Spotlight on the English Arbitration Act: **is change afoot?**

In late November last year, the Law Commission of England and Wales announced that it will conduct a review of the English Arbitration Act (Act), the principal legislation governing arbitrations in England, Wales and Northern Ireland. The Act first came into force in January 1997 and has not been revised or updated in over 25 years.

Consensus is that the Act continues to work very well and is not in need of a major overhaul. Indeed, London has consistently topped the polls as the most popular arbitration centre in the world, and many attribute London's popularity to the certainty and flexibility afforded by the Act, coupled with the support of the English judiciary. Against that background, the Law Commission has confirmed that it will not be proposing any wholesale revision of the Act. Instead, the review is intended to ensure that the UK remains at the forefront of international dispute resolution. The over-arching aim will be to "*maintain the attractiveness of England and Wales as a destination for dispute resolution and the pre-eminence of English law as the choice of law*".

Authors

Paula Hodges QC
Partner, Head of Global Arbitration Practice
T +44 20 7466 2027
paula.hodges@hsf.com

Elizabeth Kantor
Professional Support Lawyer, London
T +44 20 7466 2406
elizabeth.kantor@hsf.com

Where might changes be made?

The Law Commission has announced some possible areas of focus that may fall within the scope of its review. These include:

TOPIC	WHAT'S THE ISSUE?
Summary dismissal of claims and defences	There is no express power in the Act for an arbitral tribunal to dismiss a claim or defence summarily or early (even though this power is contained in some institutional rules). Some argue that this leads to uncertainty among arbitrators about whether or not they can summarily dismiss claims and concern that any awards issued as a result could be challenged on due process grounds. Because of this, the Law Commission may consider including an express power in the Act.
The Court's powers in support of arbitration proceedings	There is uncertainty as to whether the Court's powers set out in Section 44 of the Act (other than taking evidence from witnesses) extend to third parties. This contrasts with other arbitration legislation around the world and has not yet been resolved by the English courts. The Law Commission may consider clarifying the position in the Act.
Emergency arbitration	Emergency arbitrator procedures have been introduced into institutional rules since the Act was first drafted. As a result, emergency arbitration is not addressed in the Act and changes could be made to incorporate the concept into the drafting. In addition, and following the case of *Gerald Metals v Timis* [2016] EWHC 2327 (Ch), there is debate as to whether the availability of emergency arbitration may limit the English Court's powers to provide interim relief in support of arbitration.
Challenging jurisdictional awards	Under the Act, there are currently many routes for a party to challenge the jurisdiction of an arbitral tribunal. They may (i) object to the jurisdiction of the tribunal during the arbitral proceedings (ii) seek the Court's determination of a preliminary point of jurisdiction under Section 32 under certain circumstances (iii) not participate in the arbitration and seek the Court's determination under Section 72 and (iv) seek a re-hearing of the matter before the Court under Section 67 (if their jurisdictional challenge in the arbitration was unsuccessful). The Law Commission may consider whether or not all of these routes should be open to a party challenging jurisdiction, and whether a full rehearing by the court on the question of jurisdiction is necessary.
Appeals on points of law	Under the Act, a party can appeal an arbitration award on a point of law. This provision is fairly unique to England, even though the threshold for leave to appeal is very high, and this provision is often excluded by the parties either in their arbitration agreements or in the applicable institutional rules. Whilst some users of arbitration remain in favour of the provision (such as in the insurance industry), there is debate as to whether this provision should be removed in order to preserve the finality of arbitration, or to limit it to questions of public importance.
Confidentiality	The Act is deliberately silent on confidentiality, on the basis that an implied duty of confidentiality exists under the English common law, and that its evolution is best left to the courts. However, given that confidentiality is a key advantage of arbitration, the Law Commission may consider whether to put confidentiality on a legislative footing and if so, the best way of doing so.
Electronic service of documents, electronic awards and virtual hearings	The Law Commission may seek to ensure that the Act remains compatible with recent developments in technology, particularly in relation to service by email and virtual hearings.

Other topics which may be considered are the arbitrators' duties of independence and disclosure, discrimination and immunity of arbitrators. The Law Commission is also consulting with the arbitration community and users of arbitration on any other areas that should be considered.

While the Law Commission is considering some important and substantive topics in their review, these are all intended to improve and "future proof" the Act rather than fundamentally change it. Even if no changes are ultimately made, there is also value in the process of reflection and consultation in ensuring that the Act remains current and fit for purpose.

What's next?

The Law Commission has announced that it aims to produce a consultation paper by the end of 2022, and then it will produce its final recommendations to the English government after that. Herbert Smith Freehills is participating in the consultation process and looks forward to seeing how the review develops over the next year!