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Insights

THE ARBITRATION ACT 2025: STATE OF THE ART OR A MISSED OPPORTUNITY?

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SUMMARY

The Arbitration Act 2025 has become law in England, Wales and Northern Ireland. The new Act is largely based on the recommendations made in the Law Commission's Final Report, published following a public consultation seeking views on potential areas for reform.

The new Act doesn't represent a dramatic change to the arbitration framework in England, Wales and Northern Ireland. Feedback from the Law Commission's consultation was that the Arbitration Act 1996 works well and that significant reform was neither needed nor wanted. As a result, the new Act makes a series of discrete amendments to the 1996 Act, delivering incremental improvement as opposed to root and branch reform.

KEY CHANGES

Summary disposal: The new Act introduces a new power of summary disposal of a claim or defence has no real prospect of success. The power is akin to the summary judgment powers exercised by the courts and is a welcome amendment, giving arbitrators the express power to deal swiftly with claims or defences that have no real prospect of success.

Governing law of the arbitration agreement: The new Act introduces a new default rule specifying the governing law of the arbitration agreement. This is another welcome amendment.

In Enka v Chubb the UK Supreme Court sought to clarify the English common law principles for determining the governing law of an arbitration agreement. However, uncertainty persisted over the application of the Enka Principles in cases where the law of the underlying contract and the law of the seat of arbitration differed. These issues are discussed in our BCLP Insight Lessons from UniCredit v RusChemAlliance: What law governs your arbitration clause?

The new Act removes that uncertainly. It provides that (unless the parties specifically agree otherwise) an arbitration agreement is governed by the law of the seat and that an agreement on

the governing law of the main contract does not constitute express agreement that that law also applies to the arbitration agreement.

Arbitrators' duty of disclosure: The new Act introduces a duty of disclosure for arbitrators. This new statutory duty reflects the common law rule, as set out in *Halliburton v Chubb,* requiring arbitrators to disclose circumstances that would or might give rise to doubts as to their impartiality. The duty encompasses what an arbitrator actually knows or ought reasonably be expected to know. However, it does not address the scope of the disclosure required or set out any specific circumstances that must be disclosed. This is deliberate and designed to retain flexibility. It recognises that arbitration is used across a broad range of sectors and that in custom and practice as to what should be disclosed varies.

Extension of arbitrator immunity: The new Act extends the scope of arbitrator immunity. Under the new Act, arbitrators will have no liability for resignation, unless the resignation is shown to be unreasonable. In applications to remove arbitrators, arbitrators will not be liable for costs, unless it is shown that they have acted in bad faith.

Section 44 and third parties: The new Act amends Section 44 of the 1996 Act to make it clear that orders can be made against third parties. A third party will have full rights of appeal in respect of any order made under section 44. This is another welcome amendment. Conflicting case law had created uncertainty as to whether court orders under section 44 are available against third parties. This uncertainty has now been removed.

Powers of Emergency Arbitrators: The new Act makes targeted amendments to the 1996 Act to give Emergency Arbitrators powers that mirror those of ordinary arbitrators. This is another welcome amendment which removed uncertainty as to whether the Act supports court enforcement of the decisions of emergency arbitrators.

Section 67 challenging an award on jurisdictional grounds: The new Act amends the procedure for challenging an award under section 67 of the 1996 Act. In cases where an objection has been made that the tribunal lacks jurisdiction, and the tribunal has ruled on this, any subsequent section 67 challenge by a party who participated in the arbitral proceedings should not be in the form of a full rehearing. The new Act provides that: (1) the court should not entertain any new grounds of objection, or any new evidence, unless even with reasonable diligence the grounds could not have been advanced or the evidence submitted before the tribunal; and (2) evidence should not be reheard, save exceptionally in the interests of justice.

A MISSED OPPORTUNITY?

The Law Commission's decision to opt for incremental improvement as opposed to more significant reform mean that there are a number of significant issues that are not addressed in the new Act.

Confidentiality: The 1996 Act did not include any express provisions addressing confidentiality in arbitration. The Law Commission considered this omission but concluded that the new Act should not seek to codify the law in this area and that the law of confidentiality is better left to be developed by the courts. We think that this is a missed opportunity.

Confidentiality is one of the major selling points of arbitration. Users of arbitration place much importance on privacy and confidentiality and many assume that confidentiality is a feature of commercial arbitration in England. Whilst most UK-based arbitration practitioners are familiar with the common law principle of arbitral confidentiality (and its limitations), international parties and practitioners may not be. For them, the absence of an express provision in the Act addressing confidentiality in English-seated arbitration is a notable omission.

We recognise the difficulties in codifying a duty of confidentiality. However, the inclusion of a statement of general principle of confidentiality in arbitration, reflecting the common law position, would have been a positive reform and reflective of the expectations of end users. It is something that legislatures in some other jurisdictions (e.g., Scotland and New Zealand) have felt able to address in their arbitration legislation.

Third Party Funding and AI: The Law Commission also decided not to introduce any amendments relating to third-party funding or the use of artificial intelligence in arbitration.

Given the proliferation of third-party funding in international arbitration and the buoyant litigation funding market in England, the new Act was a good opportunity to address the disclosure of third-party funding in English-seated arbitrations.

AI is another rapidly developing area and we have already seen an increased use of AI tools in international arbitration. In our International Arbitration Survey: AI in IA, 63% of respondents were in favour of regulating the use of artificial intelligence tools in international arbitration, because of concerns about cybersecurity, breach of confidentiality and a lack of disclosure of use of those tools in arbitration proceedings. The new Act was a good opportunity to address these issues.

Corruption: This was not one of the areas for reform considered during the Law Commission's review of the 1996 Act. However, recent cases, including the widely reported decision in *Federal Republic of Nigeria v Process & Industrial Developments*, have highlighted the challenges that corruption issues pose to the integrity of the arbitration process. In our International Arbitration Survey: Arbitration and the Challenges of Corruption, 64% of respondents indicated a high or moderately high level of concern about the risk of abuse of the arbitral process in cases involving allegations of corruption.

During the passage of the Bill there was an exchange in the UK House of Lords between Lords Hoffmann and Hacking on the question of whether the new Act should explicitly address issues relating to corruption issues in arbitral proceedings. In response, the Government, indicated that contributions on the question had been received from the LCIA, the ICC, the CIArb, the LMAA, the

GAFTA and the Law Society and the Bar Council. Having considered those submissions, the Government decided not to suggest an amendment to the Bill on issues relating to corruption, preferring to rely on arbitral and professional bodies' experience and capabilities around the writing of rules and guidelines, the supervision of cases and the training of arbitrators to identify corruption red flags.

CONCLUSION

There is no doubt that the 1996 Act has been a very successful piece of legislation and that root and branch reform was unnecessary. However, one of the aims of the review was to ensure that the Act remains "*state of the art*". The new Act sees the introduction of some welcome amendments that will improve the arbitral process and ensure that the Act remains fit for purpose. However there are some notable omissions, particularly in relation to confidentiality, and one can't help but feel that we have missed the opportunity to deliver a new Act that is truly state of the art.

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