Volume 1, Number 2 March–April 2024

THE GLOBAL REGULATORY DEVELOPMENTS JOURNAL

fastcase FULL COURT PRESS

The Global Regulatory Developments Journal

Volume 1, No. 2 March–April 2024

THE GLOBAL REGULATORY DEVELOPMENTS JOURNAL (ISSN 2995-7486) at $495.00 annually is published six times per year by Full Court Press, a Fastcase, Inc., imprint.

For customer support, please contact Fastcase, Inc., 729 15th Street, NW, Suite 500, Washington, D.C. 20005, 202.999.4777 (phone), or email customer service at support@fastcase.com.

Publishing Staff
Publisher: Morgan Morrissette Wright
Production Editor: Sharon D. Ray
Cover Art Design: Morgan Morrissette Wright and Sharon D. Ray

The photo on this journal's cover is by Gaël Gaborel—A Picture of the Earth on a Wall—on Unsplash

Cite this publication as:

The Global Regulatory Developments Journal (Fastcase)

Editorial Office

729 15th Street, NW, Suite 500, Washington, D.C. 20005
https://www.fastcase.com/

POSTMASTER: Send address changes to THE GLOBAL REGULATORY DEVELOPMENTS JOURNAL, 729 15th Street, NW, Suite 500, Washington, D.C. 20005.

Articles and Submissions

Direct editorial inquiries and send material for publication to:

Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc., 26910 Grand Central Parkway, #18R, Floral Park, NY 11005, smeyerowitz@meyerowitzcommunications.com, 631.291.5541.

Material for publication is welcomed—articles, decisions, or other items of interest to international attorneys and law firms, in-house counsel, corporate compliance officers, government agencies and their counsel, senior business executives, and others interested in global regulatory developments.

QUESTIONS ABOUT THIS PUBLICATION?

For questions about the Editorial Content appearing in these volumes or reprint permission, please contact:

Morgan Morrissette Wright, Publisher, Full Court Press at morgan.wright@vlex.com or at 202.999.4878

For questions or Sales and Customer Service:

Customer Service
Available 8 a.m.–8 p.m. Eastern Time
866.773.2782 (phone)
support@fastcase.com (email)

Sales
202.999.4777 (phone)
sales@fastcase.com (email)

ISSN 2995-7486

Trends, Reform, and Advantages in English Arbitration for Commercial Dispute Resolution

John Laird, Edward Norman, and Roma Patel*

In this article, the authors review a report by the Law Commission that concluded that the Arbitration Act of 1996 is functioning well.

The Law Commission—the statutory independent body created by the Law Commissions Act 1965 to keep the law of England and Wales under review and to recommend reform where it is needed—has published its final "Review of the Arbitration Act 1996" (the Report), concluding that, on the whole, the Arbitration Act 1996 (the Act) is functioning well and it does not, therefore, recommend root and branch reform.

This is a welcome reflection of the healthy status of English arbitration. The Report is accompanied by a draft bill with its proposed amendments to the Act.

Those reforms the Report does recommend are largely aimed at making arbitration more efficient, for example, by expressly empowering tribunals to deal with issues swiftly and by clarifying certain points to reduce potential opportunities for satellite litigation. This is reflected in, for example, the proposals for summary disposal of issues, new rules on what law governs arbitration agreements, and challenges to awards under Section 67 of the Act. We consider these proposals in more detail below.

The Report proposes a number of other reforms, which are not discussed in this article regarding, for example, arbitrators' duties of independence and disclosure, discrimination in arbitration proceedings, and arbitrator immunity.

We broadly agree with the Law Commission's approach; wide-scale reform of the Act is not required, but a focus on good practice in proceedings is. However, it is also worth reflecting on what is missing from the Report. We will, therefore, discuss what we perceive as a missed opportunity to properly address, for example, issues related to emergency arbitrators.

The Global Regulatory Developments Journal / March–April 2024, Vol. 1, No. 2, pp. 99–108.

ISSN 2995-7486.

Meanwhile, the treatment of both third-party funders and the costs of third-party funding remains different from English litigation, potentially to the advantage of both funders and parties. The latter is a key differentiator between litigation and arbitration in England, although third-party funding has recently become a more complex space in English law since *R (on the application of PACCAR Inc & Ors) v. Competition Appeal Tribunal & Ors*.[1] The government accepted the Report's recommendations and put the Law Commission's draft bill before Parliament in the House of Lords on November 21, 2023. The Law Commission's proposed amendments to the Act discussed here therefore appear likely to become law in 2024.

The Law of the Arbitration Agreement

Arbitration is governed by several systems of law: the law of the substance of the dispute (typically a contract claim, or perhaps a tort related to performance of a contract); the law of the legal seat or place of the arbitration (governing the procedure of the arbitration, determining how it will be managed and supervised, and by which court); the law of the arbitration agreement (answering if it is valid, was there an agreement to arbitrate, what is its scope); and the law of enforcement (when there is an award, the law of the jurisdictions in which enforcement steps are taken).

One area of uncertainty, often overlooked, is what law governs the arbitration agreement where the parties' agreement is silent on this particular point. The Act presently has no answer to this conflict of laws question and the law has developed through case law.

Although rare, sometimes this has led to serious uncertainty and protracted disputes. In the example of *Sulamerica CIA Nacional De Seguros SA & Ors v. Enesa Engenharia SA & Ors*,[2] the parties disagreed over whether the arbitration agreement was governed by Brazilian or English law. Under Brazilian law, one of the parties would have been able to say it was not bound by it. The uncertainty led to litigation over whether or not the dispute should be litigated in São Paulo or arbitrated in London.

English law respects an express choice of law regarding the law of the arbitration agreement. But there was for some time conflicting Court of Appeal authority over whether, in the absence of that, the express governing law of the contract the arbitration agreement

is found in, or the parties' choice of the seat of arbitration, should control the law of the arbitration agreement.

In *Enka Insaat Ve Sanayi AS v. OOO Insurance Company Chubb (Rev1)*,[3] the UK Supreme Court held that a choice of law for the main contract should generally be treated as the choice of law for the arbitration agreement but that, in the absence of such a choice, the arbitration agreement is governed by the law of the seat as a default. The Report has attempted to reduce the possibility for uncertainty by recommending a statutory rule that the governing law of the arbitration agreement will be (1) the law parties expressly agree to in that agreement, or (2) if no such agreement is made, the law of the seat of arbitration, and that the law of the main contract should play no role. Greater clarity would certainly be welcomed.

Whether or not this recommendation results in the Act being amended in this way, a clear and express choice on arbitration agreement governing law would remove uncertainty.

Summary Disposal

The Report has recommended that an express power of summary disposal be introduced, which reflects the desire for arbitration proceedings to move swiftly when a claim or defense lacks merit. This power is already thought to be implicit under Section 33 of the Act (as part of the arbitrator's duty to adopt suitable procedures and avoid unnecessary delay and expense), but by being codified parties will likely be encouraged to apply for summary dismissal and tribunals will perhaps feel more comfortable doing so. The recommendation is to adopt the same test used by the courts of England and Wales in litigation of "no real prospect of success." Unlike litigation, the proposal is that it will only be available on application by a party (and not invoked by the arbitrator). However, summary dismissal of a suit is in any event rarely undertaken solely at judicial discretion in England.

Balancing Finality and Efficiency Against Legal Accuracy

Generally, one of the perceived benefits of arbitration is the ability to dispose of a dispute without lengthy litigation and rehearing. That feature comes with the risk or trade-off that decisions may

go wrong; when that happens parties can find they have limited or no recourse for correction. The Report considered the balance between finality and correctness in three areas we discuss in this section: jurisdictional challenges to domestic tribunals' awards, enforcement of foreign arbitral awards, and appeals on points of law.

First, we consider challenges to tribunals' substantive jurisdiction.

Parties may appeal to court, challenging substantive jurisdiction under which a domestic arbitration award was made under Section 67 of the Act, as long as they have first exhausted any available arbitral process of appeal or review. As a mandatory provision, parties cannot agree to waive this protection, and concerns have been expressed that it can lead to too much duplication, cost, uncertainty, and delay because parties may presently invoke a full rehearing in court to challenge substantive jurisdiction.

In one of its more controversial moments, the Report seeks to address these concerns. The Report's recommendation narrowly defines when a full rehearing can take place, proposing that a challenge can be made when a party has new grounds of objection and new evidence, not discoverable with reasonable diligence at the time of the original arbitration hearing. The Report does suggest allowing full rehearings even for issues that had or could have been raised in the arbitration, but only when it is in the interests of justice to do so. Reform in this area is a balancing act between allowing legitimate challenges and avoiding arbitration proceedings being used as a dress rehearsal for court proceedings. The Report advocates a change be made to the rules of court rather than changes to the Act, giving some scope to judicial discretion.

Second, we consider the enforcement of foreign arbitral awards.

Foreign arbitral awards are enforced under Section 103 of the Act in accordance with Article V of the New York Convention. Such enforcement is also open to jurisdictional challenge regarding the arbitral proceedings that produced the award before the enforcing court, and thus (in light of the proposed changes to Section 67) the Report grapples with whether in England a Section 67 domestic award should have different jurisdiction challenge processes than a foreign one under Section 103. The Report recommends no change to the Section 103 process, which does suggest that (if the proposed reform to Section 67 is implemented) parties may be afforded greater scope to renew jurisdictional challenges as a means of resisting the enforcement of foreign awards.

Revealing its reasoning for this different treatment, the Report goes so far as to say that it "is acceptable to make it more attractive to seat tribunals in England and Wales because our regime for challenging awards seated here is fairer or more efficient than the regime under the New York Convention."

Third, we consider appeals on points of law.

Section 69 of the Act has long granted parties to arbitral proceedings the right to appeal to the English courts regarding the substantive application of questions of law arising out of tribunals' awards. This is not a mandatory provision, however, and in the spirit of finality this has always been something that parties can opt out of. Many arbitration institutional rules contain express waivers of this (and similar) rights to appeal on points of law. Accordingly, by choosing certain institutional rules parties are also agreeing (whether they realize it or not) to waive this particular appeal right. Parties should, however, be careful about declarations in some institutional rules that they promise to "carry out" an award, or similar language. Wording of this kind may not be enough to be seen as a waiver of a Section 69 right of appeal.

The Report considered whether there should be any reform to this right of appeal under the Act, and whether additional control or limitations ought to be introduced. As part of that, the Report acknowledged that concerns have been expressed in some quarters that the development of the English common law of contract might be hampered or restricted by a lack of exposure to questions of law thrown up in arbitrations. Notwithstanding these various concerns and competing considerations, the Law Commission has recommended that Section 69 should remain unchanged. It may be noted that other arbitration systems such as the UNCITRAL Model Law, American Federal Arbitration Act, and various Middle Eastern systems such as Qatari law entirely deny recourse to substantive appeal. And so the possibility of doing so at all under English law, although still at the parties' own choice, sets England apart as an arbitration destination.

Interim Support, Emergency Arbitration, and Enforceability

In the past decade or so, arbitration institutions have sought to increase the utility of their dispute resolution tools by including

special "emergency" or "expedited" mechanisms, where parties may apply for speedy measures. In a typical example, the International Chamber of Commerce (ICC) Rules (2021), Appendix V, promise the installation of an emergency arbitrator typically within two days, and a default goal of an order produced within 15 days of the arbitrator receiving the file.

Equally, under Section 44 the Act has since its inception offered the possibility of applying to the English court to support an arbitration by way of orders regarding, among others, sale of goods, preservation of evidence, and interim injunctions.

The danger for the arbitral support mechanism by comparison to court remedies lies in the way in which arbitral institutions have introduced an emergency mechanism. For example, the ICC's and other institutions' approach expressly states that an emergency arbitrator's award will not bind the main tribunal.[4] This is understandable when considering that the function of emergency relief is likely to be to achieve an expressly temporary and interim measure.

But given the mechanisms required for enforcement, emergency arbitration could lack teeth and backfire. In England, only awards finally disposing of substantive issues are enforced by the court under the Act;[5] other court enforcement is possible of what are known as peremptory orders of an arbitration tribunal under Sections 41 and 42 of the Act. Such peremptory orders are ones given after failure to comply with an original order of the tribunal, and re-issued under a time limit. Given the special processes of emergency arbitration rules are not expressly tailored with the Act in mind, the particular sequencing and power of Section 41 of the Act may not be involved.

Emergency arbitrator awards or orders could strictly be seen as therefore neither an award nor a peremptory order. As such they are arguably of limited value, because the court is not obliged (and is likely unwilling) to "rubber stamp" them. This begs the question: might parties not be better off to proceeding straight to taking steps under Section 44 of the Act? And statistics from a 2019 ICC Commission Report on Emergency Arbitrator Proceedings suggest that enforcement concerns are not merely theoretical:[6] of 23 emergency orders reviewed, party compliance was resisted in five cases, or over 20 percent.

Additionally, the availability of emergency arbitration measures has been taken in the past by the English Commercial Court as reason to reject a party's request for the court to intervene under its discretionary Section 44 powers. While this is a balancing exercise,

and the case law does not say that the possibility of an emergency arbitrator by definition displaces the Section 44 power of the court, there is at least the potential for parties to find themselves in limbo with a court refusing to intervene because of an arbitral process the court may ultimately not support in any event under the Act's regime.

The Report has responded to this situation with recommendations that seek to provide an express enforcement framework for emergency arbitration awards. It proposes two options that should both be adopted. The first is a three-step process to enforcement of an emergency arbitration award:

1. An emergency order must be issued and ignored,
2. A peremptory order must then be issued and still ignored, and
3. Then court enforcement of the emergency arbitration award may be sought.

While we agree the process would ensure that enforcement is available, it depends on the willingness of the emergency tribunal to act swiftly to issue orders and provide short deadlines to parties to comply in order to be useful. The second option relies on use of Section 44(3) of the Act; a party requiring urgent preservation of assets and evidence can apply to the court for such an order. The Report indicated an emergency arbitrator may give permission to rely on Section 44(3) of the Act when its previous orders have been ignored. This may to some degree sidestep the issue of the court's discretion, but again adds layers to the process which appear clunky and likely time consuming, with the risk that it is the opposite of what a party seeking urgent relief might need.

For the reasons set out above, it is our view that the recommendations do not fully address the problem of enforcement. Parties arbitrating in England may wish to opt out of emergency arbitration procedures in their arbitration agreements in favor of Section 44 court support powers.

Costs, Third-Party Funding, and an Advantage Over Litigation

Third-party funding costs are treated differently in English arbitration compared with English litigation.

In English litigation, under the Civil Procedure Rules, Rule 46.2, the court has the power to order a third party to pay costs. Third-party funders are, in short, at risk of having adverse costs orders made against them, and have been so since *Arkin v. Borchard Lines Ltd and others*.[7]

In contrast, in arbitration, the power to award costs is one strictly as between the parties to the arbitration. Arbitrators generally have no jurisdiction to make directions against nonparties, or to expect (at least as a matter of course) the enforcement of such directions by courts. The Act makes no exception on this point to grant any special powers analogous to CPR 46.2. The Report notes at least one consultee suggested that be changed, but the Law Commission did not make any active consideration of a reform proposal.

On the other hand, in English litigation proceedings a successful party cannot recover the costs it incurs in obtaining third-party funding from the losing party. But in arbitration, it has been confirmed in two cases that tribunals have awarded parties these costs, exercising their broad powers in respect of costs under Section 59 of the Act.[8] In both of these cases, the Commercial Court refused to reinvestigate the issue as an excess of jurisdiction under Section 68 of the Act, deeming the issue, if anything, a question of misapplication of law as to the meaning of Section 59, which would require a Section 69 appeal that was not available in either case. The Report does not address the scope of Section 59 at all, and so it remains unanswered whether the court might think differently if called upon to rule in a Section 69 challenge to such an order for costs in the future.

Thus, as matters currently stand, the costs position of third-party funding in English litigation and arbitration is diametrically opposed: funders are exposed to adverse costs orders in litigation and their clients cannot recover the costs of funding; in arbitration, funders are at no risk of shouldering any wider costs of the proceedings than they expressly choose to, and their clients may be able to recoup the funder's charges. This arguably makes arbitration considerably more attractive for funded cases than litigation in England.

As noted at the outset, following the recent decision by the UK Supreme Court in *R (on the application of PACCAR Inc & Ors) v. Competition Appeal Tribunal & Ors*,[9] the issue of third-party funding has been made more complicated in England. English law funding agreements for litigation claims are now required to conform to the Damages-Based Agreements Regulations 2013, and

it is likely this extends to arbitration as well as litigation. However, many funders were already cautious of the Regulations, and while extra care is now required in structuring English third-party funding agreements, they are by no means disallowed.

Confidentiality

The general expectation in England (expressed in case law for some years) is that arbitrations are confidential. Moreover, under the Civil Procedure Rules, the default position is that court proceedings supporting arbitration are also confidential. This default position of confidentiality is subject to case-by-case public interest exceptions or volunteered agreement of the parties. The Report considered the situation and decided that establishing a single statutory "one size fits all" approach would be untenable, and it would be complex and problematic to create a general statutory rule with exceptions.

The position in England remains unchanged therefore that generally confidentiality is to be expected, especially where parties expressly agree to it. Any departure will be because the parties expressly agree to openness, and judicial discretion on case-by-case consideration where justice demands it. This is to be compared with some jurisdictions, such as France, where international arbitration is not confidential without express agreement and parties would do well to consider their position on confidentiality before choosing both arbitration and a particular seat for it.

Key Takeaways

- The lack of extensive reform proposed in the Law Commission's "Review of the Arbitration Act 1996" is indicative of a system that is already functioning well, and whose efficiency can only be improved by the proposal to give tribunals explicit powers for summary disposal of issues.
- Third-party funders may well continue to prefer English arbitration over English litigation, where they are exposed to adverse costs orders.
- Despite reform proposals, the efficacy and utility of emergency arbitration mechanisms remains uncertain so parties may still prefer to opt out of these in favor of court support.

Notes

* The authors, attorneys with Crowell & Moring LLP, may be contacted at jlaird@crowell.com, enorman@crowell.com, and rpatel@crowell.com, respectively.

1. R (on the application of PACCAR Inc & Ors) v. Competition Appeal Tribunal & Ors [2023] UKSC 28.

2. Sulamerica CIA Nacional De Seguros SA & Ors v. Enesa Engenharia SA & Ors [2012] EWCA Civ 638.

3. Enka Insaat Ve Sanayi AS v. OOO Insurance Company Chubb (Rev1) [2020] UKSC 38.

4. ICC Rules (2021), Article 29(3); LCIA Arbitration Rules (2020), Article 9.11, 9.12(i).

5. *See, e.g.*, Brake v. Patley Wood Farm LLP [2014] EWHC 4192 (Ch). *See also* K v. S [2019] EWHC 2386 (Comm).

6. https://iccwbo.org/content/uploads/sites/3/2019/03/icc-arbitration-adr-commission-report-on-emergency-arbitrator-proceedings.pdf.

7. Arkin v. Borchard Lines Ltd and others [2005] EWCA Civ 655.

8. Tenke Fungurume Mining SA v. Katanga Contracting Services SAS [2021] EWHC 3301 (Comm); Essar Oilfields Services Ltd v. Norscot Rig Management Pvt Ltd [2016] EWHC 2361 (Comm).

9. R (on the application of PACCAR Inc & Ors) v. Competition Appeal Tribunal & Ors [2023] UKSC 28.