ARB Brief
(Special Edition for CanArbWeek)
A short note on the Arbitration Act 2025 (England, Wales & NI)

June 2025

Summary

The Arbitration Act 2025 has become law in England, Wales and Northern Ireland ("England"). The new Act is largely based on the recommendations made in the Law Commission's Final Report, published following a public consultation seeking views on potential areas for reform.

The new Act is not a dramatic change to the arbitration framework in England. Feedback from the Law Commission's consultation was that the Arbitration Act 1996 was working well and that significant reform was neither needed nor wanted. As a result, the new Act makes a series of discrete amendments to the 1996 Act, delivering incremental improvement as opposed to radical reform.

Key Changes

There are seven key changes: summary disposal, governing law, disclosure, immunity, powers over third parties, emergency arbitrator powers and jurisdictional challenges.

Peter Ashford Limited
c/o IDRC, 1 Paternoster Lane, London EC4M 7BQ
T: +44(0)7565936869
E: peter@peterashford.com
www.peterashford.com

Summary disposal

The new Act introduces a new power of summary disposal of a claim or defence that has no real prospect of success. The power is akin to the summary judgment powers exercised by the courts and is a welcome clarification, if one were needed, that arbitrators can deal swiftly with claims or defences that have no real prospect of success, and thereby improve arbitral efficiency (saving time and cost). The reinforcement by statute of a power that many thought existed all along, should encourage greater use of the power and avoid 'due process paranoia'. However, this is not a mandatory section and the parties can otherwise agree. By agreeing e.g. LCIA arbitration the parties will have agreed upon a different test "manifestly without merit"[1].

Governing law of the arbitration agreement

The new Act introduces a new default rule specifying the governing law of the arbitration agreement. This is important as it governs how several key issues in an arbitration are determined. These include arbitrability, whether a dispute is within the scope of the agreement, which parties are bound by the agreement and whether the agreement to arbitrate has been validly agreed to.

This surprisingly short point has given rise to significant litigation in the UK not least because (1) an express choice has not been made, and (2) there are at least two plausible alternatives: the governing law of the host or matrix contract and the law of the seat.

In *Enka v Chubb* the UK Supreme Court sought to clarify the English common law principles for determining the governing law of an arbitration agreement deciding, in effect that absent an express choice, the governing law of the host contract would also apply to the arbitration agreement (the arbitration agreement is not separate for all purposes). However, uncertainty persisted over the application of the Enka principles in cases where the law of the underlying contract and the law of the seat of arbitration differed, as in *Unicredit v RusChem* where the Supreme Court said part of the Enka guidance should be disregarded.

The new Act removes that uncertainly and achieves the correct result (something I have long advocated for). It provides that (unless the parties specifically agree otherwise) an arbitration agreement is governed by the law of the seat and that an agreement on the governing law of the main contract does not constitute express agreement that that law also applies to the arbitration agreement. Quite where the line is as to what amounts to an express agreement, will have to be developed by case law. An amendment to clarify that was not adopted.

Arbitrators' duty of disclosure

The new Act introduces a duty of disclosure for arbitrators. This new statutory duty reflects the common law rule, as set out in *Halliburton v Chubb* (not a decision I am a great fan of), requiring arbitrators to disclose circumstances that would or might give rise to justifiable doubts as to their impartiality.

The duty encompasses what an arbitrator actually knows or ought reasonably be expected to know (but does not address whether knowledge derived from doing a 'conflict check' i.e. reasonable enquiry, is included). However, it does not address the scope of the disclosure required or set out any specific circumstances that must be disclosed. This is deliberate and designed to retain flexibility. It recognises that arbitration is used across a broad range of sectors and that in custom and practice as to what should be disclosed varies.

[1] The LCIA reports that in 2023 there were 25 applications for what it calls Early Determination, 3 were granted, 1 partially granted, 17 rejected and 4 either withdrawn, suspended or pending.

The duty arises when a prospective arbitrator is 'approached' and it is mandatory to then disclose, even if he were to decline being nominated. That seems wrong. Moreover, the duty is mandatory: nothing is said about protecting confidential and privileged information, where an arbitrator might decline, as being disabled from disclosure. Together these points may create real issues.

Extension of arbitrator immunity

The new Act extends the scope of arbitrator immunity for resignations and removal applications[2]. Under the new Act, arbitrators will have no liability for resignation, unless the resignation is shown to be unreasonable. In applications to remove arbitrators, arbitrators will not be liable for costs, unless it is shown that they have acted in bad faith.

Section 44 and third parties

The new Act amends Section 44 of the 1996 Act (based on Arts. 9 & 27 of the Model Law) to make it clear that orders, typically relating to the gathering of evidence, but also injunctions, can be made against third parties. A third party will have full rights of appeal in respect of any order made under section 44. Conflicting case law had created uncertainty as to whether court orders under section 44 are available against third parties. This uncertainty has now been removed.

Powers of Emergency Arbitrators

The new Act makes targeted amendments to the 1996 Act to give Emergency Arbitrators powers that mirror those of ordinary arbitrators. This removed uncertainty as to whether the Act supports court enforcement of the decisions of emergency arbitrators.

Section 67 challenging an award on jurisdictional grounds

The new Act amends the procedure for challenging an award under section 67 of the 1996 Act (based on Art 34(2) of the Model Law). In cases where an objection has been made that the tribunal lacks jurisdiction, and the tribunal has ruled on this, any subsequent section 67 challenge by a party who participated in the arbitral proceedings should not be in the form of a full rehearing.

The new Act provides that: (1) the court should not entertain any new grounds of objection, or any new evidence, unless even with reasonable diligence the grounds could not have been advanced or the evidence submitted before the tribunal; and (2) evidence should not be reheard, save exceptionally in the interests of justice.

Missed Opportunities?

The Law Commission's decision to opt for incremental improvement as opposed to more significant reform mean that there are a number of significant issues that are not addressed in the new Act.

Drafting

The Law Commission did some great work in identifying and consulting on the main issues. The main flaw in the process was that the draft Bill was an annex to the Final Report. The profession did not have the opportunity to make

[2] This was considered because of a 'throw-away' comment in *Halliburton* at [111] that an "arbitrator might, depending on the circumstances, face an order to meet some or all of the costs of the unsuccessful challenger" for failure to disclose.

representations to the Law Commission on the wording of the draft Bill. Lawyers, being lawyers, often really engage when they have a draft to 'kick around'.

The problem that arose is that some good amendments were proposed to which the response was 'that's a fair point but if we were to include that, we would have to re-consult and lose the legislative window'. A lesson for the future is to enable consultation on the draft Bill.

Confidentiality

The 1996 Act did not include any express provisions addressing confidentiality in arbitration. The Law Commission considered this omission but concluded that the new Act should not seek to codify the law in this area and that the law of confidentiality is better left to be developed by the courts.

Confidentiality is one of the major selling points of arbitration. Users of arbitration place much importance on privacy and confidentiality, and many assume that confidentiality is a feature of commercial arbitration in England. Whilst most UK-based arbitration practitioners are familiar with the common law principle of arbitral confidentiality (and its limitations), international parties and practitioners may not be. For them, the absence of an express provision in the Act addressing confidentiality in English-seated arbitration may be a notable omission.

Codifying a duty of confidentiality is difficult – see e,g, *Corporation A v Firm B*[3]. However, the inclusion of a statement of general principle of confidentiality in arbitration, reflecting the common law position, might have been a positive reform and reflective of the expectations of end users. It is something that legislatures in some other jurisdictions (e.g. Scotland[4] and New Zealand) have felt able to address in their arbitration legislation.

Third Party Funding and AI

The Law Commission also decided not to introduce any amendments relating to third-party funding or the use of artificial intelligence in arbitration.

Given the proliferation of third-party funding in international arbitration and the buoyant litigation funding market in England, the new Act was an opportunity to address the disclosure of third-party funding in English-seated arbitrations but this is probably best left to more nimble tools, such as soft law and institutional rules. The CIArb is already consulting on a draft guidance on third party arbitration funding.

AI is another rapidly developing area and we have already seen an increased use of AI tools in international arbitration. Again, this is probably best left to soft law e.g. CIArb Guideline on the Use of AI in Arbitration.

Corruption

This was not one of the areas for reform considered during the Law Commission's review of the 1996 Act. However, recent cases, including the widely reported decision in *Federal Republic of Nigeria v Process & Industrial Developments*[5], have highlighted the challenges that corruption issues pose to the integrity of the arbitration process.

---

[3] Approximately 50% of London-seated ICC arbitrations are subject to a confidentiality agreement of the parties, whether in the contract, Terms of Reference or procedural order of the arbitral tribunal. While this demonstrates the importance of confidentiality provisions, there is no standard confidentiality agreement chosen by parties. Each agreement on confidentiality is agreed by the parties, or ordered by a tribunal, depending on the specifics of the case.

[4] Rule 26 of the Scottish Arbitration Rules, Schedule 1 to the Arbitration (Scotland) Act 2010 but note that the matters considered confidential by the Scottish Act are not the same as in English law – illustrating the difficulty.

[5] Nigeria challenged the Award in the English High Court on the basis of alleged bribery and corruption by P&ID. Nigeria claimed both that the agreement signed between Nigeria and P&ID was a consequence of corruption, and that

During the passage of the Bill there was an exchange in the UK House of Lords between Lords Hoffmann (a member of the tribunal in *P&ID*) and Hacking on the question of whether the new Act should explicitly address issues relating to corruption issues in arbitral proceedings. In response, the Government, indicated that contributions on the question had been received from the LCIA, the ICC, the CIArb, the LMAA, the GAFTA and the Law Society and the Bar Council.

Having considered those submissions, the Government decided not to suggest an amendment to the Bill on issues relating to corruption, preferring to rely on arbitral and professional bodies' experience and capabilities around the writing of rules and guidelines, the supervision of cases and the training of arbitrators to identify corruption red flags.

At the time of the Hoffmann / Hacking debate The ICC Commission of Arbitration and ADR's 2024 report, *Red Flags or Other Indicators of Corruption in International Arbitration* was awaited but is now published and will be a key factor going forward.

Conclusion

There is no doubt that the 1996 Act has been a very successful piece of legislation, and that wholesale revision was neither sought nor welcomed. Nonetheless, one of the aims of the review was to ensure that the Act remains "*state of the art*". The new Act sees the introduction of some welcome amendments that will improve the arbitral process and ensure that the Act remains fit for purpose, specifically those that promote efficiency.

The "omissions" will, I consider, prove to be wise choices as the fast pace of change in AI and funding and the complexity of both confidentiality and corruption mean that soft law and institutional rules will be a better way of addressing those challenges. That is evident from the current initiatives especially by the CIArb and ICC.

English law remains fit for purpose and displays global leadership consistent with London being the most favoured arbitral seat[6].

****

Peter Ashford
Arbitrator, Mediator & Consultant

E **peter@peterashford.com**

P **+44(0)7565 936869**

A **The International Dispute Resolution Centre, 1 Paternoster Lane, London EC4M 7BQ**

W **www.peterashford.com**

Nigeria's own lawyers in the arbitration were bribed. Although the accusation the Nigeria's lawyers were bribed was not upheld, on the basis of insufficient evidence, Knowles J found that (i) P&ID's legal team had improperly obtained and retained privileged documents; (ii) P&ID relied on evidence which they knew to be false; and (iii) P&ID had bribed a Nigerian official to buy her silence in the arbitration proceedings in relation to the bribes she had accepted when the agreement was entered into.

[6] 2025 White & Case and QMUL International Arbitration Survey