generate extensive engagement and debate. On each topic, there are credible arguments in favour of and against the proposed reforms; the Law Commission is undertaking a herculean task in assessing all arguments. It has delivered formidable, well-reasoned, and measured content in both consultation papers. The final recommendations are eagerly awaited.

*Mikhail Vishnyakov is a partner and solicitor advocate at Cooke, Young & Keidan, London*