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ENGLAND & WALES LAW COMMISSION'S RECOMMENED AMENDMENTS TO THE UK ARBITRATION ACT 1996

I. Introduction

The UK Arbitration Act dated 1996 (the "**Act**"), has been the staple legislation for domestic and international arbitration, provisions of which attract many actors across the globe to the UK. However, England and Wales as a leading arbitration destination and London as one of the most popular seats for international arbitration, the Act should catch the recent developments in international dispute resolution.

For this purpose, on 6 September 2023, the England and Wales Law Commission (the "**Law Commission**") published its Review of the Arbitration Act 1996: Final report and Bill (the "**Report**"), upon the request of the Ministry of Justice.

Considering that the report was published following a two-and-a-half-year review and consultation process, the Law Commission's proposal for reform goes to reflect the evolving practical needs. Founding that complete reform of the Act was not required, the Law Commission listed its targeted recommendations to the Act including the issues considered but not touched, along with the upcoming future of the proposed amendments to the Act.

II. The Commission's Proposals for Amendment

The Law Commission concluded that *root and branch* review was neither required nor desired by the users of the Act. Hence, the proposed amendments do not appear to bear momentous influence on the substantive provisions of the Act. The Law Commission's recommendations primarily aimed to clarify certain aspects of the Act, codify the evolving industry practice, and overall, provide a plethora of notable changes to be reflected in the following application of the Act.

A. Statutory Duty of Disclosure

The Law Commission recommended that the Act should explicitly include the arbitrator's continuing duty to disclose circumstances which might reasonably give rise to justifiable doubts as to their impartiality. Under this framework, arbitrators should disclose the relevant matters that they are aware of or reasonably ought to be aware of. In this regard, the Law Commission proposes extending the continuous duty of disclosure to cover the circumstances which the arbitrator is expected to have known. The Act was projected to confirm the common law duty of disclosure developed under the pre-existing

case law, e.g. the UK Supreme Court's decision in *Halliburton v Chubb [2020] UKSC 48*. The Law Commission further leaves the question as to which circumstances should be disclosed, to the discretion of the arbitral tribunal and to be decided on a case-by-case basis.

B. Arbitrator Immunity Concerning Resignation and Applications for Removal

The Report proposed enhancing the immunity enjoyed by arbitrators by incorporating under the Act that an arbitrator should undertake no liability for resigning from a tribunal unless their resignation is unreasonable; or for the costs of an application for their removal from a tribunal, unless they acted in bad faith. These recommendations balance the arbitrator's position in the face of the parties of an arbitral dispute by lowering the possibility that arbitrators shall give in to parties' demands under the pressure of possible removal applications and undertaking related costs; essentially so as to maintain that the arbitrator stays impartial.

C. Authority to Summarily Dispose of Legal Claims

The Law Commission opines that the Act should include provisions empowering arbitrators to decide on a summary basis and dismiss legal claims that "*lack merit*" or which have "*no real prospect of success*". The introduction of such authority would allow more efficient and equitable settlement of disputes, and solidify the widespread practice embodied under various institutional rules.

D. Jurisdictional Challenges to Under Section 67

The Law Commission recommends an improved framework of Section 67. The Act is recommended to confirm that, when a tribunal's jurisdiction is appealed after it found itself competence upon a challenge under Section 67, the appealing party cannot present new objections and evidence unless it demonstrates that it could not have brought the same circumstances before the tribunal with reasonable diligence. Moreover, evidence would not be re-heard, except in the interests of justice. The Law Commission, therefore, does not propose a statutory change in this regard, however recommends improving the scope of Section 67 to alleviate the current circumstance in which the challenging party is bestowed an unequitable so-called "second bite of the cherry" to present its case with new evidence and objections in a *de novo* hearing.

E. Governing Law of Arbitration Agreements

The Law Commission proposes that the Act should clearly confirm that, in case the parties failed to expressly choose, the law governing the arbitration agreement shall be the law of the seat of arbitration. The Law Commission favours the implementation of a statutory default rule, as opposed to the current complex *closest connection test* adopted in arbitral practice in reference to the UK Supreme Court's decision in *Enka v Chubb [2020] EWCA Civ 574*. Clearly, the Law Commission is in favour of opting for a statutory default provision that would provide clarity and simplicity for industry practitioners in its application and encourage the global application of English law. Thus, if the draft legislation is adopted by the UK Parliament, it shall be clearly regulated that although the parties agree on an applicable to the

main contract, the law of seat shall govern the arbitration agreement instead of the governing law for the main contract.

F. Clarification of Court Powers in Support of Arbitral Proceedings and Emergency Arbitrators

The current version of Section 44 of the Act authorizes courts to make orders in support of arbitrators when rendering orders for granting interim injunctions, freezing injunctions, orders for the inspection and preservation of evidence, and gathering of witness evidence. The Law Commission proposes that the Act to confirm that the courts may render such orders to bind third parties. In its recommendation, the Commission also imposed a view that the Act should contain provisions that would enable third parties to enjoy unlimited rights of appeal with the relevant appellate court's consent. The recommendations also purport that, emergency arbitrators should have the same authority to enforce their orders as ordinary arbitrators by rendering decisions that are final, binding, and enforceable by national judicial bodies. Under this framework, it is recommended that applications against third-party orders be made before emergency arbitrators. In other words, parties can either apply to emergency arbitrators for an immediate order or directly apply to courts as per section 44(4) of the Act. Therefore, under the recommended version of the Act, the authorities of the emergency arbitrators clearly have been expanded upon.

III. Other Amendments that Were Considered but Not Recommended

For some of the issues, the Law Commission considered possible reforms however, came to the conclusion that the *status quo* should be preserved. The Law Commission found that as for these fields, *inter alia*, the Act had already proven to be adequate and that any possible change would be simply impractical to follow through.

A. Confidentiality

Since common law recognizes confidentiality as a general duty in international arbitration, the Law Commission disregarded the inclusion of an overall duty of arbitral confidentiality as a one-size-fits-all statutory rule. The Law Commission also noted that a statutory rule of confidentiality would not address future needs, given that each form of arbitration involves different confidentiality measures, e.g. for state-investor arbitrations transparency is usually preferred.

B. Discrimination

The Law Commission highlighted that there already are existing prohibitions on discrimination for matters aside from the appointment of arbitrators. Therefore, as for a potential statutory duty of the prohibition of discrimination for the appointment of arbitrators, the Law Commission is of the view that it would not offer a practical solution to relevant future problems. On the contrary, such type of prohibition could pave the way for possible groundless challenges to awards and satellite litigation.

C. Arbitrator's Independence

The Law Commission concluded that a statutory duty of arbitral independence would not bring any practical benefits and the already existing provisions provide sufficient protection. Further, given that independence is already a widely adopted standard in arbitration and the encounters between parties and the limited number of specialized arbitrators are nearly inevitable, there is no need to enact a statutory duty of independence to provide arbitral impartiality.

D. Appeals Under Section 69

The Law Commission recommended no reform to be brought to Section 69 of the Act which allows parties to appeal the awards on points of law. The Law Commission's proposal to preserve the *status quo* of the Section, shall likely be appreciated by the stakeholders of the sectors in which appeals on points of law are mainstream, e.g. maritime disputes subject to the LMAA Terms.

IV. Final Remarks

The Report has provided an in-depth analysis and review of the Act, suggesting the necessary amendments to its provisions considering today's dispute resolution practice that has noticeably evolved in the past years. The recommendations of the Law Commission aim to reduce uncertainty, encourage efficiency in legal proceedings and bolster the domestic arbitration framework up to current standards, by enhancing the Act through meaningful reforms, rather than radical changes, which shall ensure the Act remains as the *state-of-the-art* arbitration legislation. This approach conforms with the Law Commission's final inference that the Act still proves to be an adequate protection mechanism across the globe and ensures that the UK preserves its dominant position as the main center for international arbitration. Undoubtedly, adoption of the recommended amendments shall serve to preserve London's popularity as a seat for international arbitrations while influencing other jurisdictions to reconsider their arbitration legislations.

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