Article

The English Arbitration Act Consultation Paper: A BVI Lens

Authors: Ben Mellett, Associate | **Matthew Brown,** Counsel

On 22 September 2022, the Law Commission published a consultation paper (the "Consultation Paper") on the English Arbitration Act 1996 (the "English Arbitration Act") which included a number of significant provisional proposals. Alongside the Consultation Paper is a helpful summary document which outlines the key issues for consideration and the Law Commission's provisional proposal on those issues. This article summarises those key issues through the lens of BVI arbitration and more specifically the British Virgin Islands Arbitration Act 2013 (the "BVI Arbitration Act").

Confidentiality

The first area discussed in the Consultation Paper is confidentiality. This is a famously nebulous concept which the draftsmen of the English Arbitration Act deliberately avoided codifying due to the various exceptions that apply. It was instead left to the courts to grapple with on a case by case basis.

The BVI Arbitration Act similarly makes no express reference to confidentiality.

The Law Commission's provisional proposal is to continue to not seek to codify the law of confidentiality. First, the Law Commission is not persuaded that all types of arbitration should by default be confidential. Moreover, this is an uncertain area of law which is subject to various exceptions from extensive case law, debate and ongoing development. On that basis, the Law Commission proposes this issue is best left for the courts to develop.

Independence and Disclosure

Section 33(1)(a) of the English Arbitration Act imposes a general duty on the tribunal to "*act fairly and impartially as between the parties…*"

The Consultation Paper invites responses on whether the English Arbitration Act should also include an express duty of independence, which is not presently provided for. There is such an express duty on tribunals under the BVI Arbitration Act (see Article 44(3)(a)). The duty of independence is also provided for in a number of Arbitration Rules, including the BVI Arbitration Rules 2021 (see Article 12).

That being said, the Law Commission does not recommend imposing an express duty of independence. Its conclusion is that the existing duty of impartiality under section 33 is the paramount duty and that (provided necessary disclosures are made to the parties) a tribunal can be impartial without being strictly independent.

As to the tribunal's disclosures, the Law Commission provisionally proposes codifying the case law requiring an arbitrator to make disclosure of its connections, with a proposal for a continuing duty to disclose any circumstances which might give justifiable doubts as to their impartiality. This would bring the English Arbitration Act in line with BVI Arbitration Act which, at Article 23(1), imposes such a duty on tribunals.

Discrimination

The Law Commission has proposed amendments in order to encourage diversity of arbitral appointments. Its proposal is to limit the grounds on which to challenge an arbitrator, by precluding discriminatory challenges. More specifically, it is proposed that appointment of an arbitrator should not be subject to challenge on the basis of protected characteristics (age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation) and that any agreement as to protected characteristics should be unenforceable, unless it is proportionate to achieve a legitimate aim.

The example provided in the Consultation Paper of a potentially appropriate agreement as to protected characteristics is a requirement that an arbitrator has a different nationality from the parties. However, it is proposed that there be no blanket rule and it will depend on the context of each case.

Immunity of arbitrators

The concept of immunity of arbitrators is an important one. It supports both the finality of the award by preventing satellite litigation against the arbitrator and gives an arbitrator confidence to act impartially without concern of rebuke by a disappointed party.

The English Arbitration Act provides for immunity of arbitrators at s.29, save where it can be shown that the arbitrator has acted in bad faith (s.29(1)). By s.29(3), the immunity of an arbitrator does not apply by reason of the arbitrator resigning. In contrast, under the BVI Arbitration Act, an arbitrator's immunity is only caveated where it is proved that the arbitrator has acted in bad faith (s.101).

The Law Commission identifies good reasons for an arbitrator having to resign and refers to case law in which the arbitrator is liable for an application to court for their removal (even if that application is unsuccessful).

It is provisionally proposed by the Law Commission that the immunity of arbitrators should be strengthened and, in particular, that the case law which holds them potentially liable for the costs of court applications should be reversed.

Summary disposal

The perceived lack of a summary disposal process is often a critique made of the arbitration process. This, coupled with an arbitrator's concerns to ensure that each party has been given a reasonable opportunity to present its case, can lead to bad points occupying valuable time in an arbitration.

It is of particular note that the Law Commission considers that s.33(1)(b) of the English Arbitration Act (which requires the arbitrator to avoid unnecessary delay or expense) probably gives the tribunal power to adopt a summary procedure to dispose of issues which are without any merit. This is interesting in the context of s.44(3)(c) of the BVI Arbitration Act which is in materially identical terms.

It is provisionally proposed that an express, albeit non-mandatory, summary procedure be adopted. The safeguard to such a procedure can be managed by the application of a suitable threshold, such as if an argument is "*manifestly without merit*" or there is "*no real prospect of success*".

An express procedure for summary disposal would provide reassurance to arbitrators in applying the rules and it is hoped should lead to greater efficiency of the arbitral process.

Court Orders in support of arbitral proceedings

Section 44 of the English Arbitration Act imports the powers of the court in domestic litigation into the realm of arbitration. This includes powers relating to matters such as evidence and the preservation of assets. The Law Commission notes that the powers of the Court to make an order against a third party in domestic litigation is dependent on the nature of the relief being sought. This is the same in arbitration as it is in litigation, with it being appropriate to make orders against third parties in appropriate cases.

The Law Commission also considered whether the Court's powers to provide interim relief also apply where proceedings are governed by rules allowing for an emergency arbitrator to be appointed (such as the BVI Arbitration Rules). The view of the Law Commission is that parties should still be permitted to apply to the Court for its assistance in such circumstances.

Challenging jurisdiction of the tribunal

Where an award is challenged by a party under s.67 of the English Arbitration Act, case law states that such a challenge is potentially a full rehearing, including a rehearing of the evidence. The ruling by the tribunal, who may have had the benefit of extensive live witness evidence, is given no weight.

The Law Commission has questioned whether a challenge of this nature should indeed be a rehearing. It is provisionally proposed that a s.67 challenge should adopt the approach of an appeal which would ordinarily be limited to a review of the tribunal's ruling, allowing the appeal only where the tribunal's ruling was wrong.

Amendments of this nature will have important consequences in a jurisdiction like the BVI which sees regular actions for the enforcement of an arbitral award.

Appeals on a point of law

For completeness, we also note that the Consultation Paper considers s.69 of the English Arbitration Act which permits a party to arbitral proceedings to appeal to the court on a question of law arising out of an award. This is unique to the English Arbitration Act and there is no equivalent in the BVI.

The Law Commission's proposal is to retain s.69 without either expanding or curtailing it.

Contacts:

Ben Mellett
Associate
ben.mellett@conyers.com
+1 (284) 852 1123

Matthew Brown
Counsel
matthew.brown@conyers.com
+1 284 852 1121

For further information please contact: media@conyers.com