

A Practical Guide to ARBITRATION: THE TIMES THEY ARE A-CHANGIN'



The Law Commission's review of the Arbitration Act 1996

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Introduction

1. In 2022, the Law Commission started consulting on its review of the Arbitration Act 1996 ("the 1996 Act"). This is a timely and important review. It is timely as it is the 25th anniversary of the 1996 Act. It is important as the 1996 Act provides the framework for arbitrations seated in London, UK, the world's most popular seat.
2. Overall the 1996 Act works very well. However, the Law Commission proposed some amendments to the Act, namely:-
 - (1) Confidentiality.
 - (2) Independence of arbitrators and disclosure.
 - (3) Discrimination.
 - (4) Immunity of arbitrators.
 - (5) Summary disposal of issues which lack merit.
 - (6) Interim measures ordered by the court in support of arbitral proceedings (section 44 of the Act).
 - (7) Jurisdictional challenges against arbitral awards (section 67).
 - (8) Appeals on a point of law (section 69).
 - (9) Minor amendments.

Summary

3. The following is a summary of the Law Commission's proposals.¹

Confidentiality

4. The 1996 Act does not contain any provisions about confidentiality. The Law Commission decided that confidentiality is best left to the institutional rules, the agreement of the parties (including implied terms) and to be developed by the courts.

Independence and Disclosure

5. The Law Commission concluded that the 1996 Act should not be amended to impose a duty of independence on arbitrators. However, they proposed that the 1996 Act should be amended to provide that arbitrators have a continuing duty to disclose any circumstances which might reasonably give rise to justifiable doubts as to their impartiality.

Discrimination

6. The Law Commission propose that:-
 - (1) *the appointment of an arbitrator should not be susceptible to challenge on the basis of the arbitrator's professed characteristics; and*
 - (2) *any agreement between the parties in relation to the arbitrator's professed characteristics should be unenforceable*

unless in the context of that arbitration, requiring the arbitrator to have this protected characteristics is a proportionate means of achieving a legitimate aim".

Immunity of arbitrators

7. The Law Commission proposed that the immunity of arbitrators should be strengthened and, in particular, the case law which holds them potentially liable for the costs of court applications should be reversed. The Law Commission also consulted on whether arbitrators should incur liability if they resign.

Summary Disposal

8. The Law Commission proposed that the 1996 Act should provide explicitly that an arbitral tribunal may adopt a summary procedure to dispose of a claim or defence. Such a provision would be non-mandatory; the parties should be able to agree to opt out from it in their arbitration agreement.

Court orders in support of arbitration

9. The Law Commission propose that it be made clear that s.44 of the 1996 Act gives a court powers to make orders against third parties in appropriate cases. Such third parties should have full rights of appeal, rather than the restricted right of appeal available to arbitral parties.
10. Further, the Law Commission recommends that parties be able to seek the assistance of the Court, despite having agreed the emergency arbitration regime, so long as the requirements of s.44 of the 1996 Act are met in the usual way.

Challenging the jurisdiction of the tribunal (s.67 of the 1996 Act)

11. The Law Commission proposes that where:-
 - i) a party has participated in arbitral proceedings;

¹ Full credit is given to the Law Commission for its consultation paper and summary of its consultation paper. This Note is a summary of those papers.

- ii) the party has objected to the jurisdiction of the arbitral tribunal;
 - iii) the arbitral tribunal has ruled on its own jurisdiction in an award;
- any subsequent challenge under s.67 of the 1996 Act should be by way of appeal and not re-hearing.
12. Furthermore, the Law Commission is of the view that the courts already have the power to award costs in consequence of an award ruling that there is no substantive jurisdiction; the Law Commission proposes to make that power certain.

Appeals on a point of law (s.69 of the 1996 Act)

13. The Law Commission do not propose any changes to s.69 of the 1996 Act.

Minor amendments

14. The Law Commission also consider some minor amendments such as appeals from s.9 stays of legal proceedings and the compatibility of the 1996 Act with modern technology.

Conclusion

15. The Law Commission's consultation paper has been well-received as a perceptive and thoughtful analysis of a number of issues which needed to be considered to keep the 1996 Act as a state of the art framework for arbitrations seated in London, the world's most popular arbitration seat.

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