Review of the Arbitration Act 1996—second consultation paper unwrapped

Arbitration analysis: As part of its review of the Arbitration Act 1996, the Law Commission published its second consultation paper in March 2023 ('SCP'). Mikhail Vishnyakov, partner, Jordan Waldock, senior associate and Tulsi Bhatia, associate at Cooke, Young & Keidan LLP consider a recent panel discussion hosted by the firm in which the three issues covered in the SCP were debated.

This analysis was first published on Lexis®PSL on 17/05/2023 [XXX] and can be found here (subscription required).

Cooke, Young & Keidan LLP recently hosted a panel of distinguished speakers to present the SCP, including: Dr Nathan Tamblyn of the Law Commission (leading the review), Angeline Welsh KC (Essex Court Chambers), and Raphaël Kaminsky (partner at the Paris based dispute resolution boutique, Teynier Pic). Mikhail Vishnyakov (partner at Cooke, Young & Keidan LLP) moderated the lively debate, which covered the three issues in the SCP, being:

- the governing law of the arbitration agreement
- challenge awards under section 67 of the Arbitration Act (AA 1996), and
- discrimination

Governing law of the arbitration agreement

Currently, if the arbitration is seated in England but the governing law of the arbitration agreement is not specified, there is significant scope for argument about the governing law of the arbitration agreement. If the contract itself is not governed by English law, the arbitration agreement may, applying the current test set out by the Supreme Court in Enka v Chubb [2020] UKSC 38, also be deemed to be governed by the chosen foreign law. The SCP notes that the Enka v Chubb approach is complex; this assessment was not challenged during the evening's debate. The SCP identifies other disadvantages of the current approach, including the potential displacement of both the law of England and Wales on important topics (such as arbitrability) and the non-mandatory provisions of the AA 1996.

The 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. The majority in the audience welcomed the SCP's proposed reform. However, the merits of such a 'blanket' approach were questioned by some. For example, if the parties chose the governing law of the contract to not be English law, they may not have expected the arbitration agreement to be governed by English law (the law of the seat). Further, it was questioned if the more nuanced approaches of other jurisdictions had been considered and were more appropriate. However, overall, the clarity and simplicity of the proposed approach was well received.

AA 1996 section 67

The SCP retains, with modifications, the Commission's proposal to address the problems caused by 'de novo' challenges under AA 1996, s 67. Taking into account the responses to the first proposal, the Law Commission's amended proposal focuses on setting limits to such challenges (for example, evidence should not be reheard, save exceptionally in the interests of justice), and proposes to include those restrictions in the CPR.

The scenario that the Commission is attempting to address is this: a party challenges the jurisdiction of the tribunal, fails, and then bring the challenge again before the court, in which the Tribunal's award on jurisdiction carries no legal weight, and the unsuccessful party can introduce new evidence and arguments. There was heated debate on whether the tribunal's award on jurisdiction indeed deserves any 'deference' from the court, and the problems that may be caused by attempting to delineate what

type of new evidence or arguments may be presented before the court that were not presented before the tribunal.

Discrimination

In response to the first consultation, it was emphasised that discrimination arises in arbitral appointments, and that discriminatory arbitration agreements were relatively rare. The SCP therefore invites views on whether discrimination should be prohibited generally in the arbitration context. One difficulty that may follow from the implementation of such a recommendation is the unintended potential conflict with the positive steps already being taken in the international arbitration community to improve diversity.

Readers are reminded the deadline for responding to the consultation is 22 May 2023.

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